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 VIII

Annexes 161 through 182

ANNEX 161

CASE No. ARB(AF)/97/2

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)

B E T W E E N:

ROBERT AZINIAN, KENNETH DAVITIAN, & ELLEN BACA
Claimants

and

THE UNITED MEXICAN STATES
Respondent

AWARD

Before the Arbitral Tribunal
constituted under Chapter Eleven of
the North American Free Trade
Agreement, and comprised of:

Mr Benjamin R. Civiletti
Mr Claus von Wobeser
Mr Jan Paulsson (President)

Date of dispatch to the parties:
November 1, 1999

Annex 161

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I. THE PARTIES

A. The Claimants

1. The Claimants, Mr Robert Azinian of Los Angeles, California, Mr Kenneth Davitian of Burbank, California, and Ms Ellen Baca of Sherman Oaks, California, have initiated these proceedings as United States (hereinafter "U.S.") citizens and shareholders of a Mexican corporate entity named Desechos Solidos de Naucalpan S.A. de C.V. (hereinafter "DESONA"). DESONA was the holder of a concession contract entered into on 15 November 1993 (hereinafter "the Concession Contract") relating to waste collection and disposal in the city of Naucalpan de Juarez.

2. In these proceedings, the Claimants are represented by:

David J. St. Louis, Esq.
Law Offices of David J. St. Louis, Inc.
575 East Alluvial
Suite 102
Fresno, California 93720
USA

B. The Respondent

3. In these proceedings the Respondent, the Government of the United Mexican States, is represented by:

Lic. Hugo Perezcano Díaz
Consultor Jurídico
Subsecretaría de Negociaciones Comerciales Internacionales
Dirección General de Consultoría Jurídica de Negociaciones
Secretaría de Comercio y Fomento Industrial
Alfonso Reyes No.30, Piso 17
Colonia Condesa
México, Distrito Federal, C.P.06149
México

II. ESSENTIAL CHRONOLOGY

4. In early 1992, the Mayor of Naucalpan and other members of its Ayuntamiento (City Council) visited Los Angeles at the invitation of the Claimants to observe the operations of Global Waste Industries, Inc., a company said by the latter to be controlled by them.

5. On 7 October 1992, Mr Azinian, writing under the letterhead of Global Waste Industries Inc. (hereinafter "Global Waste") as its "President," sent a letter to the Mayor of Naucalpan containing a summary of the way "we expect to implement … the integral solution proposed for the solid waste problem" of the city. The following representations were made:

(1) "The company will replace all the current collection equipment for advanced technology in the area of solid wastes" – specifically including watertight vehicles and metal bins.

(2) "The necessary investment to implement an efficient and hygienic solid waste collection, transportation and processing system is approximately US$ 20,000,000," of which 50% "will be directed to the acquisition of collection equipment."

(3) "GLOBAL WASTE INDUSTRIES, INC. is a company specialized in the collection and reduction of solid wastes. With more than 40 years of experience, GLOBAL WASTE provides collection services to residences, businesses and industry in the Los Angeles area."

6. In the course of a session of the Ayuntamiento on 4 November 1992, the "Integrated Solution Project" was presented. It was described as involving a consortium including Sunlaw Energy Inc., a U.S. corporation experienced in the conversion of bio-mass to energy, and an investment of US$ 20 million.

7. However attractive it found this proposal, the Ayuntamiento was not in a position to grant the envisaged 15-year Concession Contract due to its own limited mandate; Mexican law requires, in such a context, approval from the relevant State legislature. Accordingly the project was presented in late July 1993 to a legislative committee. In support of the project, Mr Ariel Goldenstein, a close business associate of the Claimants, and the future general manager of DESONA, said that "our company has been working in the U.S. for more than 40 years." Naucalpan's Director of Economic Development said "that's why we chose Global Waste." Naucalpan's Mayor referred to the Claimants' "more than 40 years experience in this area, in the city of Los Angeles, in a county that as you know has more than 21 million inhabitants." (Respondent's translation of the United Legislature Committee Meeting, 22 July 1993, Annex One, Respondent's Rejoinder, pp. 1, 4 and 10.)

8. On 15 August, legislative approval of the proposed Concession Contract was published in the

official gazette, triggering a 90-day limit for its signature.

9. On 15 November, the Concession Contract was signed. Two days later DESONA commenced its commercial and industrial waste collection, using two reconditioned front-load vehicles.

10. On 13 December, DESONA commenced residential waste collection for the Satélite section of Naucalpan but did not supply the five rear-load vehicles as provided for by the schedule of operations under the Concession Contract. Until the termination of the Concession Contract, the two initial front-loaders remained the only units of the 70 "state-of-the-art" vehicles called for under the Concession Contract to be put into service by DESONA.

11. On 1 January 1994, a new administration took over the Naucalpan Ayuntamiento. (It represented the same political party.)

12. In January and February, there were a number of meetings between the personnel of DESONA and the Ayuntamiento concerning implementation of the Concession Contract. The Ayuntamiento was particularly concerned by the absence of new vehicles, which DESONA explained was due to difficulties in obtaining import permits for which it could not be faulted.

13. In mid-February, the Ayuntamiento sought independent legal advice about the Concession Contract. It was advised that there were 27 "irregularities" in connection with the conclusion and performance of the Concession Contract.

14. On 7 March, the Ayuntamiento decided to disclose the perceived irregularities to DESONA and to give it an opportunity to respond.

15. On 10 March, in the presence of Mr Davitian and local counsel to DESONA, the charges were read out and DESONA was directed to respond to them by 17 March.

16. On 15 March, DESONA initiated proceedings before the State Administrative Tribunal seeking nullification of the Ayuntamiento's decision (of 7 March) to question the Concession Contract.

17. On 21 March, despite a protest from DESONA on 16 March, the Ayuntamiento decided to annul the Concession Contract. The Claimants were notified of this decision two days later.

18. On 11 April, DESONA amended its claim before the State Administrative Tribunal to include

nullification of the Ayuntamiento's decision of 21 March.

19. On 1 June, DESONA was given an opportunity to present its case to an extraordinary session of the Ayuntamiento. Mr Goldenstein appeared on behalf of DESONA.

20. On 14 June, the Administrative Tribunal heard DESONA's claims, and dismissed it by a judgment of 4 July.

21. On 13 July, DESONA appealed to the Superior Chamber of the Administrative Tribunal, which upheld the Ayuntamiento's annulment of the Concession Contract by a judgment dated 17 November. The Superior Chamber held that of the 27 alleged irregularities, nine had been demonstrated. Of these, seven related to various perceived misrepresentations by the Claimants in connection with the conclusion of the Concession Contract.

22. On 10 December, DESONA lodged a further appeal, in the form of a so-called *amparo* petition, to the Federal Circuit Court.

23. On 18 May 1995, the Federal Circuit Court ruled in favour of the Naucalpan Ayuntamiento, specifically upholding the Superior Chamber's judgment as to the legality of the nine bases accepted for the annulment.

24. On 17 March 1997, the Claimant shareholders of DESONA initiated the present arbitral proceedings against the Government of Mexico under Chapter Eleven of the North American Free Trade Agreement (hereinafter "NAFTA"), by submitting a claim to arbitration pursuant to Article 1137(1)(b) thereof.

III. OVERVIEW OF THE DISPUTE

25. Naucalpan is an important and heavily industrialised suburb of Mexico City. In 1993, when the Concession Contract was signed, it had a population of nearly two million, and 21,800 commercial or industrial establishments. Residential and business waste management was, and remains, an important function of the municipal authorities. Somewhat more than 900 tonnes per day of residential waste were collected, and somewhat less than 900 tonnes per day of commercial and industrial waste. (The latter generates higher revenues for the provider of collection and disposal services.) When DESONA entered the scene, collection, treatment, and disposal left much to be desired. The municipality's equipment was inadequate and obsolete.

26. As conceived, the Claimants' project in fact aimed at a far greater prize than earnings from local waste disposal services. Their ambition was that this would be a pilot project which would ultimately spawn major industries, beginning with the modernisation of waste disposal throughout Mexico and extending to important profitable sidelines:

- the manufacture in Mexico of modern specialised vehicles, not only for the Mexican market but also Central and South America,
- the recycling of waste, notably to produce cardboard, and
- the erection of power generation plants to convert landfill bio-gases into electricity; revenues from these plants would be used in part to finance the improvement of the waste disposal infrastructure.

27. Once armed with a long-term contract with one important Mexican city, the Claimants hoped to interest third parties having greater financial resources and expertise to join forces with them, thus allowing the Claimants to leverage their modest means into a profitable position within a grand scheme. In some correspondence, this was referred to as a "Newco" to which DESONA would somehow assign its operations in Naucalpan. During the hearings before the Arbitral Tribunal, the plan to use the initial concession to entice new participants was referred to on a number of occasions as "taking the show on the road." In his oral testimony, Mr Goldenstein explained that the Claimants' anticipated US$ 20 million investment should have been understood as funded by Sunlaw Energy (English Transcript 21.6.99, p. 296, l. 8 and p. 298, l. 9-10). He did not explain how US$ 20 million could suffice to build a 200 megawatt power generating plant. More importantly, he could not point to any evidence that any Mexican authority had been appraised prior to signature of the Concession Contract that Sunlaw had lost interest in the project, with the result that it would no longer provide a source of funding. To the contrary, the Concession Contract retained the provision about the generating plant, which appears in Article 11 of the signed document.

28. Today, as a result of the cancellation by the City of Naucalpan of DESONA's Concession Contract, the Claimants, as shareholders in DESONA, are seeking recovery of the loss of the "value of the concession as an on-going enterprise." The highest of their alternative methods of evaluation (see Section V) results in a figure of some US$ 19.2 million. The Claimants allege that the actions of the Ayuntamiento of Naucalpan resulted in a violation of NAFTA, attributable to the Government of Mexico.

29. There are some immediately apparent difficulties with the claim. It must be said that this was not an inherently plausible group of investors. They had presented themselves as principals in Global Waste, with approximately 40 years' experience in the industry. In fact Global Waste had been incorporated in Los Angeles in March 1991, but put into bankruptcy in May 1992 – 14 months later. Global Waste owned no

vehicles, and in the year preceding its bankruptcy had had revenues of only US$ 30,000. The only Claimant who could be said to have experience in the industry was Mr Davitian, whose family had been in the business of waste disposal in the Los Angeles area. In reality, Mr Davitian was the only Claimant to hold shares (15%) in Global Waste. (Mr Goldenstein testified that there was an understanding that he, Mr Davitian, and Mr Azinian were each to be treated as one-third beneficial owners of Global Waste, but this was not reflected in formal ownership because it was a so-called Subchapter S corporation and for U.S. tax purposes could not include foreign shareholders; English Transcript, 21.6.99, p. 294, l. 2.) Even in the case of Mr Davitian personally, since he was precisely 40 years old in 1993, a claim of 40 years' experience was preposterous.

30. As for the other Claimants: Mr Azinian had no relevant experience, had a long record of unsuccessful commercial litigation, and had been declared personally bankrupt in 1991. Mr Goldenstein had a background in a family property business in Argentina and in restaurant management in the U.S., and claims expertise in the financing of major motion picture projects as a result of his studies in Los Angeles. Mr Goldenstein was never a shareholder in Global Waste but addressed Mexican authorities on its behalf. He was described by the Claimants' counsel as "the person that is most knowledgeable from Claimants' point of view as to all of the transactions that are involved here." (English Transcript, 21.6.99, p. 21, l. 12)[1]

31. None of this background was disclosed to the Naucalpan authorities. The Naucalpan authorities thus entrusted a public service to foreign individuals whom they were falsely led to believe were part of an experienced concern possessed of financial and technological resources adequate for the job.

32. Nor were there, as of the date the Concession Contract was concluded, firm commitments from the various third parties whose involvement was necessary if the venture was to evolve from a pilot project to achieve grandiose further objectives – or even if the basic engineering services and equipment under the Concession Contract were to be provided. The landfill gas conversion scheme appears to have been a fantasy, for a number of elementary practical reasons including the fact that landfill gases could not supply more than a fraction of the required raw materials. (As much as 95% of the natural gas would have to be *purchased* from PEMEX, whose attitude toward the prospect of this new source of electric energy may have been hostile.) The capacity of the power plant contemplated under the Concession Contract was astonishing. To generate 200 megawatts would likely have required investments far in excess of US$ 100 million. Such a plant would have been four times the size of the largest landfill-connected power plant in the U.S. In fact Sunlaw Energy, the U.S. corporation which was to finance the acquisition of a new waste collection fleet through the power generation project, backed away from the project shortly before the

[1] Mr Goldenstein is not one of the Claimants because as an Argentine national he has no standing under NAFTA. Ms Baca, on the other hand, is a Claimant as a result of a property settlement in her divorce from Mr Davitian, and appears to have had no substantive role in the project.

Concession Contract was signed, thus apparently leaving the Claimants with few sources of funds other than the anticipated revenues from the rate-payers of Naucalpan. Given that the city budget had no provision for the acquisition of new equipment, this can hardly be viewed as a healthy situation.

33. During the brief period of putative performance of the Concession Contract, the Claimants gave every impression of living hand to mouth, barely able to finance the acquisition of merely two vehicles (and reconditioned at that, not new), or even meeting a payroll. And yet, on the very day when the Concession Contract was presented to the Naucalpan City Council for approval, Mr Goldenstein had reaffirmed that the project investment would be approximately US$ 20 million. The evidence compels the conclusion that the Claimants entered into the Concession Contract on false pretences, and lacked the capacity to perform it.

34. The new city authorities who took over on 1 January 1994 exhibited little inclination to work things out with DESONA or its principals, but instead handed them a list of 27 putative grounds of termination. It should be made clear that the Arbitral Tribunal makes no criticism of Mr Francesco Piazzesi, who became Naucalpan's Director of Economic Development in January 1994. Mr Piazzesi appeared before the Arbitral Tribunal and gave a credible account of his actions. Indeed, Mr Piazzesi testified that his personal recommendation in March 1994 was that the Concession Contract should *not* be annulled at that time (English Transcript, 23.6.99, p. 130, l. 5-6). The reason this recommendation was not followed remains unexplained, understandably leading Mr St. Louis, for the Claimants, to castigate the Respondent for having adopted an "empty chair" policy in not producing other officials as witnesses. The list itself ignores the 30-day cure period defined in the Concession Contract. The Claimants insist that they were in a position to remedy the shortcomings and to perform their obligations.

35. The summary above explains the background of the Claimants' challenge to the validity of the purported termination of the Concession contract, as well as the opposing thesis of the Ayuntamiento of Naucalpan to the effect that the Concession Contract was either void for misrepresentations, or rescindable for failure of performance. Before going any further, the Arbitral Tribunal must satisfy itself that this debate may be subjected to a full substantive review before a NAFTA Tribunal. The Arbitral Tribunal is not so satisfied, and that, in the circumstances more fully described and for reasons stated in Section VI, suffices to resolve this case.

IV. THE PROCEDURE

36. On 24 November 1996, the Claimants sent to the Respondent a "Preliminary Notice of Intention to File a Claim and Consent of Investors" which recited that it was made "under Part 5, Chapter 11, Subchapter B of NAFTA as a result of an expropriation of a business venture by the City of Naucalpan de

Juarez, Estado de Mexico and against the Federal Government of Mexico." The Claimants thereby explicitly waived their rights to "further court or administrative proceedings regarding this claim pursuant to [NAFTA] Article 1121(1) and (2)."

37. A more detailed document from the Claimants entitled "Notice of Intent to Submit a Claim to Arbitration" was received by the Respondent on 10 December 1996; on 16 December, it received a slightly modified version, entitled "Amended Notice of Intent to Submit a Claim to Arbitration."

38. By a Notice of Claim dated 10 March 1997, submitted as of 17 March, the Claimants requested the Secretary-General of the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") to approve and register their application for access to the ICSID Additional Facility, and submitted their claim to arbitration under ICSID Additional Facility Rules.

39. On 24 March 1997, the Acting Secretary-General of ICSID informed the Parties that the requirements of Article 4(2) of the ICSID Additional Facility Rules had been fulfilled and that the Claimants' application for access to the Additional Facility was approved, and issued a Certificate of Registration of the case.

40. Following appointments in due course, the Acting Secretary-General of ICSID informed the Parties that the Arbitral Tribunal was "deemed to have been constituted and the proceedings to have begun" on 9 July 1997, and that Mr Alejandro A. Escobar, ICSID, would serve as Secretary of the Arbitral Tribunal. All subsequent written communications between the Arbitral Tribunal and the parties were made through the ICSID Secretariat. (All references to "ICSID" below are to the ICSID Secretariat.)

41. The first session of the Arbitral Tribunal was held, with the Parties' agreement, in Washington D.C. on 26 September 1997. It resulted in further agreement on a number of procedural matters reflected in written minutes signed by the President and Secretary of the Tribunal. Toronto was selected as the formal seat of arbitration by agreement among the Parties and the Arbitral Tribunal.

42. During the course of the procedural hearing, the Respondent questioned the standing of the Claimants. The Arbitral Tribunal indicated that this matter should be resolved before the consideration of the merits. It was agreed that the Respondent would submit by 6 October 1997 a written motion regarding the issue of the Claimants' standing. The Claimants would then submit a written answer, and the Respondent would then be given an opportunity to present a final written reply thereto.

43. ICSID received the Respondent's Motion for Directions (hereinafter "the Motion") on 6 October 1997. Therein the Respondent challenged the Claimants' standing under NAFTA. Specifically, the

Respondent requested that the Claimants demonstrate:

> "(i) *for each of them*, their standing to invoke Section B of Chapter Eleven; (ii) if they have such standing, whether they are advancing a claim under Article 1116 (…) or Article 1117; (iii) if the claim is being asserted under Article 1117, whether it is being asserted by the investor who owns or controls the enterprise; and (iv) in either event, that the enterprise which any of them claim to own or control, or in which any of them claim to have an equity, security or other interest was, at the material times, a valid and subsisting corporate entity, duly incorporated under applicable Mexican law."

44. The Motion also stated that it was critical that the enterprise alleged to have been harmed "has validly authorised the submission of the claim to arbitration."

45. In response, the Claimants submitted their Reply to the Motion for Directions dated 5 November 1997 in which they sought to demonstrate that: Article 1117(3) of NAFTA "expressly contemplates" that an investor may bring a claim under Article 1116 *and* 1117; that the Claimants have standing as per Article 1139's definition of "investor" and "investment;" and that the "valid subsisting" corporate entity referred to in the Respondent's Motion held the concession at the material times, and duly authorised the submission of the claim.

46. The "Respondent's Response to Claimants' Reply to the Mexican Government's Motion for Directions Regarding Standing to Submit a Claim to Arbitration" (hereinafter "the Response") was received by ICSID on 12 December 1997. Therein the Respondent reiterated its claim to have the issues concerning the nature of the claim and of the Claimants' respective standing resolved prior to the consideration of the merits. Furthermore, the Respondent questioned the adequacy of the evidence submitted by the Claimants purporting to support their right to invoke Section B of NAFTA.

47. By letter dated 16 December 1997, the Claimants requested an extension of a month in which to submit the Memorial. The Tribunal acceded by letter of 17 December 1997.

48. In an "Interim Decision Concerning Respondent's Motion for Directions" (hereinafter "the Interim Decision") dated 22 January 1998, the Arbitral Tribunal ruled that although "the pleadings (…) raise a number of complex issues which may have the effect of restricting the competence of the Tribunal (…) they seem unlikely to eliminate altogether the need to consider the merits," and thus the issue of standing would be dealt with in the pleadings on the merits. In particular, the Tribunal made the following four observations: that if part of Mr Azinian's claim was made by him as an "impermissible surrogate" for Mr Goldenstein, this could be determined by the Tribunal at a later stage as it would affect the quantum but not Mr Azinian's standing *pro se*; that if it was true that Mr Davitian was not a shareholder at the material time(s) this might defeat his standing but would not obviate the consideration of the merits, nor would his

"provisional presence" as a claimant complicate the facts to be tried on the merits; that if Messrs Azinian and Davitian were trying to introduce claims outside the jurisdiction of the Tribunal as established by the NAFTA, this could be dealt with in due course; and that although the Claimants have identified "DESONA B" as the entity harmed by the allegedly wrongful actions of the Respondent and although the complications relating to the various forms of "DESONA" will form part of the merits, neither "DESONA A" nor "DESONA B" is a claimant.

49. On 28 January 1998, the Claimants submitted their Memorial which the Respondent received on 10 February 1998.

50. On 1 April 1998, the Respondent filed a second Motion for Directions (hereinafter "the Second Motion") seeking further particulars and the production of additional documents. The Respondent also requested the Tribunal to direct that the running of time for the filing of the Counter-Memorial be suspended until the Claimants produced the particulars and documents detailed in the Second Motion.

51. The Claimants, by letter dated 9 April 1998, declared themselves amenable to producing the documents sought and "the documentary evidence called for by Mexico's Request for Particulars (…) without the necessity of a ruling by the Tribunal."

52. The Arbitral Tribunal ruled on the Second Motion by letter dated 27 April 1998, stating that it would:

> "await the production of information voluntarily proposed by the Claimants. Upon receipt thereof, the Respondent is invited forthwith to inform the Arbitral Tribunal whether it still considers it necessary to apply for any additional ruling(s), and to request a reasonable adjustment of the time-limit for its Counter-Memorial."

53. The Claimants complained by letter dated 5 May 1998 that the Respondent was violating Rule 43 of the ICSID Additional Facilities Rules by contacting the Claimants' witnesses. The Claimants asked the Tribunal to establish an understanding to the effect that witnesses cited by one side should not be contacted unilaterally by the other side. By letter dated 6 May 1998, the Tribunal inquired if the Respondent had any objection to complying with the understanding proposed by the Claimants.

54. The Respondent replied by letter dated 12 May 1998, contending that interviewing non-party witnesses about statements made in the Claimants' Memorial in no way contravened the Additional Facility Rules of ICSID and that the Respondent "should be free to gather information from non-party witnesses as it sees fit" given that "it is a well-established principle that a party has no property in a witness." With regard to Rule 43, the Respondent submitted that it regulates questions arising during the oral procedure

only.

55. By letter dated 18 May 1998, the Claimants answered the Respondent's letter of 12 May 1998, conceding that a party has no property in a witness but reaffirming their initial point that "such contact [that of the Respondent with regard to the Claimants' non-party witnesses] is designed to develop impeaching information as to the sworn statements obtained without the presence of opposing counsel." The Claimants went on to state that "(i)t is quite clear that (sic) Respondent is attempting to adduce extra-judicial evidence through 'other means' and, therefore, these extra judicial examinations do fall (…) under Article 43, which confirms authority on the panel to issue protective orders. It is a fundamental rule of law that the Tribunal does have the power and the authority to conduct its proceedings in an orderly fashion with a view towards fairness to both sides." The Respondent replied by letter on 20 May 1998, reiterating the points made in its communication of 12 May 1998.

56. The Arbitral Tribunal ruled, by letter dated 19 June 1998, on the complaint concerning interviews by one Party of witnesses whose written statements have been introduced by its opponent, as follows:

> "The Arbitral Tribunal considers that the issues raised by the Claimants are not dealt with by the ICSID Additional Facility Rules. Nor is the Arbitral Tribunal aware of any basis on which it could preclude communications between a party and a third-party witness. The Arbitral Tribunal accordingly advises the parties as follows:
>
> 1. The Arbitral Tribunal declines to restrict any party's ability to interview witnesses who freely choose to meet with that party's representative(s).
>
> 2. During any such interview, the witness is (as far as the Arbitral Tribunal is concerned) free to answer or decline to answer individual questions as he or she sees fit.
>
> 3. The Arbitral Tribunal expects that any such witnesses would be informed, in advance, by the party seeking to meet him or her that his or her legal counsel may be present at any interview.
>
> 4. Statements made by a witness during any such interview shall not be received into evidence.
>
> 5. The only testimony to be given probative value is that contained in signed written statements or given orally in the presence of the Arbitral Tribunal.
>
> 6. The Arbitral Tribunal does not require that any party which secures the agreement of a witness to a meeting give the other side an opportunity to be present during that meeting; whether a witness makes the presence of both sides a condition for accepting such a meeting is not a matter for the Arbitral Tribunal."

57. In the interim, on 18 May 1998, ICSID had received the Claimants' Response to the Respondent's second Motion for Directions of 1 April 1998.

58. On 8 June 1998, the Respondent filed a "Motion for Directions to Answer Request for Particulars and Produce Documents" in which it renewed the demands of its Second Motion for Directions. It requested that the Arbitral Tribunal direct the Claimants to give further particulars and produce additional documents; and that the time for filing the Counter-Memorial be suspended until the Claimants complied with the requested direction of the Tribunal. On 18 June 1998, the Claimants replied to this third Motion for Directions by letter. They claimed that they had responded to the best of their ability to the prior Motion for Directions and requested that the Tribunal direct the Respondent to submit their Counter-Memorial.

59. The Arbitral Tribunal, by letter dated 22 July 1998, declined to rule on the Respondent's Motion for Directions of 8 June 1998, noting that the Respondent would have a full opportunity to comment on "perceived deficiencies" in its Counter-Memorial. Furthermore, it instructed the Respondent to submit its Counter-Memorial by 1 October 1998.

60. On 5 October 1998, ICSID received a partial version of the Respondent's Counter-Memorial. It received the remaining portions on 23 October 1998, following a letter from the Claimants dated 20 October 1998, complaining of the delay and requesting a 45-day period for the Reply and an additional 30 days for the Rejoinder. The Respondent objected to a second round of written pleadings by letter dated 28 October 1998 and requested that the Claimants "express in detail its reasons that would justify submitting a reply and [a] rejoinder."

61. By letter of 30 October 1998, the Claimants responded on the issue of further written pleadings, invoking Article 38(3) of the ICSID Rules as grounds for a second round of pleadings and describing their purpose as follows:

> "(a) Identify matters of common ground in submissions both as to law and fact; (b) Respond to the Government of Mexico's characterization of pertinent law and its application to the issues in this case; (c) Address specific considerations bearing upon the respective parties' burden of proof with reference to competent evidence; and (d) Reply to the accusations of bias, lack of creditability and outright wrong-doing directed at the majority of the Claimants' witnesses."

62. By letter dated 10 November 1998, the Respondent rebutted the Claimants' letter of 30 October 1998, stating that the Claimants had not demonstrated that a second round of written pleadings was necessary, the reasons given being just as easily capable of being addressed in the oral proceedings. It went on to demand that, in the event the Arbitral Tribunal were to deem that a Reply and a Rejoinder are necessary, such a Reply be limited to issues that "the Tribunal agrees are properly the subject of a Reply to the Counter-Memorial in the circumstances of this case." Furthermore, the Respondent opposed the Claimants' earlier request to tender "DESONA's operating journals, reconstructed from old records, which the Claimants refused to produce in response to the Respondent's repeated requests." In paragraph 18 of

this letter, the Respondent stated in particular:

> "If the Tribunal determines to allow any type of Reply relating to this category of information, it should (i) require the Claimants to describe with particularity which issues they wish to address, (ii) ensure that the list includes only matters that the Tribunal deems as "new" issues raised for the first time in the Counter-Memorial, and (iii) expressly forbid the Claimants from including other issues or legal argumentation in their Reply."

63. The decision of the Arbitral Tribunal concerning the filing of a Reply and a Rejoinder was given by letter dated 24 November 1998. It directed the parties to prepare a further round of written pleadings as "the oral phase of the proceedings is likely to be better focussed by allowing Reply and Rejoinder Memorials," and stated that:

> "(a)t the same time, the Tribunal acknowledges that many of the observations made in the Respondent's letter of 10 November are pertinent in principle, such as the restrictive criteria listed in paragraph 18. It would not, however, be efficient to initiate a separate preliminary debate over the permissible scope of a Reply which is yet to be submitted. It should be enough for the Tribunal to exhort the parties to ensure that their respective final Memorials are responsive to their opponent's previous submissions, and be organised in such a way that this responsive character is plain to see.
>
> The same reasoning applies to evidence in support of a Reply or Rejoinder, including the DESONA operating journals. The Tribunal notes that the Respondent at one point called for the production of such evidence, and still suggests that it was not previously produced because it "would severely undermine the validity of [the Claimants'] experts' so-called 'indications of value'." (Paragraph 34 of 10 November letter.) While the Respondent asserts that it would at this stage suffer prejudice if such materials are produced, because it may have to develop new counter-arguments and indeed new analyses to serve as support for those counter-arguments, the Tribunal does not view this objection as decisive. In the first place, in as much as it could be raised against any evidence accompanying any Reply the objection goes too far to be acceptable in principle. Secondly, there is no basis to rule *a priori* that it would be particularly burdensome to deal with the materials the Claimants wish to produce. (With respect to operating logs, it is the experience of the Tribunal that notwithstanding their typical bulkiness they are not necessarily difficult to interpret with respect to basic information such as productivity and downtime.)
>
> In view of the above, and having furthermore regard to the fact the Claimants have had time to consider the Counter-Memorial, the Tribunal instructs the parties to proceed as follows:
>
> (1) The Claimants to file their Reply by 19 January 1999.
>
> (2) The Respondent to file its Rejoinder by 19 April 1999." (Emphasis in original.)

64. By letter dated 12 January 1999, the Claimants requested permission to file their Reply on 20 January 1999 due to a national holiday on 18 January 1999. The extension was granted by letter of 13 January 1999 in which the Tribunal also fixed the week of 21 June 1999 for the hearing in Washington

D.C. in accordance with Article 39 of the Additional Facility Arbitration Rules.

65. The Claimants submitted the English version of their Reply on 20 January 1999. The members of the Tribunal, unlike the Respondent and ICSID, did not receive sets of the Annex containing, according to the Claimants, "approximately two thousand pages of checks and invoices."

66. The Spanish version of the Reply was received by ICSID on 9 February 1999. Given the delay in filing the Claimants agreed to an extension of the time period for filing the Rejoinder for the period that the Claimants were delayed in completing the filing of their Reply. Thus, the Tribunal informed the parties by letter dated 17 March 1999, that the Rejoinder was due by 10 May 1999. The Respondent requested an extension by letter dated 3 May 1999, in order to file the Rejoinder on 17 May 1999. By letter of 7 May 1999, the Tribunal decided that the English version of the Rejoinder and its accompanying documentation should be filed by 14 May 1999, and the Spanish version by 17 May 1999. ICSID received the Rejoinder, in both its English and Spanish versions with their accompanying documentation, on 17 May 1999.

67. During the written phase of the pleadings, written statements from the following persons were submitted by the parties: by the Claimants, Robert Azinian, Kenneth Davitian, Ellen Baca, Ariel Goldenstein, Basil Carter, Ted Guth, Bryan A. Stirrat, David S. Page, William Roth-rock, Richard Carvell, Ernst & Young, and Robert E. Proctor; by the Respondent, Raúl Romo Velázquez, James Hodge, J. Cameron Mowatt, Carlos Felipe Dávalos, Francesco Piazzesi di Villamosa, Patricia Tejeda, Emilio Sánchez Serrano, Oscar Palacios Gómez, and David A. Schwickerath. The Claimants' Reply, at Section V, contained responses to the witness statement and expert reports submitted by the Respondent in its Counter-Memorial. In addition to offering such responses as rebuttal of certain of the Respondent's witness statements (namely, those made by Mr Romo Velázquez, by Mr Hodge, by Mr Piazzesi, by Ms Tejeda, by Mr Sánchez Serrano and by Dr Palacios Gómez), Claimants argued that the statement made by Mr Mowatt was legally objectionable and inadmissible in view of the Tribunal's directions of 19 June 1998. In the event, the Arbitral Tribunal has not had regard to Mr Mowatt's statement.

68. By letter of 19 May 1999, the Tribunal informed the parties of the procedural arrangements for the hearing on the merits, and asked the Parties to provide a list of the witnesses and experts that they wished to examine.

69. By letter of 24 May 1999, the Respondent stated that it would require the following witnesses to be available for cross-examination: Ariel Goldenstein; Bryan A. Stirrat; Kenneth Davitian; Robert Azinian; Ronald Proctor; David S. Page; William Rothrock; and Basil Carter.

70. By letter of the same date, the Claimants requested that the Respondent make available for cross-

examination the following witnesses: Oscar Palacios; Francesco Piazzesi di Villamosa; and Raul Romo Velázquez.

71. The Claimants, by letter of 2 June 1999, responded to the Respondent's earlier request and stated that Basil Carter and William Rothrock would be unable to attend the scheduled hearings in person but that they could be cross-examined by videoconference or telephone. Furthermore, Bryan A. Sirrat would only be able to attend on 21 June 1999. The Claimants expressed their intention to have the following individuals attend on their behalf to conduct cross-examination: David J. St. Louis; Clyde C. Pearce; Jack C. Coe; Peter Cling; and William S. Dodge. The Respondent replied by letter dated 4 June 1999 and suggested that it contact the Claimants to discuss alternative arrangements for those witnesses unable to attend the hearings. For example, it proposed that the individuals in question be excused from the hearings on the condition that they answer a limited list of admissions to be provided by the Respondent. The Claimants answered by letter of 8 June 1999 and stated that they would solicit the approval of David Page, Basil Carter and William Rothrock to the Respondent's suggestion regarding the witnesses' answers to written questions.

72. Of the Claimants' witnesses, Messrs Stirrat, Proctor, Goldenstein and Carter appeared at the hearing. Mr Davitian, although excused by the Respondent, was allowed to give direct rebuttal evidence. The Respondents excused Messrs Azinian and Page. Mr Rothrock did not appear at the hearing and the Respondent stated that it would make submissions as to the weight to be given to his written statement. Of the Respondent's witnesses, Mr Piazzesi appeared at the hearing. The Claimants excused Dr Palacios and agreed with Respondent to file certain written admissions in lieu of the testimony of Mr Romo, who was not present at the hearing.

73. At the conclusion of the examination of witnesses, the Tribunal sought the parties' confirmation that the evidentiary phase of the proceeding was closed to the satisfaction of each side, to which both parties agreed (English Transcript, 23.6.99, p. 149 l. 13-19).

74. The parties filed post-hearing submissions on 16 July 1999.

V. RELIEF SOUGHT

75. The Claimants contend that "the City's wrongful repudiation of the Concession Contract violates Articles 1110 ("Expropriation and Compensation") and 1105 ("Minimum Standard of Treatment") of NAFTA" (Reply of 19 January 1999, Sec. III, p. 17), and accordingly seek the following relief, as articulated in their Prayer for Relief dated 23 June 1999:

"A. With respect to the enterprise, as follows:

1. The value of the concession as an ongoing enterprise on March 21, 1994, the date of the taking based upon the values obtained:

   a. By applying the Discounted Cash Flow (DCF) method in the amount of US$11,600,000 (PCV);

   In the alternative,

   b. By applying the Similar Transaction Method yielding an amount of US$19,203,000 (PCV);

   In the alternative,

   c. Based upon the offer made by Sanifill to purchase the concession in an amount of US$18,000,000;

   In the alternative,

   d. Based upon the lower range value from the fair market value analysis of the concession conducted by Richard Carvell in an amount of US$15,500,000;

In addition:

2. Interest on the amount awarded as the value of the concession as set forth in section A above from the date of the taking at the rate of 10% per annum to the date of the award;

3. Cost of the proceedings, including but not limited to attorneys fees, experts and accounting fees and administrative fees;

4. Simple interest on the entirety of the award accruing from and after the date of the award until the date of payment at 10% per annum;

As a separate and distinct prayer, Claimants request relief as follows:

1. Out of pocket expenses in the amount of US$3,600,000 (Memorial Section 6 Page 2);

2. Interest on the amount awarded as out of pocket expenses from the date of the taking at the rate of 10% per annum to the date of the award;

3. Cost of the proceedings, including but not limited to attorneys fees, experts and accounting fees and administrative fees;

4. Such additional amount as shall be fixed by the Tribunal to compensate for the loss of the chance or opportunity of making a commercial success of the project;

5. Simple interest on the entirety of the award accruing from and after the date of the award until the date of payment at 10% per annum;

B. NOTE: Claimants acknowledge as an offset amounts received from a partial sale of assets in the amount of US$500,000, credit for which should be given as of the date of receipt of such funds by the claimants or on their behalf on May 20, 1994;

C. With respect to Claimants individually, relief as requested herein should be allocated as follows:

To Robert Azinian	70%
To Ellen Baca	20%"

76. The Respondent asks that the claim be dismissed with costs assessed against the Claimants.

VI. VALIDITY OF THE CLAIM UNDER NAFTA

A. The general framework of investor access to international arbitration under NAFTA

77. For the purposes of the present discussion, the Claimants are assumed to be "investor[s] of a Party" having made an "investment" as those two terms are defined in Article 1139 of NAFTA. The Respondent has raised questions as to the permissibility of claims being made by a formally qualified shareholder on behalf of a beneficial owner who is not a national of a NAFTA Party. (In this case, a portion of Mr Azinian's shareholding in DESONA is said to be beneficially owned by Mr Goldenstein, who is not a national of a NAFTA Party.) The Respondent has also challenged Mr Davitian's status as a shareholder of DESONA at the time material for entitlement to claim under NAFTA. In its Interim Decision of 22 January 1998 (see paragraph 48), the Arbitral Tribunal determined that those objections need only be decided if there is *some* degree of liability on the merits, for only then would it be necessary to decide whether recovery should be excluded on account of these allegedly non-qualified investments.

78. The Ayuntamiento as a body determined that it had valid grounds to annul and rescind the Concession Contract, and so declared. DES-ONA then failed to convince three levels of Mexican courts that the Ayuntamiento's decision was invalid. Given this fact, is there a basis for the present Arbitral Tribunal to declare that the Mexican courts were wrong to uphold the Ayuntamiento's decision and that the Government of Mexico must indemnify the Claimants?

79. As this is the first dispute brought by an investor under NAFTA to be resolved by an award on the merits, it is appropriate to consider first principles.

80. NAFTA is a treaty among three sovereign States which deals with a vast range of matters relating to the liberalisation of trade. Part Five deals with "Investment, Services and Related Matters." Chapter Eleven thereunder deals specifically with "Investment."

81. Section A of Chapter Eleven establishes a number of substantive obligations with respect to investments. Section B concerns jurisdiction and procedure; it defines the method by which an investor claiming a violation of the obligations established in Section A may seek redress.

82. Arbitral jurisdiction under Section B is limited not only as to the persons who may invoke it (they must be nationals of a State signatory to NAFTA), but also as to subject matter: claims may not be submitted to investor-state arbitration under Chapter Eleven unless they are founded upon the violation of an obligation established in Section A.

83. To put it another way, a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and *still not be in a position to state a claim under NAFTA*. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many *Mexican* parties can be found who had business dealings with governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in this respect. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.

84. It therefore would not be sufficient for the Claimants to convince the present Arbitral Tribunal that the actions or motivations of the Naucalpan Ayuntamiento are to be disapproved, or that the reasons given by the Mexican courts in their three judgements are unpersuasive. Such considerations are unavailing unless the Claimants can point to a violation of an obligation established in Section A of Chapter Eleven attributable to the Government of Mexico.

B. Grounds invoked by the Claimants

85. The Claimants have alleged violations of the following two provisions of NAFTA:

> Article 1110(1)
>
> "No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such investment ("expropriation") except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6."
>
> Article 1105(1)
>
> "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

86. Although the parties to the Concession Contract accepted the jurisdiction of the Mexican courts,

the Claimants correctly point out that they did not exclude recourse to other courts or arbitral tribunals – such as this one – having jurisdiction on another foundation. Nor is the fact that the Claimants took the initiative before the Mexican courts fatal to the jurisdiction of the present Arbitral Tribunal. The Claimants have cited a number of cases where international arbitral tribunals did not consider themselves bound by decisions of national courts. Professor Dodge, in his oral argument, stressed the following sentence from the well-known ICSID case of *Amco v. Indonesia*: "An international tribunal is not bound to follow the result of a national court." As the Claimants argue persuasively, it would be unfortunate if potential claimants under NAFTA were dissuaded from seeking relief under domestic law from national courts, because such actions might have the salutary effect of resolving the dispute without resorting to investor-state arbitration under NAFTA. Nor finally has the Respondent argued that it cannot be held responsible for the actions of a local governmental authority like the Ayuntamiento of Naucalpan.

87. The problem is that the Claimants' fundamental complaint is that they are the victims of a breach of the Concession Contract. NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes. *The Claimants simply could not prevail merely by persuading the Arbitral Tribunal that the Ayuntamiento of Naucalpan breached the Concession Contract.*

88. Understanding this proposition perfectly well, Professor Dodge insisted that the claims are not simply for breach of contract, but involve "the direct expropriation of DESONA's contractual rights" and "the indirect expropriation of DESONA itself." (English Transcript, 24.6.99, p. 23, l. 9-11.)

89. Professor Dodge then argued that a breach of contract constitutes an expropriation "if it is confiscatory," or, quoting Professor Brownlie, *Principles of Public International Law*, 5th edition at 550, if "the state exercises its executive or legislative authority to destroy the contractual rights as an asset." Specifically, he invoked a "wealth of authority treating the repudiation of concession agreements as an expropriation of contractual rights."

90. Labelling is, however, no substitute for analysis. The words "confiscatory," "destroy contractual rights as an asset," or "repudiation" may serve as a way to describe breaches which are to be treated as extraordinary, and therefore as acts of expropriation, but they certainly do not indicate on what basis the critical distinction between expropriation and an ordinary breach of contract is to be made. The egregiousness of any breach is in the eye of the beholder – and that is not satisfactory for present purposes.

91. It is therefore necessary to examine whether the annulment of the Concession Contract may be considered to be an act of expropriation violating NAFTA Article 1110. If not, the claim must fail. The

question cannot be more central.

92. Before examining this crucial issue, it should be recalled that the Claimants originally grounded their claim on an alleged violation of Article 1105 as well as one of Article 1110. While they have never abandoned the ground of Article 1105, it figured very fleetingly in their later pleadings, and not at all in Professor Dodge's final arguments. This is hardly surprising. The only conceivably relevant substantive principle of Article 1105 is that a NAFTA investor should not be dealt with in a manner that contravenes international law. There has not been a claim of such a violation of international law other than the one more specifically covered by Article 1110. In a feeble attempt to maintain Article 1105, the Claimants' Reply Memorial affirms that the breach of the Concession Contract violated international law because it was "motivated by noncommercial considerations, and compensatory damages were not paid." This is but a paraphrase of a complaint more specifically covered by Article 1110. For the avoidance of doubt, the Arbitral Tribunal therefore holds that under the circumstances of this case if there was no violation of Article 1110, there was none of Article 1105 either.

C. The contention that the annulment was an act of expropriation

93. The Respondent argues that the Concession Contract came to an end on two independently justified grounds: invalidity and rescission.

94. The second is the more complex. It postulates that the Ayuntamiento was entitled to rescind the Concession Contract due to DESONA's failure of performance. If the Ayuntamiento was not so entitled, its termination of the Concession Contract was itself a breach. Most of the evidence and debate in these proceedings have focused on this issue: was DESONA in substantial non-compliance with the Concession Contract? The subject is complicated by the fact that DESONA was apparently not given the benefit of the 30-day cure period defined in Article 31 of the Concession Contract.

95. The logical starting point is to examine the asserted original invalidity of the Concession Contract. If this assertion was founded, there is no need to make findings with respect to performance; nor can there be a question of curing original invalidity.

96. From this perspective, the problem may be put quite simply. The Ayuntamiento believed it had grounds for holding the Concession Contract to be invalid under Mexican law governing public service concessions. At DESONA's initiative, these grounds were tested by three levels of Mexican courts, and in each case were found to be extant. How can it be said that Mexico breached NAFTA when the Ayuntamiento of Naucalpan purported to declare the invalidity of a Concession Contract which by its terms was subject to Mexican law, and to the jurisdiction of the Mexican courts, and the courts of Mexico then

agreed with the Ayuntamiento's determination? Further, the Claimants have neither contended nor proved that the Mexican legal standards for the annulment of concessions violate Mexico's Chapter Eleven obligations; nor that the Mexican law governing such annulments is expropriatory.

97. With the question thus framed, it becomes evident that for the Claimants to prevail it is not enough that the Arbitral Tribunal disagree with the determination of the Ayuntamiento. A governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level.* As the Mexican courts found that the Ayuntamiento's decision to nullify the Concession Contract was consistent with the Mexican law governing the validity of public service concessions, the question is whether the Mexican court decisions themselves breached Mexico's obligations under Chapter Eleven.

98. True enough, an international tribunal called upon to rule on a Government's compliance with an international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of public officials. As a former President of the International Court of Justice put it:

> "The principles of the separation and independence of the judiciary in municipal law and of respect for the finality of judicial decisions have exerted an important influence on the form in which the general principle of State responsibility has been applied to acts or omissions of judicial organs.
>
> These basic tenets of judicial organization explain the reluctance to be found in some arbitral awards of the last century to admit the extension to the judiciary of the rule that a State is responsible for the acts of all its organs.
>
> However, in the present century State responsibility for acts of judicial organs came to be recognized. Although independent of the Government, the judiciary is not independent of the State: *the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.*
>
> The responsibility of the State for acts of judicial authorities may result from three different types of judicial decision.
>
> The first is a decision of a municipal court *clearly incompatible with a rule of international law.*
>
> The second is what it known traditionally as a '*denial of justice.*'
>
> The third occurs when, in certain exceptional and well-defined circumstances, a State is responsible for a judicial decision contrary to municipal law." Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century," 159-1 Recueil des cours (General Course in Public International law, The Hague, 1978). (Emphasis added.)

99. The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. *What must be shown is that the court decision itself constitutes a violation of the treaty*. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.

100. But the Claimants have raised no complaints against the Mexican courts; they do not allege a denial of justice. Without exception, they have directed their many complaints against the Ayuntamiento of Naucalpan. The Arbitral Tribunal finds that this circumstance is fatal to the claim, and makes it unnecessary to consider issues relating to performance of the Concession Contract. *For if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated*.

101. The Arbitral Tribunal does not, however, wish to create the impression that the Claimants fail on account of an improperly pleaded case. The Arbitral Tribunal thus deems it appropriate, *ex abundante cautela*, to demonstrate that the Claimants were well advised not to seek to have the Mexican court decisions characterised as violations of NAFTA.

102. A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is no evidence, or even argument, that any such defects can be ascribed to the Mexican proceedings in this case.

103. There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrong-doing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the *bona fides* of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.

104. To reach this conclusion it is sufficient to recall the significant evidence of misrepresentation brought before this Arbitral Tribunal. For this purpose, one need to do no more than to examine the twelfth of the 27 irregularities, upheld by the Mexican courts as a cause of nullity: that the Ayuntamiento was misled as to DESONA's capacity to perform the concession.

105. If the Claimants cannot convince the Arbitral Tribunal that the evidence for this finding was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious, they simply cannot prevail. The Claimants have not even attempted to rebut the Respondent's evidence on the relevant standards for annulment of concessions under Mexican law. They did not challenge the Respondent's evidence that under Mexican law a public service concession issued by municipal authorities based on error or misrepresentation is invalid. As for factual evidence, they have vigorously combated the inferences made by the Ayuntamiento and the Mexican courts, but they have not denied that evidence exists that the Ayunamiento was misled as to DESONA's capacity to perform the concession.

106. At the presentation of the project to the Ayuntamiento in November 1992, where Mr Goldenstein "of Global Waste" explained that his company would employ some 200 people and invest approximately US$ 20 million, Mr Ted Guth of Sunlaw Energy – identified as a company to be associated in the creation of DESONA – also appeared and articulated some "essential elements" of the project as follows:

> "to enter into a power agreement with the electric company for 15 years and to build a power plant that will use methane gas from the sanitary landfills of Rincon Verde and Corral del Indio in Naucalpan, with an estimated generation of 210 megawatts, using bio-gas and some natural gas."

107. As indicated above (see paragraph 32), this prospect – apparently devoid of any feasibility study worth the name – strikes the Arbitral Tribunal as unrealistic. This was the grandiose plan presented to the Ayuntamiento, which was told at the same meeting that the city of Naucalpan would be given a carried interest of 10% in DESONA "without having to invest one single cent and that after 15 years it would be theirs." One can well understand how members of the Ayuntamiento would be impressed by ostensibly experienced professionals explaining how a costly headache could be transformed into a brilliant and profitable operation.

108. The Claimants obviously cannot legitimately defend themselves by saying that the Ayuntamiento should not have believed statements that were so unreasonably optimistic as to be fraudulent.

109. So when the moment came, one year later, for the Concession Contract to be signed, an absolutely fundamental fact had changed: the Claimants had fallen out with Sunlaw Energy, who had disappeared from the project, as best as the Arbitral Tribunal can determine, by October 1993.

110. For the Claimants to have gone ahead without alerting the Ayuntamiento to this factor was unconscionable. The Arbitral Tribunal cannot believe that the matter was adequately covered by alleged oral disclosures; Article 11 of the Concession Contract states flatly that "[t]he Concessionaire is obligated to install an electricity generating plant which will utilize biogas out of Rincon Verde, Corral del Indio, or

other." (Claimants' Translation, Claimants' Memorial, Section 3, p. 22.)

111. It is more than a permissible inference that the original text of the Concession Contract had been prepared on the basis, from the Claimants' perspective, that they would be able to form an operating consortium, that they had envisaged a programme dependent on the contributions of such third parties, and that once the text had been approved by the legislature they did not wish to endanger what they had achieved by disclosing that key partners had defected.

112. The testimony of Mr Ronald Proctor, although he was proffered by the Claimants, was unfavourable to them. His written statement explains that during late October and early November 1993, he attended meetings with Naucalpan officials, including the Mayor, during which he explained that his company, BFI, was assisting DESONA and

> "would commit the necessary start-up effort, capital and operational expertise to DESONA in order to ensure the performance of the Concession Contract."

113. There is no doubt about *BFI*'s capacity; it is a billion-dollar company with unquestioned credibility in the industry. The point is rather that this testimony flatly contradicts an ostensible foundation of the Concession Contract *with DESONA*. There is not a shred of written evidence that Mexican officials were content to rely on DESONA because BFI was there, in effect, to do everything: start-up, funding, and operations. Quite to the contrary, the contemporaneous written evidence relating to the period prior to signature shows reliance on the representations of the Claimants as to their own capabilities. The Concession Contract itself does not contemplate assignments, sub-contracts, or surrogates – let alone any suggestion that DESONA could ensure performance of the Concession Contract only if it found an able joint venture partner.

114. In a phrase, Mr Proctor's testimony, perhaps unintentionally, supports the conclusion that the Claimants' main effort was focussed on getting the Concession Contract signed, after which they intended to offer bits and pieces of valuable contract rights to more capable partners.

115. The Ayuntamiento was entitled to expect much more.

116. The Concession Contract says nothing about assignability. The Respondent has proffered evidence of Mexican law to the effect that public service concessions are granted *intuitu personae* to a physical person or legal entity on the basis of particular qualities. The Claimants have not contradicted this evidence.

117. The Claimants also sought to rely on an unsigned letter said to have been written by the previous Mayor of Naucalpan in March 1994. The substance of the letter is in support of the Claimants, who of course at that point in time were in imminent danger of losing DESONA's concession. The Respondent does not accept this document as genuine. But taking it as proffered by the Claimants, it is highly damaging to their case in connection with the alleged misrepresentations, because it refers to the fact that the DESONA

> "stockholders are owners of a North American company that has 40 years of experience in waste collection service. … These businessmen provide services in the City of Los Angeles, Montebello, City of Industry and the City of Malibu."

118. If this is what the Mayor who signed the Concession Contract still thought in March 1994, the Claimants cannot seriously contend that, whatever they say might have been their earlier "puffery" in 1992 (to use Mr St. Louis' hopeful euphemism), they had revealed all relevant elements of their modest experience, and Global Waste's short and woeful corporate history, by the time the Concession Contract was signed in November 1993.

119. The only evidence the Claimants have to support their contention that they made adequate disclosures before signature of the Concession Contract – as is clear from their post-hearing "Closing Memorial" – is the self-serving oral assertion of Mr Goldenstein that he fully informed city officials in various unrecorded conversations. This evidence is not consistent with the record. It is rejected.

120. To resume: the Claimants have not even attempted to demonstrate that the Mexican court decisions constituted a fundamental departure from established principles of Mexican law. The Respondent's evidence as to the relevant legal standards for annulment of public service contracts stands unrebutted. Nor do the Claimants contend that these legal standards breach NAFTA Article 1110. The Arbitral Tribunal finds nothing in the application of these standards with respect to the issue of invalidity that appears arbitrary or unsustainable in light of the evidentiary record. To the contrary, the evidence positively supports the conclusions of the Mexican courts.

121. By way of a final observation, it must be said that the Claimants' credibility suffered as a result of a number of incidents that were revealed in the course of these arbitral proceedings, and which, although neither the Ayuntamiento nor the Mexican courts would have been aware of them before this arbitration commenced, reinforce the conclusion that the Ayuntamiento was led to sign the Concession Contract on false pretences. It is hard to ignore the consistency with which the Claimants' various partners or would-be partners became disaffected with them. A Mexican businessman, Dr Palacios, appears to have contributed US$ 225,000, as well as equipment, in the mistaken belief that he was making a capital contribution which would lead to his becoming a DESONA shareholder. On 5 June 1994 he brought a criminal action for fraud

against Mr Goldenstein, requesting that the police be requested to arrest him on sight. Mr Proctor of BFI, although called as a witness by the Claimants, apparently recommended legal action against the Claimants when he found out that the two vehicles purchased with the proceeds of a loan from BFI were sold by DESONA without repaying the loan. Mr Bryan Stirrat, whose company worked as an independent contractor on the Naucalpan landfill and to this day has an unsecured claim against DESONA in the amount of US$ 765,000, excluding interest, stated on cross-examination that he had not been aware when he went with Mr Goldenstein on 1 June 1994 to a meeting of the Ayuntamiento to seek reinstatement of the Concession Contract that DESONA had sold all of its assets 10 days earlier; he affirmed that his company had received nothing from the proceeds of that sale.

122. The list of demonstrably unreliable representations made before the Arbitral Tribunal is unfortunately long. The arbitrators are reluctant to dwell on it in this Award, because they believe that the Claimants' counsel are competent and honourable professionals to whom a number of these revelations came as a surprise. Nor is there any reason to embarrass Mr Davitian, who struck the Arbitral Tribunal as a hard-working individual who may have been well out of his depth in an unfamiliar environment, not even understanding what was being said on his behalf. The same is *a fortiori* true of Ms Baca, his divorced spouse, who apparently had no role in the project at all.

123. The credibility gap lies squarely at the feet of Mr Goldenstein, who without the slightest inhibition appeared to embrace the view that what one is allowed to say is only limited by what one can get away with. Whether the issue was how non-U.S. nationals could de facto operate a Subchapter S corporation, how the importer of vehicles might identify the ostensible seller and the ostensible price to the customs authorities, or how a cheque made out to an official – as reimbursement of a luncheon – but endorsed back to the payer might still be presented as evidence of payment under a lease, Mr Goldenstein seemed to believe that such conduct is not only acceptable in business, but a sign of worldly competence.

124. The Arbitral Tribunal obviously disapproves of this attitude, and observes that it comforts the conclusion that the annulment of the Concession Contract did not violate the Government of Mexico's obligations under NAFTA.

VII. COSTS

125. The claim has failed in its entirety. The Respondent has been put to considerable inconvenience. In ordinary circumstances it is common in international arbitral proceedings that a losing claimant is ordered to bear the costs of the arbitration, as well as to contribute to the prevailing respondent's reasonable costs of representation. This practice serves the dual function of reparation and dissuasion.

126. In this case, however, four factors militate against an award of costs. First, this is a new and novel mechanism for the resolution of international investment disputes. Although the Claimants have failed to make their case under NAFTA, the Arbitral Tribunal accepts, by way of limitation, that the legal constraints on such causes of action were unfamiliar. Secondly, the Claimants presented their case in an efficient and professional manner. Thirdly, the Arbitral Tribunal considers that by raising issues of defective performance (as opposed to voidness ab initio) without regard to the notice provisions of the Concession Contract, the Naucalpan Ayuntamiento may be said to some extent to have invited litigation. Fourthly, it appears that the persons most accountable for the Claimants' wrongful behaviour would be the least likely to be affected by an award of costs; Mr. Goldenstein is beyond this Arbitral Tribunal's jurisdiction, while Ms. Baca – who might as a practical matter be the most solvent of the Claimants – had no active role at any stage.

127. Accordingly the Arbitral Tribunal makes no award of costs, with the result that each side bears its own expenditures, and the amounts paid to ICSID are allocated equally.

VIII. DECISION

128. For the reasons stated above, and rejecting all contentions to the contrary, the Arbitral Tribunal hereby decides in favour of the Respondent. Made as at Toronto, Canada, in English and Spanish, both versions being equally authentic.

/ signed /
Mr Benjamin R. Civiletti

Date: [October 11, 1999]

/ signed /
Mr Claus von Wobeser

Date: [October 18, 1999]

/ signed /
Mr Jan Paulsson,
President

Date: [6 October 1999]

ANNEX 162

Diplomatic Protection

CHITTHARANJAN F. AMERASINGHE
BA, LLB, Ph D, LLD (Cambridge, UK),
LLM (Harvard), Ph D (Ceylon);
Member, Institut de Droit International;
Former Judge, UN Administrative Tribunal, and
Registrar, World Bank Administrative Tribunal,
Full Professor and Honorary Professor of Law,
University of Ceylon, Colombo.

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Exhausting Local Remedies

The rule that, where there has been a violation of international law in the treatment of an alien by a State, local remedies must be exhausted by the alien before his claim may be espoused by his national State has in some respects had a distinguished history.[1] It can hardly be said that in the context of modern international law it is defunct or has ceased to be relevant, although a tendency may have arisen to try sometimes to circumvent it by various techniques.[2] As had been pointed out by the ILC in its draft articles on State responsibility, the non-observance of the rule is an objection to admissibility of an international claim.[3] The rule is firmly established. Moreover, its raison d'être is still to be deemed unchanged and viable.

The rule sprang up primarily as an instrument designed to ensure respect for the sovereignty of host States in this particular area of international dispute settlement. Basically, this is the principal reason for its survival today. In the modern law of diplomatic protection the raison d'être of the rule is the recognition given by members of the international community to the interest of the host State, flowing from its sovereignty, in settling international disputes of a certain kind by its own means before international mechanisms are invoked. The utility of this policy value underlying the rule cannot be denied. Even though the disputes concerned, involving individuals as they do, are international disputes, the same reasons that led to the formation of the rule through the years have really survived the development of more sophisticated systems of international dispute settlement. Functionally, to date, the accelerated interaction between aliens and foreign States because of the ease of international travel, the growing sense of community in the world, and the demands of economic development, in both developed and developing nations, means that the rule could be important in

[1] See C F Amerasinghe, *Local Remedies in International Law* (2004) 22 ff and authorities there cited. The rule of exhaustion of local remedies has been considered and discussed in detail in the above work.

[2] C F Amerasinghe, ibid 247 ff 425; C F Amerasinghe, 'Whither the Local Remedies Rule?' 5 ICSID Review (1990) 293 ff. For an assessment of the usefulness of the rule and its future see ibid 309–10; C F Amerasinghe (note 1 above) 425 ff.

[3] Article 44(b): Crawford, *The International Law Commission's Articles on State Responsibility* (2002) 70, 264–5. Now see also Article 2006 14(1) of the ILC's Draft Articles on Diplomatic Protection: *Report of the ILC (2006)* 20, 71.

the settlement of international disputes that may arise from the exercise of, or in the context of situations which may lead to, diplomatic protection. The respect, shown by reference to the rule, for the sovereignty of the respondent State in conflict situations involving diplomatic protection in general international law has not waned. The ICJ has recognized the viability of the rule in several cases.[4]

Although the value attached to respect for the sovereignty of the host or respondent State is at the heart of the implementation of the rule, there is evidence in the evolution of the rule that international law attaches importance, in the rule's application, to values other than the interests of the host or respondent State. Such interests as those of the alien or individual, of the national State of the alien, and of the international community have been taken into consideration. In different situations, the conflict between or among the various interests has been resolved in favour of one or other of the interests besides those of the host or respondent State, while sometimes the roll of the dice has favoured the latter. Generally, it may be concluded that there has been a judicious weighing of conflicting interests, particularly by judicial or quasi-judicial organs of the international community, before a solution has been reached.

It is apparent that local remedies operate as a step or steps in the orderly procedure of settling international disputes. The rule is no more and no less than a method of ascribing to sovereign States a dispute settlement function in international disputes to which they are parties. While States are surely capable of responsibly and constructively discharging the trust placed in them by the international community in conferring on them a role which flows from respect for their sovereignty, it is reasonable to expect that the rule should operate essentially as a means of securing economically and efficiently the settlement of international disputes in the areas relating to the protection of aliens. Thus, while on the one hand a sovereign State is given every opportunity of settling such disputes equitably through its own organs, and it is in the interest of all concerned that such disputes should be settled at the earliest possible opportunity at a local level, on the other hand it is logical that some recognition should also be given to the countervailing interests of all parties concerned in efficient justice without, inter alia, financial waste.

Scope of the Rule

An issue which is crucial to the operation of the rule in practice concerns the extent to which local remedies must be exhausted. As already pointed out, the interplay between the two principal sets of conflicting interests, those of the host

[4] See the statement of the ICJ in the *ELSI Case*, 1989 ICJ Reports 42; particularly also the *Interhandel Case*, 1959 ICJ Reports 27; the *Diallo Case* (*Preliminary Objections*), 2007 ICJ Reports, para 42, <http://www.icj-cij.org.>.

or respondent State arising from its sovereignty and those of the alien in securing a fair and equitable solution to his complaint without being put to undue expense or hardship, is significant here, although there tends to be a greater emphasis on those of the host or respondent State in having an opportunity to settle the dispute by its own means. The question is how extensive must be the resort to local remedies in order to enable the host or respondent State to have a proper opportunity of settling the dispute.[5] The development of the rule, particularly through judicial decisions, demonstrates that, while great respect is shown for the sovereignty of the host or respondent State, there has been some concern for the interests of the alien, so as not to make the extent of resort required unreasonable.

There has in the past been some discussion of the question of what remedies must be exhausted in order that the requirements of the rule be satisfied, particularly with respect to extraordinary remedies. The theory of the matter has not been paid much attention in discussions in the past. However, it is reasonably clear that in the past practice relating to diplomatic protection the rule has been applied generally to remedies of a judicial nature.[6] Indeed, in 1864 Phillimore, in an opinion to the British Crown, specifically defined the term local redress which he used as being redress 'through courts of law'.[7]

It was usual to include remedies available through special courts, provided they were legally constituted, in the concept of 'judicial remedies'.[8] Remedies which could lead to reparation according to rules of law are included among those to be exhausted.[9] In principle courts have certainly been included in the concept of local remedies, even in the decisions of international tribunals. Thus, in the *Croft Case*,[10] a special court which had jurisdiction over the cancellation of patent rights was held to be a local remedy to which the aggrieved alien should have had resort. Remedies available through a special system of administrative courts are also to be characterized as exhaustible remedies.[11] The fact that resort

[5] See on this particularly C F Amerasinghe (note 1 above) 182 ff.

[6] For decisions see eg *Mavrommatis Palestine Concessions Case*, PCIJ Series A No 5 (1925); the *German Interests in Upper Silesia Case*, PCIJ Series A No 6 (1925); the *Chorzów Factory Case*, PCIJ Series A No 9 (1927); the *Phosphates in Morocco Case*, PCIJ Series A/B No 74 (1938); the *Panavezys-Saldutiskis Railway Case*, PCIJ Series A/B No 76 (1939); the *Electricity Co of Sofia Case*, PCIJ Series A/B No 77 (1939); the *Norwegian Loans Case*, 1957 ICJ Reports 14; the *Interhandel Case*, 1959 ICJ Reports 11; the *ELSI Case*, 1989 ICJ Reports 15; the *Arrest Warrant of 11 April 2000 Case*, <http://www.icj-cij.org>; the *Finnish Ships Arbitration* (Finland v Great Britain), 3 UNRIAA p. 1479 (1934); the *Ambatielos Claim* (Greece v UK), 12 UNRIAA 83 (1956); other cases cited in de La Pradelle-Politis, *RAI*, vol 1, 24, 48, 131, 138, 161, 460, 474, 476, 582 and 592; vol 2, 103, 112, 121, 275, 291, 294, 486, 487, 594, 673, 674 and 710; and vol 3, 116, 121 and 123. There are also some cases in Moore, 6 *International Arbitrations* (1898) and the UNRIAA series. For some diplomatic practice, see eg Moore, *International Law* (1906) 656 ff; Hackworth, 5 *Digest* (1943) 501 ff; and McNair, 2 *International Law Opinions* (1956) 312 ff.

[7] McNair, 2 ibid 312.

[8] C F Amerasinghe (note 1 above) 183.

[9] See C F Amerasinghe, ibid 183–4.

[10] (Great Britain v Portugal, 1856), 59 BFSP (1859–60) 1288.

[11] See the *Phosphates in Morocco Case*, PCIJ Series A/B No 74, 17 (1938); the French pleadings in PCIJ Series C No 84, 209 ff.; and the Italian pleadings in PCIJ Series C No 84, 439 ff.

has already been had to the same courts before would not seem to matter, even if the legal means available are in reality extraordinary ones, provided a legal remedy may be available.[12] In the *Ambatielos Claim*, the tribunal put the matter succinctly by characterizing the remedies to be exhausted as 'legal' when it said: 'It is the whole system of legal protection, as provided by municipal law, which must have been put to the test.'[13]

Legal commentators generally discuss the rule on the assumption that it is limited to remedies of a judicial or legal nature.[14] Codification drafts of an official nature clearly make the same assumption in general.[15] García Amador's draft is an exception in that it refers to 'all the remedies and proceedings established by municipal law'.[16]

Private bodies have not been so specific or limited in their formulations.[17] Some support is given for these formulations by a statement made by the PCIJ in the *Phosphates in Morocco Case* to the effect that a failure of local remedies might result 'either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies'.[18] Nowhere, in that case, however, did the parties refer to any remedies except judicial remedies, which were available through administrative courts. Hence, the statement could consistently be interpreted to cover only

[12] See the *Interhandel Case*, 1959 ICJ Reports 27.

[13] Greece v UK, 12 UNRIAA 120 (1956).

[14] Anzilotti, 'La Responsabilité internationale des étâts à raison des dommages soufferts par des étrangers', 13 RGDIP (1906) 8; Borchard, *The Diplomatic Protection of Citizens Abroad* (1916) 381; Ralston, *The Law and Procedure of International Tribunals* (1926) 95; Eagleton, *The Responsibility of States in International Law* (1929) 95; Eagleton, 'Une théorie au sujet du commencement de la responsabilité de l'état', 11 RDILC (1930) 643; Hoijer, *La Responsabilité internationale des étâts* (1930) 374; Borchard, in 38 AIDI (1931-I) 424; Dunn, *The Protection of Nationals* (1932) 156; Witenberg, 'La Recevabilité des réclamations devant les juridictions internationales', 41 Hague Recueil (1932) 50; H Friedmann, 'Épuisement des voies de recours internes', 14 RDILC (1933) 318; Ténékidès, 'L'épuisement des voies de recours internes comme condition préalable de l'instance internationale', 14 RDILC (1933) 514; Fachiri, 'The Local Remedies Rule in the Light of the Finnish Ships Arbitration', 17 BYIL (1936) 19; Ago, 'La Regola del Previo Esaurimento dei Ricorsi Interni in Tema di Responsabilità Internazionale', 3 ArchivDP (1938) 181; Freeman, *The International Responsibility of States for Denial of Justice* (1937) 407 and 422; Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?', 31 BYIL (1954) 452; Verzijl, in 45 AIDI (1954-I) 5, 84 and in 46 AIDI (1956) 13 ff; C de Visscher, 'Le Déni de justice en droit international', 52 Hague Recueil (1935) 421 ff; Shea, *The Calvo Clause* (1955); Bagge, 'Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders', 34 BYIL (1958) 162; Law, *The Local Remedies Rule in International Law* (1961); Mummery, 'The Content of the Duty to Exhaust Local Judicial Remedies', 58 AJIL (1964) 389; Gaja, *L'Esaurimento dei Ricorsi Interni nel Diritto Internazionale* (1967); Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* (1968) 28 ff; Chappez, *La Régle de l'épuisement des voies de recours internes* (1972); and Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983) 58. I have also considered this aspect of scope in *Local Remedies in International Law* (2004) 182 ff.

[15] YBILC (1956), vol 2 221 ff.

[16] Article 18, YBILC (1961), vol 2 48.

[17] See for examples C F Amerasinghe (note 1 above) 185.

[18] PCIJ Series A/B No 74, 28 (1938).

'administrative or extraordinary methods of redress' of an essentially judicial nature.[19] That an act of grace does not come under the concept of remedies to be exhausted seems to have been accepted later. Thus, remedies which would result in a non-binding recommendation given by the deciding body to an executive organ of the host or respondent State seem to be excluded from those which must be exhausted.[20]

Later in the arguments in the *Barcelona Traction Co Case* some views on either side were expressed by the contending States on the issue of ordinary and extraordinary remedies. The Spanish government in its preliminary objections stressed that it was the whole system of legal protection afforded by the respondent State that had to be tested.[21] In the case there were certain remedies arguably involved which may be described as extraordinary. One was the action which could be brought against a corrupt judge in the event that he was fraudulent in giving a decision. The second was contentious administrative proceedings in respect of administrative decisions taken by an executive organ, beginning with a hierarchical appeal to the Minister and followed by recourse to the administrative courts. The Spanish argument was emphatic that the first remedy should have been exhausted because it fell within the category of exhaustible remedies.[22] As regards the contentious administrative proceedings, the Spanish government was of the view that these were certainly included as the kind of remedies to be exhausted, although they were extraordinary.[23]

The Belgian government did not dispute the principle enunciated in the Spanish government's argument relating to contentious administrative proceedings.[24] Thus, there seems to have been agreement on the principle that the extraordinary remedy of contentious administrative proceedings including a hierarchical appeal was not excluded per se from those remedies that had to be exhausted by virtue of its character. With regard to the extraordinary remedy by way of action against a corrupt judge, on the other hand, the Belgian government objected that this was not a normal case of remedies, although it could have resulted in the overturning of the decision of the judge in question.[25]

The Belgian argument concerning the action against a corrupt judge seems to be based on the idea that exceptional recourse is not as such included in the

[19] There is an early British precedent relating to reprisals which contradicts this view: see McNair, 2 *International Law Opinions* (1956) 312. But not only is this an old precedent but it refers to the use of force.

[20] See the *Neptune's Case* (1977), where an opinion given by the House of Lords to the British Government would not have been binding: Moore, 3 *International Arbitrations* (1898) 3043.

[21] ICJ Pleadings (1962–9), vol 4, 592–3.

[22] 'Exceptions preliminaries présentées par le Gouvernernent espagnol' ICJ Pleadings (1962–9), vol 1, 242. The Spanish government also referred to the remedy by way of revision of the bankruptcy judgment, which, it argued, although extraordinary, should have been exhausted: ICJ Pleadings (1962–9), vol 9, 923.

[23] ICJ Pleadings (1962–9), vol 1, 242.

[24] 'Observations et conclusions du Gouvernement Belge', ICJ Pleadings (1962–9), vol 1, 267–8.

[25] Ibid 221.

concept of the remedies to be exhausted, rather than that it was not to be expected that the remedy would be invoked because it was not reasonable to demand this of the aggrieved aliens. There was an element of disagreement on the character of the remedy that must be exhausted.

Generally, except for a few broad statements, particularly in some codification drafts, the tendency has been to accept some limitations on the nature of the remedy to which resort must be had. The question then relates to the extent of the limitations. There are references to, for example, 'normal usage' and the exclusion of exceptional recourse. But in fact most descriptions refer to the exhaustion of legal or judicial remedies as being required. The better view is that only those remedies which are of a judicial or quasi-judicial character must be exhausted, although they may not be confined to those provided by the regular courts of law. The 2006 ILC Draft Article 14(2) is not sufficiently specific. It refers merely to ordinary or special remedies, whether provided by judicial or administrative courts or bodies.[26]

[26] The Commentary to Article 14 expresses views which reflect what has been said above: Report of the ILC (2006) 71–2. Now in the *Diallo Case* (*Preliminary Objections*) the ICJ had something to say on what kinds of remedies must be exhausted. The Court explained that, while extraordinary, administrative remedies must be exhausted, remedies involving acts of grace need not be exhausted:

> 47 The Court further observes that, even if this was a case of expulsion and not refusal of entry, as the DRC maintains, the DRC has also failed to show that means of redress against expulsion decisions are available under its domestic law. The DRC did, it is true, cite the possibility of requesting reconsideration by the competent administrative authority (see paragraph 36 above). The Court nevertheless recalls that, while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Thus, the possibility open to Mr. Diallo of submitting a request for reconsideration of the expulsion decision to the administrative authority having taken it — that is to say the Prime Minister — in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted. (2007 *ICT Reports*, para 47—<http://www.icj-cij.org>)

With regard to both the claims made by the claimant State, Guinea, in respect of (i) the alleged wrongful expulsion of its national and (ii) the alleged direct injury to him as a shareholder of two companies incorporated in the Democratic Republic of Congo (DRC), the respondent, the court held that there were no effective remedies to exhaust. In respect of the first claim the court pointed out, as seen above, that there were no 'legal' remedies available, let alone effective ones. The court then stated that

> 48. Having established that the DRC has not proved the existence in its domestic legal system of available and effective remedies allowing Mr. Diallo to challenge his expulsion, the Court concludes that the DRC's objection to admissibility based on the failure to exhaust local remedies cannot be upheld in respect of that expulsion. (Ibid, para 48)

With regard to the second claim the court in effect found that the respondent had not established that there are any effective internal remedies to which resort could have been had by Mr. Diallo in seeking redress for the alleged violation of his direct rights as a shareholder of the two companies—the remedies available being no different from those relating to the claim based on his alleged expulsion. The court said:

> 74. The Court notes that the alleged violation of Mr. Diallo's direct rights as *associé* was dealt with by Guinea as direct consequence of his expulsion given the circumstances in which that

In principle the policies behind the rule of local remedies would not warrant an unlimited extension of the concept of remedies to all types of remedies. Although the respondent State is given an opportunity of redressing a wrong, it is also relevant that for social ends the alien is being prevented from obtaining what may be less expensive justice by a direct recourse to an international tribunal. It would be proper, then, that he should be compelled to use only those means by which he has an opportunity to obtain justice according to law. What international law is interested in is the determination according to law, in an impartial manner, of the alien's rights. Hence, the emphasis on the judicial or quasi-judicial nature of remedies cannot be out of place. It would be improper to insist on his seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles. Thus, to expect him to approach the administration or the legislature in the hope of having his problem solved as a result of the beneficence of either would be unreasonable. It would seem, therefore, that it is only where remedies enjoy a character which ensures impartial determination of disputes, according to law and not purely by uncontrolled discretion, that the alien must resort to them. This is the test that must be applied to determine the exhaustibility of remedies outside the normal judicial sphere. Hence, administrative tribunals and the like may fall within the category of exhaustible remedies, if they share the required character.

A distinction must, of course, be made between the method of deciding the dispute and the procedure for implementing the decision. It is only the former that is of relevance here. The fact that the implementation of a decision is at the discretion of the respondent State would not affect the position, since this lies within the sovereign powers of the State and a truly judicial determination may in any case be disregarded. The respondent State has a right to determine the alien's right in the proper way, and whatever the subsequent attitude it may adopt towards fulfilling its secondary obligation of reparation, this fact should not affect the classification of a remedy in such a way that it is incumbent upon the alien to resort to it. The distinction which is viable is between those remedies which are legal or judicial and quasi-judicial and those that are not.

> expulsion occurred. The Court has already found above (see paragraph 48), that the DRC has not proved that there were effective remedies, under Congolese law, against the expulsion Order against Mr. Diallo. The Court further 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 but have confined themselves in it to examining remedies open to Africom-Zaire and Africontainers-Zaire, without considering any which may have been 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.
>
> 75. 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. (ibid, paras 74 and 75)

Both natural and juridical persons must exhaust local remedies, while a foreign company financed partly or mainly by public capital is also required to exhaust local remedies when it engages in *acta jure gestionis*, and aliens who are non-nationals of a State which may exercise protection in exceptional circumstances must exhaust remedies.[27]

As was stated in the *ELSI Case*, the essence of the claim should be brought before the local judicial bodies and all available and accessible remedies must be 'exhausted' in that they have been pursued as far as is permitted or required by local law so that a final decision is given.[28] This also means that the alien must use the procedures, evidentiary ones especially, which are available to him to support his claim in the process of exhausting remedies and that he fails to exhaust remedies, if the preparation or presentation of his claim at the local level is faulty and results in a wholly or partially unsuccessful resort to remedies.[29]

It is to be noted that the ILC's 2006 Draft Articles, also in Article 15(a), in addition make it clear that only reasonably available local remedies which provide effective redress need be exhausted.

Exceptions to or Limitations on the Rule

Respect for the sovereignty of the respondent or host State constitutes the foundation of the rule that local remedies must be exhausted. Recognition of other interests, such as those of the alien claimant in avoiding undue hardship and excessive expense in pursuing local remedies, has resulted in limitations being placed on or exceptions being made to the operation of the rule. In its positive form, the rule was not absolute and had certain parameters in so far as exhaustion was initially limited to remedies which were, for example, of a legal nature, available, and effective. In a sense, the negative requirements are the other side of the coin. The limitations, thus directly resulting, and such others as may have been placed on the rule flow primarily out of consideration for the interests of the alien claimant, but also because of the need to have justice dispensed efficiently and economically, which is an interest of the international community. The limitation that those remedies which are ineffective or inadequate need not be exhausted, raises some issues of definition which have been addressed in the various sources of the law.

[27] Ibid 69. See also C F Amerasinghe (note 1 above) 197–8.

[28] 1989 ICJ Reports 45–6. See also C F Amerasinghe (note 1 above) 195 ff; Commentary on Article 14 of the ILC Draft: Report of the ILC (2006) 73; the *Finnish Ships Arbitration* (1938), 3 UNRIAA 1502, where slightly different language was used in describing what aspects of the claim must be presented to the local institutions.

[29] See C F Amerasinghe (note 1 above) 195–6, 216 ff; commentary on Article 14 of the ILC Draft Articles: Report of the ILC (2006) 73 ff.

The interests of the alien claimant are an important consideration in deciding how the rule of local remedies is to be applied. These interests were noted in the *Finnish Ships Arbitration*,[30] particularly in regard to the setting of limits upon the rule. It was also pointed out by the arbitral commission in the *Ambatielos Claim* that the rule could not be strained too far, even though respect for the sovereignty of the respondent or host State required that the whole system of legal protection be tested and exhausted,[31] thus implicitly giving particular value to the interests of the alien claimant. However, identifying the limitations on the rule requires more than mere regard for such interests. The process demands reconciliation of the conflict between the interests of the respondent or host State in having an opportunity of doing justice, and other interests, including those of the alien as claimant in avoiding undue hardship and in a quick and efficient dispute the settlement procedure. In jurisprudence and practice some categories of limitation have been clearly established. Theoretically, however, there is room for expansion of these categories when new situations arise which may be eligible for consideration. While the outcome of such consideration may not always be foreseeable, it is clear that in each case a careful weighing of the conflicting interests must take place. In this exercise, because of the history of the rule and of the manner in which it has evolved, the important place held by respect for the sovereignty of the host or respondent State, which requires that it be given a fair opportunity of doing the justice through its own system, cannot be ignored. Consequently, it is only where the interests of the alien claimant or other interests clearly dominate and require recognition that a limitation is to be accepted. Where limitations have been imposed it is because a reasonable case has been made for such limitations. Similarly, where future limitations are canvassed the same principle would apply.

The first systematic attempt to deal with the problem of exceptions to or limitations on the application of the rule of local remedies was, perhaps, in the *Finnish Ships Arbitration*.

The limitations on the rule of local remedies seem to have been described in its early history as being based on the absence of exhaustible justice but this may not be the sole raison d'être of all the limitations. In a broad sense, the absence of exhaustible justice may be a highly important consideration, particularly as the inapplicability of the rule is viewed from the point of view primarily of the host or respondent State in so far as the limitations on the rule are related to the inability of that State to do justice. But, as was implied in the *Finnish Ships Arbitration*, it was really consideration also of the alien's interest in not being put to undue hardship that gave rise to the limitation which was found to exist in that case. The tribunal concluded that it was 'hard' (or unjust or unfair) to expect the alien

[30] Finland v Great Britain, 3 UNRIAA 1497 (1934).

[31] Greece v UK, 12 UNRIAA 120 (1956). See also p 125 (Alfaro) and p 128 (Spiropoulos) for comparable ideas.

to pursue remedies any further in the circumstances which prevailed in the case. Thus, at the heart of the problem of limitations is the question of justice or fairness, which in turn is inextricably involved with a balancing of the conflicting interests in reality associated with the rule.

There may be remedies which, although available, are not in the circumstances applicable to the particular injury of which the alien complains. International courts or organs have then tended to regard the remedy as not available. Apart from the cases discussed earlier in which the remedy was held not to be available in this sense, there have been cases which came before the UN Human Rights Committee in which the remedy was held not to be exhaustible because it was not available according to law.[32] Thus, it is not the theoretical existence of a remedy under the law of the host or respondent State which makes it exhaustible, but rather whether according to that law it is applicable to the claimant's case. By the same token it would follow that it must be quite clear according to the law of the host or respondent State that the remedy in question is inapplicable to the claimant's case.

(a) Ineffective Remedies

The limitation arising from the positive requirement that the remedy be effective or adequate for the object of the claim implies that ineffective remedies need not be exhausted. In the application of the rule to the problem of appeals from one court to another within the same national system in the *Finnish Ships Arbitration* it was held that a claimant was not under an obligation to resort to an appeal which was obviously futile. It was insufficient that the remedy merely appeared to be futile for the alien to be exempt from making the appeal. On the other hand, the alien was not absolutely compelled to take his case through to the highest court, whatever the circumstances might be:

> As regards finally the third question, whether the local remedy shall be considered as not effective only where it is obviously futile on the merits of the case which are to be taken into account, to have recourse to the municipal remedy, or whether, as the Finnish Government suggests, it is sufficient that such a step only appears to be futile, a certain strictness in construing this rule appears justified by the opinion expressed by Borchard when mentioning the rule applied in the prize cases. Borchard says (a.a. § 383): 'In a few prize cases it has been held that in the face of a uniform course of decisions in the highest court a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.'[33]

[32] Some early cases: Communication No 8/1977, HRC *Selected Decisions* 48; Communication No 28/1978, HRC *Selected Decisions* 58–9; and Communication No 44/1979, HRC *Selected Decisions* 77 and 79.

[33] Finland v Great Britain, 3 UNRIAA 1504 (1934). The term 'effective remedy' was used at p. 1495.

Accordingly, it was held that, where the finding of fact by a board under an Indemnity Act was final and the success of the claimant's case depended on a different finding of fact, an appeal to a higher court[34] or a reference to a different court or body[35] was 'obviously futile'. Furthermore, it was held that in any case there was no effective remedy by way of petition of right to the king of the respondent State, the UK, since such a remedy lay only in contract cases and there was no contract in that case.[36]

The resulting principle excused the alien from exhausting remedies in certain circumstances as opposed, on the one hand, to laying upon him the absolute obligation to appeal to all available sources of justice, and, on the other, to excusing him from such appeal in any circumstances in which he chose, whether on a bona fide estimate of the effectiveness of the remedies available or not.[37] Where it is clear that the resort to an appeal or reference to another court or tribunal would not be a source of adequate redress, the alien is excused from spending his money and time. Also, in this situation nothing has been lost by the respondent State, as far as its interest in doing justice by its own means is concerned.

This rule which evolved in the *Finnish Ships Arbitration* was applied more recently by Judge Lauterpacht in the *Norwegian Loans Case,* where the issue of non-exhaustion of local remedies was raised but not decided by the court. The plaintiff State, France, argued that there were no remedies to exhaust, but Judge Lauterpacht in a separate opinion held that the Norwegian objection was good because it was not clear that resort to the Norwegian courts would have been absolutely futile.[38] In the *Interhandel Case,* the Court similarly held that there was still a possibility of success in the US courts for the Swiss Interhandel Company so that it could not be said that there were no remedies available, and therefore the Swiss aliens should have exhausted local remedies before having their case taken up before an international tribunal.[39]

In the law of diplomatic protection the principle that local remedies need not be exhausted where they are 'obviously futile' seems to be established. The *Finnish Ships Arbitration* made it clear that the test is obvious futility or manifest ineffectiveness, not the absence of a mere reasonable prospect of success or the improbability of success, which are less strict tests. The absence of a reasonable prospect of success as a test seems to have found its way into the law relating to the protection of human rights. The test of obvious futility clearly requires more than the probability of failure or the improbability of success, but perhaps less than the absolute certainty of failure. The test may be said to require

[34] Ibid 1543.
[35] Ibid 1545.
[36] Ibid 1550.
[37] Fachiri criticized this particular solution: 'The Local Remedies Rule in the Light of the Finnish Ships Arbitration', 17 BYIL (1936) 36.
[38] 1957 ICJ Reports 39 ff.
[39] 1959 ICJ Reports 26 ff.

evidence from which it could reasonably be concluded that the remedy would be ineffective.[40]

The application of the test of obvious futility has resulted in the dismissal of the objection that local remedies had not been exhausted in several kinds of cases. First, it has been held that, where resort to the courts will result in the repetition of a uniform line of decisions adverse to the alien, the remedy is obviously futile.[41] What this means is that the mere likelihood of an adverse decision is insufficient, something more than probability of defeat but less than certainty being required. It seems readily to be accepted that a *jurisprudence constante* or *bien établie,* or the existence of a series of decisions which shows that resort to remedies will not end in success, exempts the alien or claimant from exhausting local or internal remedies. This point was either explicitly or implicitly conceded in the written pleadings and oral arguments in the *Barcelona Traction Co Case.*[42]

Second, as in the *Finnish Ships Arbitration,* there is no need to resort to a court or body which has no jurisdiction over the issue raised by the alien. This is so whether it is a case of resort to a court of first instance or a court of appeal. However, in such a case this point must be strictly proved, as it was in the *Finnish Ships Arbitration.* In the *Panavezys-Saldutiskis Railway Case,* the argument was raised that it would have been useless to take the matter to the Lithuanian courts because they would not take jurisdiction over an 'act of state', an act *jure imperii,* since this was an act in performance of the government's public function and not a matter 'concerning a civil right' within the meaning of the Lithuanian Code of Civil Procedure. The PCIJ held that it was not satisfied that this was the

[40] Mummery requires that the absence of a proper remedy be 'reasonably clear': 'The Content of the Duty to Exhaust Local Judicial Remedies', 58 AJIL (1964) 401. In the *ELSI Case,* a chamber of the ICJ held that what was important was whether it could be concluded from all the circumstances that the possibility of success of a remedy was remote: 1989 ICJ Reports 47–8. In that case it was found that the remedy identified as not having been exhausted could not have been regarded as possibly relevant to the success of the alien's claim.

[41] *Finnish Ships Arbitration* (Finland v Great Britain), 3 UNRIAA 1495 (1934), endorsed this principle. In the *ELSI Case,* 1989 ICJ Reports 47–8, the ICJ found that it was clear that the alien company could not have succeeded in the local courts, because the established law worked definitely against its contentions: see on this point in the case Adler, 'The Exhaustion of Local Remedies Rule after the International Court of Justice's Decision in ELSI', 39 ICLQ (1990) 651. A similar conclusion exempting the alien from exhausting local remedies was reached for the same basic reason as in the *ELSI Case,* in the *Interpretation of the Treaty of Finance and Compensation Arbitration* (Austria v FRG, 1972), 32 ZAORV 49. See also the *Johnson Case* (United States v Peru, 1878); de La Pradelle-Politis, 2 RAI 593 ff; and Freeman (note 14 above) 421.

[42] See ICJ Pleadings (1962–9), vol 1, 256; ICJ Pleadings (1962–9), vol 3, 814; ICJ Pleadings (1962–9), vol 9, 593 and 609 (the Spanish view); and ICJ Pleadings (1962–9), vol 8, 577–8 (the Belgian view). See also the *Panavezys-Saldutiskis Railway Case,* PCIJ Series A/B, 1939, No 76, 4 and 18; *'S.S. Lisman'* (1937) 3 UNRIAA, 1773; *'S.S. Seguranca'* (1939), 3 UNRIAA 1868. Human rights cases under the European Convention on Human Rights have followed suit: see eg *X* v *Federal Republic of Germany,* 1 *Yearbook of the European Convention on Human Rights* (1956), 138; *X* v *Federal Republic of Germany,* 2 ibid (1958–1959) 344; *X* v *Austria,* 3 ibid (1960) 202.

case in the absence of a Lithuanian court decision on the point.[43] The difference between the two cases is that in the *Finnish Ships Arbitration* the law consisting of statute and common law was clear, while in the *Panavezys-Saldutiskis Railway Case* the law, as it stood, was not so clear and therefore the court refused even to examine it. In the *Norwegian Loans Case,* Judge Lauterpacht's view was similar, namely that the position was not clearly what the French government made it out to be.[44] In the *Interhandel Case,* the ICJ took basically the same stand.[45] The fact that in the *Panavezys-Saldutiskis Railway Case* the court refused to examine the issue must be explained by the fact that it was not clear on the face of it that the Estonian argument was a good one. In the *Finnish Ships Arbitration* the converse was the case and, therefore, the tribunal examined the law to find that the Finnish argument was a good one. Thus, it may further be asserted that unless it appears that there is a clear case that no tribunal has jurisdiction in the case in hand, an international tribunal will not even examine the national law.

Third, where it is clear that a national law justifying the acts of which the alien complains would have to be applied by the local organs or courts, thus rendering recourse to them obviously futile, local remedies need not be exhausted. In the *Forests of Central Rhodope Case,*[46] the international wrong was the confiscation of certain forests under a national law permitting such confiscation. Since all State organs would have had to apply that law, it was obvious that recourse to local remedies would have been futile. Hence, the arbitral tribunal held that they did not have to be exhausted.

Fourth, absence of independence of the courts has been held to exempt the alien or claimant from resorting to the courts. In the *Robert E Brown Case,*[47] an alien was excused from exhausting local remedies because the courts were at the time completely under the control of the executive. The obvious futility of recourse to the State judicial organs in these circumstances is based on the absence of justice in the true sense.

Fifth, where the remedies available clearly will not satisfy the object sought by the claimant, they need not be resorted to because they are ineffective or obviously futile. There are several decided cases on this point concerning

[43] PCIJ Series A/B, 1939, No 76, 18. See also the *Arbitration under Article 181 of the Treaty of Neuilly,* reported in 28 AJIL (1934) 789; *Claims of R Gelbtrunk and Salvador Commercial Co et al,* 15 UNRIAA, 476–477; *'The Lottie May' Incident* (1899, Honduras v UK), 15 UNRIAA, 31.

[44] 1957 ICJ Reports 39 ff.

[45] 1959 ICJ Reports 26 ff. Where the applicant's appeal is on the facts and a higher court has no jurisdiction except in appeals on matters of law, there is no need to appeal to the higher court: see Communication No 27/1978, HRC *Selected Decisions* 14, which is a case on human rights protection.

[46] Greece v Bulgaria, 3 UNRIAA 1405 (1933). See also *Arbitration under Article 181 of the Treaty of Neuilly,* 28 AJIL (1934), 789; *Ambatielos Claim,* 12 UNRIAA 119; *Interhandel Case* 1959, *ICJ Reports* 28.

[47] (1923, USA v GB), 6 UNRIAA 120. See also on the similar position in human rights protection, eg Communication No 63/1979, HRC Selected Decisions 102; the *Vélasquez Rodríguez Case* (1989), 28 ILM 304 ff.

the protection of human rights under the European Convention on Human Rights.[48] For this same reason, where it is obvious that the reparation available under the national remedy would not be adequate in terms of what the alien is entitled to in international law, the remedy would be 'obviously futile' and resort need not be had to it. In the *Finnish Ships Arbitration,* Finland argued that the remedy of the shipowners with the Admiralty Board was ineffective because the rates by which the Board was bound in assessing compensation did not represent fair market rates. The arbitrator rejected the argument because he found that the redress which would be given under the Indemnity Act was adequate redress.[49] It is evident that for the exception to operate on the ground that reparation is not adequate for the purpose of satisfying the international claim, the inadequacy of the remedy for the specific object must be proven beyond reasonable doubt.

Sixth, apart from the inaccessibility of remedies, which is a reason for not exhausting them, the absence of due process of law in the legal system of the host or respondent State is clearly a good excuse for not exhausting remedies.[50]

In the *Ambatielos Claim,* it was stated that, where the futility of a remedy otherwise available is the result of the alien's fault, there is no exemption from the application of the rule.[51]

The ILC has taken a strange course. While examples which in any case satisfy the test of 'obvious futility' (many of which have been referred to above and which have been interpreted to do so) and Judge Lauterpacht's separate opinion in the *Norwegian Loans Case* were cited, the ILC opted for the test of absence of a

[48] *Becker* v *Denmark,* Application No 7011/75, Decisions and Reports, ECHR, vol 4, 227–8 and 232–3. See also *X* v *Denmark,* Application No 7465/76, Decisions and Reports, ECHR, vol 7, 154; *X* v *Austria,* Application No 6701/74, Decisions and Reports, ECHR, vol 5, 78–9; and *Zamir* v *UK,* Application No 9174/80, Report of the Commission; *Kornmann* v *Federal Republic of Germany,* Application No 2686/65, 22 *Collection* 10.

[49] Finland v Great Britain, 3 UNRIAA 1496 (1934). See also the *Vélasquez Rodríguez Case* (1989), 28 ILM 304–9; *Yağci and Sargin* v *Turkey,* Judgment of 8 June 1995, European Court of Human Rights, Reports and Decisions, No 319, 17, para 42; *Hornsby* v *Greece,* Judgment of 19 March 1997, 1997-II European Court of Human Rights, Reports and Decisions, No 33, 509, para 37.

[50] The ground has been supported by the Institut de Droit International: see 36(I) AIDI (1935) 435; and 45 AIDI (1954) 28 ff. See also HLS, 'Research in International Law II. Responsibility of States' (1929) 23 AJIL (1929), Supplement, 134. This ground is specifically referred to in Article 46(2)(a) of the ACHR. Although not all forms of denial of justice may have the result of exempting the alien or claimant from exhausting remedies, certainly this one would seem to have the effect of rendering remedies obviously futile in so far as proper justice and fairness cannot be expected to prevail. The exception would be relevant even in the absence of specific provisions for it in a conventional instrument. The exception was found to be applicable by the IACHR in Resolution No 1a/88, where it held that the irregularities pertaining to legal process inherent in Chilean military justice were reflected in the abusive recourse to secrecy in the conduct of the proceedings, with the result that it was initially impossible to gain access to basic elements of the trial and the military authorities were allowed to control the evidence submitted. Therefore, the Commission held that due process of law was non-existent and local remedies did not have to be pursued: see Resolution No 1a/88, Case 9755, *Ann Rep IAComHR 1987–88,* 137.

[51] Greece v UK, 12 UNRIAA 122 (1956).

'reasonable possibility' of effective redress,[52] rejecting the 'obvious futility' test as being different and not generous enough to injured aliens. It referred to three tests for determining whether remedies were ineffective and need not be exhausted: (i) obvious futility, (ii) absence of a reasonable prospect of success, and (iii) absence of a reasonable possibility of effective redress. While a difference between (i) and (ii) is apparent in that under (ii) it is easier than under (i) to establish whether remedies need not be exhausted, it is difficult to see a material difference between (i) and (iii). If there is no reasonable *possibility* of redress, exhausting remedies would be obviously futile. The intention of the ILC was, however, to interpret the current law as requiring a lower threshold for the absence of a need to exhaust remedies. That a lower threshold reflects the law is questionable. The ILC's formulation, if it does lower the threshold, can only be accepted as an attempt at development of the law. The ILC's test is based on a statement by Judge Lauterpacht in his separate opinion in the *Norwegian Loans Case*. What he did say in reference to the situation prevailing in the case was that:

> 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 Norwegian courts.[53]

A close reading of this statement, particularly taking into account the requirement of abundant clarity of the legal position, the reference to possibility rather than certainty, and the absence of an explicit rejection of, or even reference to, the prevailing 'obvious futility' test of which the judge must be deemed to have been aware, leads to the conclusion that Judge Lauterpacht was merely redefining the 'obvious futility' test. It is too much to assume that he was replacing the accepted test with another test without even a reference to or dismissal of the former. Moreover, the formulation he put forward is clearly no more than a definition of the 'obvious futility' test, because that test does not require *certainty* of failure which means that it is based on absence of even a *possibility* of success. The addition of the epithet 'reasonable' to describe the possibility does not do much to dilute the meaning given to obvious futility.

On the other hand, a requirement that there must be no 'reasonable prospect of success' which is the test used in most human rights cases, particularly under the European Convention of Human Rights,[54] may be more generous to the claimant in that what is meant is that only an absence of *probability* of success results in the remedies being ineffective. The commentary to the ILC Draft Articles excludes this test as applicable in cases of diplomatic protection, clearly on this assumption.

[52] See Report of the ILC (2006) 77–9 (the Commentary) and Article 16(a) of the Draft Articles.

[53] 1957 ICJ Reports 39.

[54] See the Commentary to Article 15(a) of the ILC Draft Articles: Report of the ILC (2006) 78 and cases therein referred to in footnote 202.

Whatever the test, the question whether remedies are effective or ineffective must be determined with regard to the local law and circumstances at the time at which they are to be used and the decision on this matter must be made on the assumption that the claim is meritorious.[55]

(b) Undue Delay

Undue delay in the administration of justice has been held to be a good reason for not exhausting local remedies. This exception may be closely related to the general exception based on obvious futility but it is better considered separately, as delay may not always signify that there is a clear indication that the alien or claimant will not succeed after a lapse of time. However, undue delay in the administration of justice is regarded as a denial of justice in itself and is certainly one which does not require any further exhaustion of remedies. In the *El Oro Mining and Railway Co Case*,[56] it was held that a court's delay in taking action for nine years was sufficient to make it an ineffective remedy.

The delay necessary to make a remedy ineffective in each case will, of course, vary, it being impossible to lay down a specific time limit for all cases, since several circumstances including the volume of work involved in a thorough examination of the case are relevant.[57] In the *Interhandel Case*, although ten years had already passed since the institution of the action, the court did not hold that there had been undue delay in the provision of a remedy.[58] Dissenting Judge Armand-Ugon was of the view that, because a further unknown period would have to elapse before remedies were exhausted, ten years already having passed, such

[55] See the *Finnish Ships Arbitration* (1934), 3 UNRIAA 1504; the *Ambatielos Claim* (1956), 12 UNRIAA 119–20. The ILC's 2006 Draft Article 15(a) states that local remedies need not be exhausted where 'there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress', *Report of the ILC (2006)* at 20. The Commentary explains the Article, ibid at 77–9, as receiving a lower threshold than that referred to in the cases and the text above.

The ICJ has explained the matter of burden of proof in connection with effective and ineffective remedies. Most recently in the *Diallo Case (Preliminary Objections)* it pointed out that the respondent state, the DRC, had 'not proved the existence in its domestic legal system of available and effective remedies allowing Mr. Diallo to challenge his expulsion...' (2007 ICJ Reports, para 48, <http://www.icj-cij.org>) stating that:

> 44. 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 (see the *ELSI Case,* 1989 ICJ Reports, 43–44, para. 53). It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted (see ibid., p. 46, para. 59). Thus, in the present case, Guinea must establish that Mr Diallo exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that he did not do so; it is, on the other hand, for the DRC to prove that there were available and effective remedies in its domestic legal system against the decision to remove Mr Diallo from the territory and that he did not exhaust them. (ibid para 44)

[56] (1931, GB v Mexico), 5 UNRIAA 191.

[57] Ibid 198.

[58] 1957 ICJ Reports 6.

ANNEX 163

Principles of International Investment Law

Second Edition

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as restricting the clause to contractual undertakings.[359] In *Noble Ventures v Romania*[360] the Tribunal said:

> The employment of the notion 'entered into' indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II(2)(c) would be very much an empty base unless understood as referring to contracts.[361]

4. Access to justice, fair procedure, and denial of justice

The 2004 and 2012 US Model BITs in Article 5(2)(a) state that the FET standard includes the obligation 'not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'. It would appear that even without such a specific reference, these principles are still covered, at least in part, by the requirement of full protection and security[362] and by the rule on fair and equitable treatment.[363] Also, it is plausible to assume that the US approach refers to the relevant rules of customary law.

The standard will cover proceedings before the courts of the host state. However, depending on the wording of the treaty, it may also find application in the conduct of a party during arbitration proceedings, in particular if a party ignores a previous agreement to arbitrate.[364] Generally, the principle of denial of justice applies to actions of all branches of a government.[365] An international tribunal will decide (p. 179) independently whether the principle has been respected and will in this respect not be bound by the position of a domestic court.[366]

The principles of access to justice, fair procedure, and the prohibition of denial of justice relate to three stages of the judicial process: the right to bring a claim, the right of both parties to fair treatment during the proceedings, and the right to an appropriate decision at the end of the process and its enforcement. In *Azinian v Mexico*,[367] the Tribunal summarized these criteria in the following terms:

> A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. ... There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law.[368]

The principles of international law that apply during all phases set forth a broad framework which national rules have to respect. Essentially, these principles operate as the expression of an international standard that requires the establishment of a decent and civilized system of justice as reflected in accepted international and national practice. Thus, the concept of the minimum standard of international law[369] has a substantive and a procedural side. So far, most issues of procedural propriety have in practice been reviewed under the standard of fair and equitable treatment, as discussed above.[370]

In *Duke Energy v Ecuador*,[371] the Tribunal considered that the duty to provide effective access to justice 'seeks to implement and form part of the more general guarantee against denial of justice'.[372] The case was brought by an investor who had concluded an arbitration agreement with a local Peruvian company subject to local law. In arbitration proceedings initiated by the investor in this local setting, the local arbitral tribunal had upheld a jurisdictional objection by the state, and the claimant did not challenge this award. The Tribunal did not agree with the claimant that Peru's conduct had failed to provide effective means to assert a claim.[373]

(p. 180) As the major studies on the subject by Freeman,[374] de Visscher,[375] and Paulsson[376] show, the application of the relevant principles is rather fact-specific, but the principles as such have been generally recognized. In the broadest terms, the concept of a procedural minimum standard was expressed in the *Ambatielos* case:

> 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.[377]

In principle, a host state is under an obligation to establish a judicial system that allows the effective exercise of the substantive rights granted to foreign investors. This does not necessarily mean that all governmental actions must be subject to judicial review. In particular, the concept of state immunity has traditionally operated in most countries to prevent lawsuits against the government in various areas. Within NAFTA, the Tribunal in *Mondev* had to decide whether the Massachusetts Tort Claims Act violated Article 1105(1) of the NAFTA inasmuch as the Act granted immunity for intentional torts to public employers that were not organized as independent corporate entities.[378] The Canadian claimant, which had done business with a Boston public authority falling under the rule of immunity, argued before a NAFTA tribunal that the rule on full protection and security in Article 1105 of the NAFTA should be interpreted so as to render unlawful the Massachusetts rules on state immunity when applied to the Boston authority. The Tribunal disagreed, pointing out that there may be sound reasons to protect a public employer from private lawsuits.

Even on the level of human rights, the ECtHR has accepted that granting immunity to a government is permitted provided that the very essence of the right is not impaired, that the law on immunity pursues a legitimate aim, and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[379]

The situation will be different if the law on immunity or its application amounts to discrimination against the foreign investor.[380] Also, any conduct ignoring an agreement to arbitrate and any undue interference with the ordinary proceedings of (p. 181) an arbitral tribunal will be seen as unlawful.[381] Moreover, whenever a foreign investor has been subject to a seriously unlawful act, the local authorities are required to take appropriate measures to ensure that justice is done.[382]

There is no doubt that actions of courts are attributable to the state.[383] The *Chattin* decision of the Mexican–US Claims Commission (1927) summarized the duty of courts to conduct fair proceedings as follows:

> Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court.[384]

In *Tokios Tokelės v Ukraine*,[385] the Tribunal found that a 'failure to comply with the elementary principles of justice in the conduct of criminal proceedings, when directed

towards an investor in the operation of his investment, may be a breach, or an element in a breach, of an investment treaty'.

Procedural irregularity played an important role in *Loewen v United States*.[386] The Tribunal held that the conduct of the domestic trial in the proceedings against Loewen had been disgraceful and that the judge in Mississippi had failed to protect Loewen against flagrant appeals to prejudice.[387] According to the Tribunal, the trial as a whole did not satisfy the minimum standards of international law,[388] exposing the defendant to 'manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety'.[389] Moreover, in the view of the Tribunal, the staggering amount of punitive damages awarded to the claimants by the Mississippi jury indicated that the jury was 'swayed by prejudice, passion or sympathy'.[390]

As to retroactive application of laws, J Paulsson has rightly pointed out that, depending on the circumstances of the case, this may be seen as unlawful.[391] In (p. 182) principle, the correct position seems to be that the laws of the host state, as they stood at the time of the initial investment, will serve as the proper benchmark.[392]

Concerning the outcome of a case before a local court, it is clear that an investment tribunal will not act as an appeals mechanism and will not decide whether the court was in error or whether one view of the law or the other would be preferable. Nevertheless, a line will have to be drawn between an ordinary error and a gross miscarriage of justice, which may no longer be considered as an exercise of the rule of law. This line will be crossed especially when it is impossible for a third party to recognize how an impartial judge could have reached the result in question. Proof of bad faith may be relevant, but is not required in such a case.[393]

In *Chevron v Ecuador*,[394] the claimant extensively argued, with reference to case law, that Ecuadorian courts had delayed local proceedings with the result that the case was dormant for 14 years.[395] The Tribunal examined the issue in light of the treaty-based requirement for the host to provide 'effective means of asserting claims and enforcing rights', a clause found, for example, in some US treaties and in the ECT.

The Tribunal found that this provision is to be understood as *lex specialis* vis-à-vis for the rule on denial of justice,[396] even though the close link between the two standards was recognized. Claims for undue delay, for interference by the government with the judicial process, but also for manifestly unjust decisions fall under the treaty clause,[397] and individual claims have to be examined in light of all circumstances.[398] Given the specificity of the case, the Tribunal had no difficulty in finding a violation of the clause. Moreover, the Tribunal found that the clause, being different from the rule on denial of justice, did not require exhaustion of local remedies.[399]

5. Emergency, necessity, armed conflicts, and *force majeure*

The legal rules applicable to extraordinary events and periods of economic and social disorder are of direct interest both to the host state and to the foreign investor. The host state's concern is to retain sufficient legal flexibility in dealing with extraordinary situations without incurring any liability towards the foreign investor. The investor and its home state will be aware that during a longer (p. 183) investment project, extraordinary situations may arise and that one of the purposes of the legal framework created by an investment treaty will be precisely to protect the investment during such difficult periods. The relevant international rules will operate and will be applied on their own, independent of domestic provisions dealing with extraordinary periods.[400]

September 2007, paras 308–14; *Duke Energy v Ecuador*, Award, 18 August 2008, paras 314–25.

[345] *Siemens v Argentina*, Award, 6 February 2007, paras 204–6; *BG Group v Argentina*, Final Award, 24 December 2007, paras 206–15, 361–6; *El Paso v Argentina*, Award, 31 October 2011, paras 531–8.

[346] *Azurix v Argentina*, Award, 14 July 2006.

[347] At para 52.

[348] At para 384.

[349] *CMS v Argentina*, Award, 12 May 2005, paras 296–303.

[350] *CMS v Argentina*, Decision on Annulment, 25 September 2007.

[351] At para 96.

[352] W M Reisman and M H Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19 *ICSID Review-FILJ* 328.

[353] See M C Gritón Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in C Binder, U Kriebaum, A Reinisch, and S Wittich (eds), *International Investment Law for the 21st Century* (2009) 490.

[354] *Enron v Argentina*, Award, 22 May 2007, paras 269–77; see also Decision on Annulment, 30 July 2010, paras 317–46; *Noble Energy v Ecuador*, Decision on Jurisdiction, 5 March 2008, paras 154–7; *Plama v Bulgaria*, Award, 27 August 2008, paras 185–7.

[355] *LG&E v Argentina*, Decision on Liability, 3 October 2006, paras 169–75.

[356] BIT between Argentina and the United States, Art II(2)(c).

[357] At para 175.

[358] *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, para 121.

[359] *CMS v Argentina*, Decision on Annulment, 25 September 2007, para 95(a) and (b). See also *Continental Casualty v Argentina*, Award, 5 September 2008, paras 297–303.

[360] *Noble Ventures v Romania*, Award, 12 October 2005.

[361] At para 51.

[362] See pp 160 et seq.

[363] See pp 130 et seq.

[364] In *Waste Management v Mexico*, Final Award, 30 April 2004, paras 118–40, one issue was that a Mexican city refused to advance funds to cover the cost of local arbitration and the claimant then withdrew the case. The Tribunal ruled that the refusal of payment did not amount to a wrongful act.

[365] See *Petrobart v Kyrgyz Republic*, Award, 29 March 2005, pp 75–7. This case involved the improper intervention of the government in judicial proceedings. Due process and procedural fairness are not required for strictly internal governmental matters; see *Bayindir v Pakistan*, Award, 27 August 2009, paras 338 et seq.

[366] See *Feldman v Mexico*, Award, 16 December 2002, para 140; *Himpurna v Indonesia*, XXV ICCA YB Commercial Arbitration 109, 181. Tribunals have not yet spelled out in detail under what circumstances the misapplication of domestic law may lead to international responsibility; see *Waste Management v Mexico*, Award, 30 April 2004, paras 129 et seq. As to the decision of lower courts, it is widely assumed that their rulings will not be considered to amount to an internationally wrongful act as long as a reasonable opportunity exists for

the foreigner for appropriate review; see *Ambatielos Claim*, ICJ Reports (1953) 10; *Loewen v United States*, Award, 26 June 2003, para 154.

[367] *Azinian v Mexico*, Award, 1 November 1999.

[368] At paras 102, 103. See also *Mondev v United States*, Award, 11 October 2002, paras 126–7; *Parkerings v Lithuania*, Award, 11 September 2007, para 317.

[369] See p 3.

[370] See pp 154–6.

[371] *Duke Energy v Ecuador*, Award, 18 August 2008, para 391.

[372] At para 391.

[373] At paras 390–403.

[374] A V Freeman, *The International Responsibility of States for Denial of Justice* (1938).

[375] Ch de Visscher, 'Le Deni de justice en droit international' (1935) 54 *Collected Courses of the Hague Academy of International Law* 370.

[376] J Paulsson, *Denial of Justice in International Law* (2005).

[377] *Ambatielos Claim*, 6 March 1956 (*Greece v UK*) 23 ILR 306, 325.

[378] *Mondev v United States*, Award, 11 November 2002, paras 139–56.

[379] *Fogarty v United Kingdom*, 21 November 2001, 34 ECHR (2002) 12. In another case decided on the same day, the Court upheld an Irish law granting immunity to foreign states: *McElhinney v Ireland*, ECHR, 21 November 2001.

[380] See Ch de Visscher, 'Le Deni de justice en droit international' (1935) 54 *Collected Courses of the Hague Academy of International Law* 370, 396; J Paulsson, *Denial of Justice in International Law* (2005) 147 et seq; *Loewen v United States*, Award, 26 June 2003, 42 ILM 811 (2003), para 135.

[381] J Paulsson, *Denial of Justice in International Law* (2005) 149.

[382] See eg *Wena Hotels v Egypt*, Award, 8 December 2000, para 84; *Tecmed v Mexico*, Award, 29 May 2003, para 177.

[383] Article 4(1) of the ILC's Articles on State Responsibility provides:

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

See J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 94.

[384] *BE Chattin (USA v Mexico)*, 23 July 1927, IV RIAA 282, 295 (1951).

[385] *Tokios Tokelės v Ukraine*, Award, 26 July 2007, para 133.

[386] *Loewen v United States*, Award, 26 June 2003.

[387] At para 53.

[388] At para 121.

[389] At para 132; see also *Azinian v Mexico*, Award, 1 November 1999, para 99.

[390] At para 105.

[391] J Paulsson, *Denial of Justice in International Law* (2005) 199–200:

> 'Surprising departures from settled patterns of reasoning or outcomes, or the sudden emergence of a full-blown rule where none had existed, must be viewed with the greatest scepticism if their effect is to disadvantage a foreigner.'

[392] See pp 145–6.

[393] But see also Paulsson, *Denial of Justice in International Law* (2005), 202, citing D P O'Connnell, *International Law*, 2nd edn (1970) 948: 'Bad faith and not judicial error seems to be at the heart of the matter, and bad faith may be indicated by an unreasonable departure from the rules of evidence and procedure.' On denial of justice based on collusion between the local partner of a foreign investor and the local judiciary, see *France v Venezuela* (*Fabiani* case), Award of 1898, *Moore's International Arbitrations*, p 4878; collusion among branches of government with the judiciary are also considered to amount to denial of justice, see *United States v Great Britain* (*Brown* case), 23 November 1923, VI RIAA 120.

[394] *Chevron v Ecuador*, Award, 30 March 2010.

[395] At paras 171 et seq.

[396] At para 242.

[397] At para 248.

[398] At para 249.

[399] At paras 276 et seq.

[400] See eg *Funnekotter v Zimbabwe*, Award, 22 April 2009, para 103; *Sempra v Argentina*, Award, 28 September 2007, para 257, generally explained that the solutions for periods of crisis cannot be undertaken by unilateral measures.

[401] See eg *Spanish Zone of Morocco Claim* (1924) II RIAA 615, 642; *Pinson v United Mexican States* (1928) V RIAA 327, 419 (1952); generally I Brownlie, *Principles of Public International Law*, 7th edn (2008) 466.

[402] On the duty of the host state to take reasonable precautionary and coercive action, see eg *Ziat, Ben Kiran* (1924) II RIAA 730 (1949); *Pinson v United Mexican States* (1928) V RIAA 327 (1952); see also the *Iranian Hostage Case*, ICJ Reports (1980) 3, 29 (Iran failed to control militant groups and approved of its acts).

[403] A D McNair, *International Law Opinions*, vol II (1956) 245.

[404] *AAPL v Sri Lanka*, Award, 27 June 1990, paras 72–86.

[405] At para 85.

[406] See ICJ, *Israel Security Wall Case*, Advisory Opinion, 43 ILM 1009 (2004), para 140; *Gabčíkovo-Nagymaros Project*, ICJ Reports (1997) 7, 63, para 102; see also *Russian Indemnity Case*, II RIAA 431 (1912); *Société Commerciale de Belgique*, 1939, PCIJ, Series A/B, No 78, 160.

[407] *Gabčíkovo-Nagymaros Project*, ICJ Reports (1997) 7, 63, para 51; *CMS v Argentina*, Award, 12 May 2005, para 317; *LG&E v Argentina*, Decision on Liability, 3 October 2006, paras 207–14; *Suez v Argentina*, Decision on Liability, 30 July 2010, paras 235–43.

[408] *CMS v Argentina*, Award, 12 May 2005.

ANNEX 164

THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS

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LEIDEN — 1949
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V. PROCEDURAL RIGHTS

We have discovered that international law exercises a control over the State's legal order with regard to aliens. We furthermore stated that the violation of these substantive rights by the State organs entails the State's responsibility.

It is a well known fact that no governmental organization of any sort is beyond reproach. Misapplication of laws and regulations by officials, acting in good or bad faith, is a danger any form of administration runs. It is therefore proper for a civilized community to create agencies destined to give wronged citizens reparations for the wrongs inflicted on them. In our form of society this task is fulfilled by the judicial authorities. Judicial processes are thus an obvious way of providing for a system of redress, because judicial authorities are instituted also to repair wrongs inflicted by individuals in their private capacity on their fellow citizens.

In the event that an alien is wronged in his rights by an official, a State organ, etc., an international delict has been committed by the act of the violation itself. As we know, such a violation entitles the home State of the alien to intervene through normal diplomatic channels on behalf of its nationals at the government of his State of residence. But although the international delict has come into existence by the act itself, it would be unjust to prevent the State of residence to repair the wrong done to the alien independently and by its own means through its proper municipal organization. It has to be maintained as a general rule that a diplomatic intervention is justified as long as the agencies of the municipal organization did not have an opportunity to repair the invasion of rights. Any other rule would fail to recognize that the law of nations itself contemplated that the State would have its own agencies for the repair of damage done. Since the State is permitted this power, it must be given a chance to use it. Hence international law instituted the local remedy rule.

International intervention of the State on behalf of its citizens is not legitimate until the citizen has exhausted local remedies without adequate success. It is a general rule that no international claim 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 com-

mitted. Prof. Borchard stated that "this principle is so strongly established that the detailed citation of authorities seems hardly necessary." [1])

Under particular circumstances, however, there are exceptions to this principle. Otherwise it would be possible for any State to hide behind its municipal codes and, asserting that its own laws had been properly enforced, to refuse to allow any intervention on behalf of aliens by their home state. [2])

The most frequent case where the exception is in order, is, as was well expressed by Mr. Fish, Secretary of State of the United States, that "a claimant in a foreign State is not required to exhaust local justice in such States when there is no justice to exhaust." [3])

We cannot, however, enter into a detailed discussion of the local remedy rule and its exceptions. Suffice it is to say that it exists. [4]) In the second instance, an alien, living and carrying on business in his State of residence may be wronged by individuals. So he would need to go to court to enforce contractual claims, or, to protect himself from libel and so forth, to use the legal machinery in the same way as the national.

The alien should therefore possess some procedural rights and this for a double reason: in the first place, because he is under obligation to exhaust the available local remedies before he may claim the diplomatic protection of his home State; and secondly, because his life in a modern community necessitates the capacity of being able to appeal to agencies for the protection of rights.

It is logical thate since the alien is granted substantive rights by general international law, the same law of nations provides also for his procedural rights for protection of the former. It is unquestionable that these procedural rights, too, must conform with an international standard.

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1) Diplomatic Protection, p. 818; Freeman, Denial of Justice, pp. 403—455; Eagleton, Responsibility, pp. 95—124; Havard Draft on Responsibility, A.J., spec. suppl., vol. 23 (1929), pp. 149—157; Dunn, Protection of Nationals, p. 156-159.

2) Eagleton, op. cit., p. 103

3) Moore, Digest, vol. VI, p. 677

4) cf. e.g., **The Panevezys-Soldutiskis Railway Case**, P.C.I.J., Series A/B, No. 76; The Court considered the Lithuanian objection on the non-observation by the Estonian Government of the "rule of international law requiring exhaustion of remedies afforded by municipal law" (p. 18). The Court then examined all grounds on which Estonia's contention was founded and found that they "cannot be regarded as excusing that company from seeking redress in the Lithuanian courts" (p. 21).

In this connection the question arises whether the law of nations binds States to set up judicial systems and procedures so organized and operated as to conform to certain fundamental principles generally recognized by civilized nations. We think it is evident that the State is at liberty to choose the means for the accomplishment of the desired state of stability and security. It is also clear that the judicial remedies available to the alien should be the normal, proper courts and not any form of special and exceptional board or tribunal created for the particular purpose, perhaps with doubtful intentions. [1])

But "the subjection of the alien to the local law and remedies is necessarily based upon the assumption that the local law and remedies measure up to the standard required by international law." [2])

A normally constituted State will possess regular courts and laws [3]) and the requisite standard will be easily met by it in every case where local justice is permitted to operate in a normal manner. [4])

On the other hand, as the draftsmen of the Harvard Draft admit, the charge against a country that its local laws or remedies do not meet this standard is not a light one to make.

When approaching this field from the viewpoint of State-responsibility we enter the sphere of denial of justice in the narrow meaning of the term, which signifies "some misconduct or inaction of the judicial branch of the government by which an alien is denied the benefit of due process of law." [5])

In our terminology the question is what kinds of action of courts, when dealing with cases involving aliens, are to be considered as improper, which consequently means by what standards the action of the local judical system has to be judged. [6])

In normal court procedure, three aspects have to be considered:

1. Free access to court
2. Obstacles in the procedings
3. Undue delay during the trial [7])

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[1]) Basdevant, Répertoire, p. 60; Freeman, op. cit., p. 547; cf., e.g., U.S. (Idler) v. Venezuela, Moore. Arbitrations, p. 3508
[2]) Harvard Draft, comment to art. 5, loc. cit., p. 148
[3]) Borchard, op. cit., p. 101
[4]) Freeman, op. cit., pp. 537–538
[5]) Dunn, op. cit., quoting Borchard, p. 147
[6]) Dunn, op. cit., p. 149
[7]) cf. Mr. de Visscher's explanations at the Hague Cod., Conf., Doc. C. 351 (c). M.145 (c.). 1930. V.p. 153

I. Free Access to Court

One of the fundamental international obligations incumbent upon the State is to grant the alien free access to court for the protection and enforcement of his rights. [1])

This principle is universally recognized and its violation has always been considered as the most elementary form of denial of justice. A very elucidating passage has been written by Freeman on this point:

> "The reason for this universality is clear. Resort to the machinery of domestic justice is but a means to an end; and that end is the vindication and enforcement of rights under which a determinate substantive capacity is guaranteed in aliens. Without the faculty of invoking domestic justice, an individual would be totally bereft of the technique necessary to ensure an application of the law governing his material rights." [2])

Refusal of free access to courts is encountered in modern practice with increasingly less frequency than it used to be in the time when the alien's situation was still indefinite. We therefore need not undertake lengthy proof of the validity of this rule.

One of the famous examples, however, should be mentioned.

In the *Fabiani Case* (France v. Venezuela) the President of the Swiss Confederation held: [3])

> "En permettant aux adversaires de Fabiani d'entraver sans droit l'exécution des sentences françaises, les autorités judiciares du Vénézuéla ont commis à l'encontre de ce dernier des dénégations de justice, consacrées essentiellement par l'admission de l'appel des Roncayolo avec effet suspensif; il y a eu refus déguisé de statuer."

The replies to the questionnaire drawn up by the preparatory Committee of the Hague Codification Conference, too, leave no doubt that there is a complete agreement among the governments as to the validity of this rule. [4]) It furthermore was recognized in the

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1) Freeman, op. cit., 215; Basdevant, op. cit., pp. 57–58
2) Freeman, op. cit., p. 216
3) Moore, Arbitrations, p. 4900; cf. also cases cited by Freeman, op. cit., pp. 230–239
4) Basis of Discussion No. 5

Draft Convention for the Paris Conference under the heading "civil and judicial guarantees." [1]) One specification, however, seems necessary with regard to *cautio judicatum solvi.*

The obligation to give security for costs has no direct connection with the question of free access to courts. [2]) Under normal circumstances it cannot be interpreted as barring the alien from his lawful procedural right. Continental courts have consistently held this view in their practice, [3]) and it was incorporated as a principle in paragraph 3 of article 9 of the above quoted Draft Convention.

This question, however, is not so important anymore since the Hague Convention on Procedure in Civil Cases of 1905 has abolished the *cautio* among many states. [4])

2. Obstacles in the Procedure

As Mr. Freeman pointed out it would be a staggering task to enumerate the infinite varieties of judicial misconduct which might be produced during the course of a trial.

In the search for a test of a proper trial, he considered that the international obligations of a State have been disregarded whenever judicial action is taken without observing the following rules: [5])

The alien must be given the opportunity of a fair hearing:

> "Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested.... amounts to the same thing as an absolute denial of justice." [6])

The alien should be informed of the charges against him, be able to prepare a defense, be allowed to produce proofs, [7]) and no documents should be withheld, hidden or destroyed by authorities to the prejudice of the foreigner's case, and he should be allowed to produce all evidence and summon witnesses in court: [8])

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1) Doc. C. 31.M.21.1929.II p. 5
2) Freeman, op. cit., p. 224
3) cf. the decisions of the Swiss Federal Court, **Instant Index Corporation v. Tribunal of the Canton of Vaud.**, BGE, vol. 60, I, p. 220 and **Richter and Sons v. Court of Appeal of Berne**, BGE, vol. 62, I, p. 246; cf. also Reichsgericht, **Security for Costs (Germany) Case**, A.D. 1919–22, case No. 170
4) Basdevant, op. cit., p. 58
5) Denial of Justice, pp. 266–267
6) **Cotesworth and Powell Case**, Moore, Arbitrations, p. 2083
7) **Cotesworth and Powell Case**, loc. cit., p. 2083
8) Freeman, op. cit., pp. 267–268

> "Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceeding, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the court." [1])

The judicial action should neither be influenced by the government or any other political authority, nor should it show a partiality for one of the parties. [2]) Equally the decission of a court should not be arrived at by an obviously fraudulent or erroneous interpretation or application of the local law, especially the law of procedure. [3])

3. *Undue Delay during the Procedure*

On the other hand, the opinion about the consequences of delays in the procedure is divided. In his Report, Mr. Guerrerro denied responsibility for abnormal delay in the administration of justice:

> "No State can claim to possess courts so efficient that they ever 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." [4])

It seems, however, to be generally accepted that undue delay in the procedure is a violation of the alien's procedural rights. Excessive delay is as effective as any other method for preventing an alien from getting redress for a wrong inflicted upon him.

Such has been the opinion of many arbitral tribunals.

The Claims Commission between Great Britain and Mexico held, for example, in the *Interoceanic Railway of Mexico Case:*

> "....There could be no doubt as to the claimants having exhausted all the local means of redress open to them. These local

1) U.S. (B. E. Chattin) v. United Mexican Sts., op of Comm., 1927, p. 440
2) Freeman, op. cit., p. 268
3) Diss. Op. of Mr. Nielsen, in the Garcia Case, Op. of Comm., 1927, p. 173
4) A. J., spec. suppl., vol. 20 (1926), p. 192

> means of redress had, however, proved insufficient. By taking the course indicated by the Mexican laws, the claimants had not been able to pursue their right. For this reason a denial of justice or undue delay of justice must be assumed to exist, in other words that international delinquency which.... entitled the claimant to apply to his own government...." [1])

In the *Salem* Case also "inexcusable delay of proceedings" [2]) was mentioned; and the Mexican Claims Commission held in the *Dyches Case* that:

> "the fact remains that the procedure was delayed longer than what it should reasonably have been, in view of the simple nature of the case." [3])

It derives from the few decisions quoted that here, too, the existence of an international standard may be affirmed. But in view of the fact that the literature about denial of justice is very abundant, the discussion of the procedural rights of the alien has been kept short. Before we state the rule of general international law touching these matters, however, some general considerations have to be expressed.

It is, of course, an admitted principle that the alien is subject to at least as effective means of redress for injuries as nationals have. The first test to be applied is, therefore, whether, according to national justice, the alien's judicial treatment was correct and lawful. Then, in the second place, it must be ascertained whether the State's judicial organization measures up to the standard instituted by international law.

In the end it is immaterial whether the deficiency in judical action be due to inadequate laws under which the local system operates, or whether it proceeds from the fact that the action taken in a given case is itself short of that required of an average modern State. [4]) In both cases the State can be held responsible.

Where a faithful application of the local law has been established, responsibility can only be incurred when it is evident that the

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[1]) A. J., vol. 28 (1934), pp. 173—174
[2]) A. D. 1931—32, case No. 188
[3]) U.S. (C. Dyches) v. United Mexican Sts., Op. of Comm., 1929, p. 196
[4]) Freeman, op. cit., p. 539

minimum requirements of international law have been left unsatisfied, that the very law itself fails to provide those sanctions of justice which the law of nations prescribes in the treatment of aliens. [1])

These minimum requirements we venture to formulate in the following manner:

Rule No. 8.

International Law grants the alien procedural rights in his State of residence as a primary protection against the violation of his substantive rights. These procedural rights amount to freedom of access to court, the right to fair, non-discriminatory and unbiased hearing, the right to a just decision rendered in full compliance with the laws of the State within a reasonable time.

VI. RECAPITULATION OF THE RESULTS

1. The Rules

It may be of advantage to state at the end of our investigation once again the results at which we have arrived; this time freed from all the obscuring, though eminently necessary, considerations which we had to make in order to find and establish them in rule form.

The *a prioristic* concept in the form of an arbitrary division of the social form of human existence into three spheres, namely the sphere of human and juridical personality, the economic sphere and the judicial sphere, seems to have become justified by the fact that in each case we were considering an aspect of one particular sphere our endeavour produced results which appear to be logical and which can be proved. In a way, therefore, the eight following rules are, in the light of practical experience, the minimum requirements, imposed by general international law upon the States with regard to the treatment of aliens.

(1) An alien, whether natural person or corporation, is entitled by international law to have his juridical personality and legal capacity recognized by the receiving State.

(2) The alien can lawfully demand respect for his life and protection for his body.

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[1]) Freeman, op. cit., p. 299

(3) International law protects the alien's personal and spiritual liberty within socially bearable limits.

(4) According to general international law, aliens enjoy no political rights in their State of residence, but have to fulfil such public duties as are not incompatible with allegiance to their home State.

(5) General international law gives aliens no right to be economically active in foreign States. In cases where the national policies of foreign States allow aliens to undertake economic activities, however, general international law assures aliens of equality of commercial treatment among themselves.

(6) According to general international law, the alien's privilege of participation in the economic life of his State of residence does not go so far as to allow him to acquire private property. The State of residence is free to bar him from ownership of all certain property, whether movables or realty.

(7) Wherever the alien enjoys the privilege of ownership of property, international law protects his rights in so far as his property may not be expropriated under any pretext, except for moral or penal reasons, without adequate compensation. Property rights are to be understood as rights to tangible property which have come into concrete existence according to the municipal law of the alien's State of residence.

(8) International law grants the alien procedural rights in his State of residence as primary protection against the violation of his substantive rights. These procedural rights amount to freedom of access to court, the right to a fair, non-discriminatory and unbiased hearing, the right to full participation in any form in the procedure, the right to a just decision rendered in full compliance with the laws of the State within a reasonable time.

2. *Justification of the Method*

As it has been stated in the introductory section of this second part, our analysis must be considered as an attempt to search for rules, not necessarily rules of law, in the vast material furnished by the State practice of the last 150 years.

It is generally maintained that it is probably less difficult to apply

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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 proceedings[2] 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. 57 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

material on the point can be found in the pleadings in the second phase before the International Court.

appear to be even a reasonable possibility that it will afford an effective remedy. This test is acceptable provided it is borne in mind that what there must be a reasonable possibility of is the *existence* of a possibly effective remedy, and that the mere fact that there is no reasonable possibility of the claimant *obtaining* that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule.

(*c*) *The burden of proof.* Lauterpacht next considered the question of the distribution of the burden of proof in cases where non-exhaustion of local remedies was alleged, and it was pleaded in reply that there were no effective remedies to be exhausted. While deprecating too hard and fast an attitude on the subject, he propounded (ibid.) the following, as being right in principle:

'(1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had; (2) no such proof is required if there exists legislation which on the face of it deprives the private claimants of a remedy; (3) in that case it is for the defendant State to show that notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed; (4) the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting.'[1]

It is clear from the sentence immediately following this passage that in (4) Lauterpacht was referring to the case mentioned in (3). In this passage, therefore, he may be taken as having lent his authority to the following three propositions (*inter alia*) in cases where 'ineffectiveness' is alleged:

(i) Where there exists legislation ostensibly ruling out any remedy (or the particular remedy relied on), a *prima facie* presumption arises that there is no such remedy.

(ii) This presumption may be displaced by evidence that notwithstanding the legislation, there were means of recourse which, if utilized, could have proved effective.

(iii) Comparatively little evidence may suffice to establish this last point.

Lauterpacht went on to say, in a rather far-reaching application of the third of these propositions—his (4)—that both in the written and the oral proceedings, the Norwegian Government had 'attempted to adduce such

[1] In this passage Lauterpacht, of course, assumed the existence of an initial plea of non-exhaustion. It would seem that, in putting forward such a plea, the onus lies on the defendant State simultaneously to indicate what were the remedies it contends were available but were not resorted to. If the plaintiff State, while not denying the existence of the remedies or the fact of non-recourse to them (either or both of which are also possible replies), answers that there was no obligation to have recourse to the remedies in question because they were or would have proved ineffective, then the distribution of the remainder of the burden of proof would be as stated by Lauterpacht.

proof'; and that 'whatever may be its cogency [i.e. even if its cogency may not be very great], it must be regarded as sufficient for the purpose'.

(*d*) *What suffices to establish the existence of a potential remedy?* Thereafter Lauterpacht addressed himself to the grounds on which, despite the existence of this Norwegian legislation, he considered that the possibility of an effective remedy in the Norwegian courts could be ruled out. In the first place he thought (ibid., p. 70) that in matters of currency and international loans, the decisions of the courts of various countries—'including those of Norway'—had not 'been characterized by such a pronounced degree of uniformity as to permit a forecast with full assurance, of the result of an action in the Norwegian courts'.[1] He then briefly reviewed international practice, and pointed out (*inter alia*), with regard to the existence of legislation, that there were cases in which courts had nevertheless 'acted on the view that while the operation of the gold clause is subject to the law of the State concerned, it is so only within the limits of public policy'. He therefore concluded (ibid.) that this being so,

> '. . . there may be no sufficient reason for drawing final conclusions from the alleged previous practice of the Norwegian courts and for asserting that it has been conclusively proven that there is in this case no remedy available under Norwegian law. It is possible—however unlikely in the view of the French Government that possibility may be—that the Norwegian courts may hold that the bonds embodied a true gold clause and that, having regard to international law or the constitutional law of Norway, the [*sc.* Norwegian] law of 1923 cannot be applied, or that it must be applied so as not to injure the bondholders.'

In this passage Lauterpacht relied heavily on the test of the potential existence of an effective remedy, and stamped equally hard on any test based on the unlikelihood of its being afforded *in the given case*. Only if rejection could be 'forecast with full assurance' would the local remedies rule be displaced.[2]

Another ground on which Lauterpacht thought that the possibility of remedial action through the Norwegian courts could not be ruled out was the fact that the Norwegian courts might elect to apply international law, and in so doing might find in favour of the bondholders. He could not, he said (pp. 40–41), 'consider it as a certainty that, assuming that the Norwegian legislation on the subject is contrary to international law in so far as it affects aliens, no remedy at all is possible under Norwegian law', because, although the Norwegian Government had admitted that 'in no case can a Norwegian court overrule Norwegian legislation on the ground that it is contrary to international law', that Government had also 'asserted that it is possible that a Norwegian court may consider international law to

[1] Here yet another form of the same basic test seems to be propounded.

[2] Even this would not suffice where the certainty of rejection existed only because of the manifest lack of merits of the claim.

form part of the law of the Kingdom to the extent that it ought, if possible, to interpret the Norwegian legislation in question so as not to impute to it the intention or the effect of violating international law'. Again, it seemed to be 'a fact that in certain matters Norwegian courts have the power to review the acts of the legislature, in particular from the point of view of their conformity with the constitution'. He concluded therefore (p. 41):

'These possibilities may be remote. They are not so absolutely remote as to deserve to be ruled out altogether.'

Here again a position strongly assertive of the applicability in general of the local remedies rule was taken up. Only if the possibility of a remedy being afforded was 'so absolutely remote as to deserve to be ruled out altogether' would that rule cease to be applicable. It is clear that this attitude was not due solely to Lauterpacht's agreement (though he evidently did agree) with the reason usually, and rightly, given for the local remedies rule—namely that a State must be afforded the opportunity to do right, or remedy wrong, in its own way, or through the action of its own courts, before it is held actionable in international proceedings (and indeed there may not even, in the final analysis, be any breach of international law at all until this has been done). It was also because of his sense of what (to use a well-known American expression) was required by way of 'due process of law', and the orderly conduct of international claims. This is a legitimate inference from the following passage in which he stated his final conclusion on the whole matter (p. 41), and also by implication, an important part of his legal philosophy:

'No decisive importance can be attached to the [*sc.* French] view that, seeing that the Norwegian Government repeatedly reiterated it was prevented by the Norwegian law to effect payment in gold, the French bondholders were entitled to assume that they have no remedy under Norwegian law. The Norwegian Government, being an interested party, was not for this purpose an authorised interpreter of Norwegian law. It was for the bondholders, by bringing an action before the Norwegian courts, to attempt to show that the Norwegian Government was mistaken in its interpretation of Norwegian law. If the courts held that that interpretation was correct, then the road to international proceedings would no longer be blocked by the objection based on the failure to exhaust local remedies. I must therefore, although with some hesitation, consider that objection well founded.'

The words 'although with some hesitation' at the end of this passage would seem to indicate awareness on Lauterpacht's part that the general line he had taken went about as far as it could safely go in the direction of insisting on the exhaustion of local remedies even where these were of dubious effectiveness—in fact in all cases where the bare possibility of their effectiveness could not positively be ruled out. Some may think he thereby carried

the matter a shade too far; but if there was a fault, it was a fault on the right side, and there is no question of the cogency of his view. At the least he greatly clarified the issues involved in this rather difficult subject.

§ 11. Particular Points of International Law:

(2) Breaches of State Contracts entered into with Foreigners

It will be noticed that it is implicit in the passages cited under the preceding head that an alleged breach by a government of a contract with a foreigner is *prima facie* a matter that raises issues under international law, and is therefore in principle a matter of international jurisdiction. However, in view of his finding on the jurisdictional aspects of the *Norwegian Loans* case, Lauterpacht was not called upon to go into the substantive question of whether the alleged breach of contract would in fact have involved a violation of international law. Therefore it would be wrong to attribute to him the view that if there is in fact a breach by a State of a contract between itself and a foreign national or corporate entity, a breach of international law is thereby *ipso facto* constituted, even in the absence of any denial of justice such as would result if, for instance, a right of action were not afforded to the foreigner in the local courts, or if, such a right being afforded, the decision were given against him on manifestly dishonest grounds.

It is clear that, *failing any denial of justice in the courts*, no breach of international law can arise from the mere breach of a contract between an individual *national* (or national entity) of the country concerned and a foreigner—or from a decision given in such a case against the foreigner (unless of course it is clearly motivated by xenophobic considerations—in which event it constitutes a denial of justice). It may be slightly less obvious that there is no breach of international law arising from the breach of contract *per se*, where the contract is between the local *government* and a foreigner, and where a breach on the part of the government is alleged; but, to cite from the United Kingdom counter-case in the third phase of the *Ambatielos* case,[1] paragraph 269, 'It is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach . . . but involves an obviously arbitrary or tortious element, e.g. a confiscatory breach of contract—where the true basis of the international claim is the confiscation, rather than the breach *per se*.' Thus Hyde (*International Law*, 1st ed., vol. 1, p. 549), referring to the practice of the United States, says that 'a breach of contract must

[1] See p. 57, n. 1, above.

ANNEX 166

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain)

9 May 1934

VOLUME III pp. 1479-1550

legal contentions, which may be doubtful, and the respondent Government is entitled to the decision of one of its own courts upon these points, before it takes its decision to pay, or refuse to pay, compensation. It would seem that, provided there was a municipal tribunal which was in a position to decide upon the merits of the case, the respondent Government would be entitled to insist that recourse must be had to it, even if the tribunal was not, in fact, in a position actually to award compensation at all, in order that the questions of law and fact arising might be decided. It must be remembered that the rule covers all possibilities or recourse to administrative tribunals or enquiries and that such bodies frequently only possess advisory functions.

The Finnish Government in their Countermemorial (No. 33) submit that this view is untenable and contrary not only to common sense but to the authorities cited both in the Finnish and the British Memorials.

As regards this last contention of the British Government—although in the case of an initial breach of international law (viz. arising from an act of the governmental authorities, quite apart of a failure of law or courts to fulfil the requirements of international law) the reasons for the local remedy rule are not only that the State shall have an opportunity of discharging its responsibility by doing justice in its own way but also that the State shall have the investigation and adjudication of its own tribunals upon the questions of law and fact which the international claim involves for being able to appreciate its international responsibility (cf. Brit. Mem. No. 49 note 32) —it appears hard to lay on the private individual the burden of incurring loss of money and time by going through the courts only to exhaust what to him—at least for the time being—must be only a very unsatisfactory remedy; and although the Arbitrator is aware that the contrary opinion has been frequently expressed, the Arbitrator is inclined to find it doubtful whether the fact that such a kind of exhaustion has not taken place always can give the respondent State the right to object to an international interposition.

But, as the British Government say in their Memorial (No. 46), the case of an ordinary judicial tribunal being in a position to decide on the merits of the case but not to award compensation must be a comparatively rare one.

As to the present case the Arbitrator, upon the reasons brought forward by the British Government, finds that the compensation which could be given under the Indemnity Act does not fall short of what has been meant by the term adequate being used in connection with the term effective remedy.

Is the municipal remedy of appeal which was open to the shipowners, under international law to be considered as effective on the merits of the case?

Before the Arbitrator enters into the examination of the question whether, under international law, on the merits of the case there was an effective remedy by appeal from the decision of the Arbitration Board, there arise, in the opinion of the Arbitrator, three questions which must in beforehand be considered.

Firstly: Which contentions of fact and propositions of law are to be considered by the Arbitrator? Every plausible contention "by which the individual claimants can, or probably can, obtain from a tribunal a decision on the merits of their claim provided they formulate their claim in the right way" (British Memorial No. 45)? Or only the contentions brought forward

by the Finnish Government before the Council of the League of Nations? Or added to these the contentions of the Finnish shipowners before the Arbitration Board, if there are any such additional arguments?

Secondly: Are the contentions of fact and propositions of law which are thus to be taken into account when applying the local remedies rule to be considered as well founded? (British Memorial Nos. 44, 45, and Countermemorial No. 21; Finnish Memorial No. 31.) Is, as regards the legal propositions, the case to be considered upon the basis only of the propositions of law which reasonably arise out of the facts? (Finnish Memorial No. 31.)

Thirdly: Is the local remedy under the local remedies rule to be held as not effective only where it is obviously futile to have recourse to the remedy on those merits of the case which are to be taken into account, or is it sufficient that such a step only appears to be futile? (British Countermemorial No. 21; Finnish Government at the oral hearing 6.2.)

As to the first question it is to be observed that the British Government before the Arbitrator, in their Memorial (No. 45), say: A case is not taken out of the operation of the local remedies rule because it can be formulated in a way and upon grounds so that there is no municipal remedy, if there are other grounds and other ways of formulating it upon the basis of which a municipal remedy exists.

The British Government, at the oral hearing, further contended that the points of law put forward at the proceedings before the Arbitration Board are to be considered, whether they afterwards may have been abandoned by the claimant State or not (3.49).

The British Government before the Arbitrator, at the oral hearing, added: A respondent state is only able to do justice in its own, or to obtain a decision of, its Courts of justice on the facts and the law in a case, if the grounds of law and fact on which the international claim is based are actually raised and submitted to its tribunals. The very idea that you are going to do justice and that you are going to investigate a claim must mean that all the relevant questions of law and fact are before the tribunal. In order to satisfy the local remedies rule it is necessary that all contentions, both of law and of fact, should have been raised and submitted to the tribunal and pronounced on by them. Otherwise you could not carry out the *raison d'être* of the local remedies rule. It is therefore necessary in the present case to see how the claimants formulate their claim and to examine the grounds on which it is based and then to see whether the various contentions could have been taken before the Arbitration Board in the first place and before the Court of Appeal in the second place. If they could have been raised and taken then it is, in order to satisfy the local remedies rule, necessary that they should be taken (5.75).

The British Government further said that they would not contend that every possible legal argument which could have been used afterwards ought to have been taken before the Arbitration Board. But if it was a legal argument which, if sound, was necessary in order to establish the claim, viz. was an essential constituent element of the international claim in the legal sense, then you must treat it as one which must be raised before the Court of first instance (5.77; 1.78).

As to the second and third question it may be mentioned that the British Government before the Arbitrator, in their Countermemorial (No. 21) and in their Memorial (Nos. 44, 45), say that the local remedies rule does not require recourse to remedies which are obviously futile. But in deciding whether the local remedy is one which must be considered to be obviously

futile, the case must be considered upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct. If, upon the assumption that the claim is a good one, there is a means by which the individual claimants can, or probably can, obtain from a tribunal a decision on the merits of their claim provided that they take the proper proceedings within the right time and formulate their claim in the right way, they must have recourse to this remedy. If there is a manner in which they can formulate their claim and obtain redress under the municipal law they must avail themselves of it.

The British Government before the Arbitrator, in their Memorial (No. 44) add: It is stated that there is no need to have recourse to municipal remedies, if it is clear that this action can lead to no possible result other than the rejection of the claim. It may, however, be that there is no chance of success, not because the municipal law fails to provide adequate remedies, but because there are no merits whatever in the claim; it may be founded upon alleged facts which are palpably erroneous and be supported by contentions of law which would be rejected in the courts of any nation. It is clear that the fact that a claim is obviously ill founded and therefore it would be useless to pursue it in the municipal courts is not a ground for taking it out of the rule that municipal remedies must be exhausted. This would be equivalent to saying that the rule applied in the case of meritorious but not to unmeritorious claims, which is manifestly absurd. In order to ascertain whether, under the rule, the case is one where recourse must be had to the municipal remedies or whether without any such recourse it can be stated that no such remedies exist, the case must be considered upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct. It is obviously upon this basis that this question must be considered.

The Finnish Government before the Arbitrator, in their Countermemorial (No. 31), say: The relevant principle to be adopted in connection with the rule as to local remedies does not appear to have been discussed by authority. In theory there might be something to be said for the view that some investigation even of the facts would be permissible, in order to ascertain whether municipal means of recourse were open to the claimants, but this involves practical difficulties and it is certainly convenient to proceed upon the hypothesis that the allegations of fact in the claim are true. The Finnish Government, therefore, has no objection to this being adopted as the basis in the present case. But as regards the legal propositions, whilst we consider that, properly understood, those advanced in support of the present claim are substantially correct, the Finnish Government is quite unable to accept the principle laid down by the British Government. The true hypothesis is to consider the case upon the basis of the propositions of law reasonably arising out of the facts. In order to illustrate our meaning we would say that, if a contention of law which is manifestly absurd has been put forward at some time or other in support of a claim, it is idle to assume that that contention is well founded and to ask: What would the claimants rights be under the municipal law upon that erroneous hypothesis?, for it is clear that, in fact, they would have none. Some regard must be had to realities. But it is not necessary, on the other hand, to insist that before a legal proposition is taken into account its correctness must be conclusively established. It is sufficient if the proposition is reasonably arguable so that it cannot be said in advance that the municipal court would reject it, as in this case there may be ground for holding that a local remedy existed. A

proposition of law of this character may, therefore, be assumed to be correct for the purpose of seeing whether, under the international law, resort should have been had to the municipal means of recourse. The rule as to local remedies is not a rule divised for the purpose of preventing international claims from being made because they are, or are thought to be ill founded, but it is based upon quite different conceptions: in cases of the present character the basis of the rule is that the foreign State should, first of all, be given the opportunity of redressing the wrong alleged. Whether a wrong has really been committed is a different question altogether, with which the international rule under discussion is not concerned; the only point under that rule is: Does the municipal means of redress exist?

The British Government before the Arbitrator, at the oral hearing, submitted that there is not a right to challenge the British Court of Appeal for not being an effective means of redress without approaching the question on the basis that the submissions were effective submissions in law and not bad points of law which, after having been rejected by the Court of first instance, could not be taken to the Court of Appeal (3.106). The Courts of England are being arraigned in an international procedure for not affording justice to people (3.50). This matter must be decided on the assumption that the propositions of law put forward at the Arbitration Board were sound propositions. A man has not the right to put forward a whole string of contentions, have them rejected, and then say that the appeal is illusory because they have been rejected, unless he is prepared to go on to say: "These propositions of law must be assumed to be sound, on the assumption that they are sound, was there an appeal?" (1.50, 51). Throughout the statements of the Finnish Government there is the assumption that there is the injury, that there is the right to compensation corresponding to the injury and that the British Government does not provide effective and substantial means of obtaining that redress. This leads to the basis that the submissions of law are valid and that the Finnish shipowners therefore have an *injuria* to which the British Government are unwilling to give a redress. You must not slip from the conception of a claim put forward by a wronged individual who has suffered an injury into the conception of a claim, however ill founded, which it is idle to pursue (3.102). You can only see whether their injury will get no redress by assuming that their points are right, because if their points of law are right the decision ought to have been the other way. It is only by assuming that their points of law, or sufficient of them to change the decision of the Arbitration Board round, were right that you can put them into the position of being able to say that they have an injury which we have failed to redress (3.108). You have to approach the question, not on the truth but on the assumption that at least one or more of those submissions of law, being relevant to the decision, were right (3.111). It is a perfectly accurate statement of the Finnish Government that the hypothesis must be that the contentions of law reasonably arising out of facts are well founded, although, of course, the law may come in at the beginning or in the middle or mixed up with the facts or at the end. But the Finnish Government cannot be allowed to say that any point of law which has actually been put forward by that side does not reasonably arise out of facts (3.104). If they argued them at the Arbitration Board or are trying to argue them before the League of Nations, they cannot be heard to say that they do not reasonably arise (1.105).

The Finnish Government before the Arbitrator, at the oral hearing, contended that the question whether a claim is meritorious or not has nothing to do with the rule of exhaustion of local remedies. This rule has nothing to do with the question of the merits of the case. It is not to be lightly assumed that a responsible and civilised Government is going to take up a completely and palpably bad claim. But if it did, it would be very easy for the other Government to deal with it from an international point of view, but the rule as to local remedies has nothing to do with the question whether the claim is a good claim or not on the merits. Neither can it be said that the fact that a contention has been put forward makes the contention reasonable (4.78).

The Finnish Government before the Arbitrator, at the oral hearing, further contended that the international law requires that a foreigner should exhaust only such remedies as appear to be effective and adequate (6.2).

In the view of the Arbitrator, the British Government, when saying that the Courts of England are being arraigned in an international procedure for not affording justice, cannot mean that here is an alleged case of failure of courts to fulfil the requirements of international law, creating liability for the British Government under international law. This is the case e.g. where there is a decision of the courts which is, as Borchard says (*Diplomatic Protection of Citizens abroad* §§ 130, 81), "grossly unfair and notoriously unjust". That this here should be the case has, of course, not been alleged. The contention of there being an arraignment can only mean to say that the Finnish Government contend that the claim rejected by the Arbitration Board is a meritorious claim. But a rejection of a meritorious claim by a British Court does not in itself under international law create any liability for the British Government.

The international claim of the Finnish Government, in consequence, is not based on the fact of the rejection of the claim of the Finnish shipowners being a breach of international law. If the basis were an alleged failure of courts or law to fulfil the requirements of international law it would have been natural to hold that all relevant facts and points of law which could support the private claim should be taken into consideration. Otherwise such a failure, especially of law, could not be ascertained. But here the alleged fact, creating liability under international law, is an initial breach of international law, consisting in the alleged taking and using of the Finnish ships without paying for it.

In this case the local remedies rule serves only the function explained by the British Government (British Memorial, No. 49 note 32) and accepted by the Finnish Government (Finnish Memorial No. 23 and at the oral hearing 4.56) to the effect that the respondent State is entitled, first of all to discharge its responsibility by doing justice in its own way, but also to the investigation and adjudication of its own tribunals upon the questions of law and fact which the claim involves and then on the basis of this adjudication to appreciate its international responsibility and to meet or reject the claim accordingly.

The Finnish and the British Governments are of the opinion (expressed in the British Memorial No. 4 and the Finnish Countermemorial No. 23) that there may be cases where it can be said that a breach of international law has been committed by the very acts complained of and before any recourse has been had to the municipal tribunal. These acts must be committed by the respondent Government or its officials, since it has no direct responsibility under international law for the acts of private individuals.

The Finnish Government, as has previously been mentioned, contend that the situation alleged to have arisen by the taking and using of the Finnish ships by the British authorities without paying for it, covers such a case.

If what the parties in these respects contend is right—and the Arbitrator is of the opinion that it is so—then it appears that the *raison d'être* of the local remedies rule, in a case of an alleged initial breach of international law, can be solely that all the contentions of fact and propositions of law which are brought forward by the claimant Government in the international procedure as relevant to their contention that the respondent Government have committed a breach of international law by the act complained of, must have been investigated and adjudicated upon by the municipal Courts up to the last competent instance, thereby also giving the respondent Government a possibility of doing justice in their own, ordinary way.

The consequence is, in the opinion of the Arbitrator, that in a case of an alleged initial breach of international law, the rule that the respondent State "is entitled to the adjudication of its own tribunals upon the question of law and fact which the claim involves" can bear only on the contentions of fact and propositions of law put forward by the claimant Government in the international procedure and that the opportunity of "doing justice in its own way" ought to refer only to a claim based upon these contentions. If the claimant Government do not maintain certain of the contentions advanced and rejected in the municipal courts, though perhaps, in fact, these contentions are relevant to the success of the international claim, the disadvantage is on the side of the claimant Government. The respondent Government has no reasonable interest to insist upon that, as a previous condition to further international proceedings, such contentions, perhaps repudiated by the claimant Government and in all events not put forward as a basis of their claim, should be subject to the investigation and the adjudication and the decision by the municipal courts, and it does not seem reasonable to ask the claimant Government in the international procedure to advance and defend propositions which they hold to be wrong.

The Arbitrator is aware of the fact that in learned works, at the conferences of Institut de Droit International and especially at the Codification Conference of 1930 the proposition has been advanced that no responsibility of the State can come into existence until the private claim has been rejected by the local courts, whether the basis brought forward for of the international claim may be a failure of the local courts or law to fulfil the requirements of international law, or the basis is an initial breach of international law.

If this proposition means that the responsibility of the State does not come into existence until the grounds upon which the claimant Government in the international procedure base their contention of an initial breach of international law have been rejected by the municipal courts, this proposition does not seem to result in any difference as to the question which contentions of fact or propositions of law should be considered under the local remedies rule.

It is, besides, of interest to observe that this proposition seems to be in conflict with arbitral decisions by United States and British claims Commission of 1871. The claims to be considered by this Commission were all claims on the part of corporations, companies or private individuals, citizens of the two countries, upon the Government of the other country, arising out of acts committed against the persons or property of citizens of each country during 13 April 1861—9 April 1865, with the exception of the claims

generically known as the Alabama claims, which were dealt with by another commission. In two of these cases the private claimant was excused for not having appealed because of the impossibility to communicate with counsel or because of the court's decision having been given so rapidly that the claimant, residing far away, had no opportunity to interpose any claim or defence. (Moore, Arbitr., pp. 688-690; 3152-3159.) If the international breach does not come into existence until the private claim is rejected by the highest competent municipal court, then the recourse to that court is a matter of substance and not of procedure and it is difficult to see how, if such is the case, an excuse as the one put forward in these cases could have been accepted.

The answer to the first question: Which contentions of fact and propositions of law in support of the international claim shall be considered by the Arbitrator? is then: All the contentions and propositions brought forward by the Finnish Government in the international procedure before the Council of the League of Nations, but only these, shall be taken into account.

The British Government before the Arbitrator, at the oral hearing contended that the international claim is based on exactly the same legal grounds as those which were raised by the Finnish shipowners before the Arbitration Board (5.75). If this contention were accurate the question now dealt with would be of no direct relevance. It will, however, be seen that, on important points, this is not quite the case.

The Finnish Government before the Arbitrator, at the oral hearing, declared to withdraw one of the contentions of law, advanced before the Arbitration Board by the Finnish shipowners and maintained by the Finnish Government before the Council of the League of Nations.

The British Government objected to this withdrawal as the formal arguments of the Finnish Government before the League of Nations are forming the very basis of the Arbitration (3.85).

The Arbitrator is of the opinion that the purpose of the proceedings before him is only to help him to answer the question whether the requirements of the local remedies rule have been fulfilled, and that that question includes the point whether the contentions put forward before the Council of the League of Nations have been tried in the competent municipal courts. Under such circumstances a point of law which has been urged before the Council cannot properly be withdrawn before the Arbitrator.

As to the second question the Arbitrator wants to make the following observations.

According to the principles approved by the Arbitrator every relevant contention, whether it is well founded or not, brought forward by the claimant Government in the international procedure, must under the local remedies rule have been investigated and adjudicated upon by the highest competent municipal court.

The parties in the present case, however, agree—and rightly—that the local remedies rule does not apply where there is no effective remedy. And the British Government, as previously mentioned, submit that this is the case where a recourse is obviously futile. It is evident that the British Government there include not only cases where recourse is futile because on formal grounds there is no remedy or no further remedy, e.g. where there is no appealable point of law in the judgement, but also cases where on the merits of the claim recourse is obviously futile, e.g. where there may be appealable points of law but they are obviously insufficient to reverse the decision of the Court of first instance. The British Government, however, contend that in

this latter case the merits must be considered upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct.

The Arbitrator is of the same opinion, with the reservation only that, of course, where it is, as here, a question of remedy on appeal, and contentions of fact maintained by the claimant Government but rejected by the Arbitration Board, are not appealable, such contentions may not be taken as well founded.

The contentions to be taken into account must be considered well founded because otherwise the rule that where recourse is futile recourse is not required, would lead to the consequence, pointed out by the British Government, that unmeritorious international claims would be taken out of the rule that municipal remedies must be exhausted. But, as previously said, every relevant contention brought forward by the claimant Government in the international procedure—whether erroneous or not— must, according to the opinion expressed by the Arbitrator, under the local remedies rule have been examined by the municipal courts, ere the respondent State is bound to enter into further international proceedings.

The Finnish Government agree that the case should be considered on the basis that the allegations of fact are to be taken as true and the contentions of law as well founded, provided that these latter contentions are reasonably arising out of the facts.

The British Government find this statement perfectly accurate, but contend that all contentions of law still argued by the Finnish Government before the League of Nations must be considered as reasonably arising out of the alleged facts.

The effect of this contention is, in fact, the same as the effect of the rule accepted by the Arbitrator, viz. that as every point of law put forward by the claimant Government in the international procedure must be examined by the municipal courts, it does not matter whether the point is erroneous or not. But it is evident that if the alleged facts deemed to be true or the facts which in the decision of the Court of first instance are stated to be true and are not appealable, are in conflict with the facts which, according to the contention of law, equally deemed to be true, are necessary for arriving to the contended act in the law, then the contention of law must be without relevance to the present case. It seems to the Arbitrator impossible to come to another solution in this conflict of contentions which must all be considered as well founded.

As regards finally the third question, whether the local remedy shall be considered as not effective only where it is obviously futile on the merits of the case which are to be taken into account, to have recourse to the municipal remedy, or whether, as the Finnish Government suggest, it is sufficient that such a step only appears to be futile, a certain strictness in construing this rule appears justified by the opinion expressed by Borchard when mentioning the rule applied in the prize cases. Borchard says (a.a. § 383): "In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief."

These previous questions having been considered, the Arbitrator now has to deal with the matter whether, on the principles thus accepted, the remedy of appeal was effective. This means an examination of the questions whether

there were any appealable points of law in the judgement of the Arbitration Board and whether these points of law, if existent, were obviously insufficient or not on appeal to reverse the decision of the Arbitration Board.

The question whether the final conclusion of the Arbitration Board, that there was a Russian and not an English requisition, is, as the Finnish Government contend, a finding of fact from which no appeal lay or an appealable point of law, depends on statements to be made in connection with the question whether there are any appealable points of law in the judgement of the Board and will therefore be dealt with under this question.

It should be observed that of the three previous questions now examined, only the first question is of interest as to the matter whether there are any appealable points of law in the judgement of the Arbitration Board, and only in that respect that as only contentions maintained by the claimant Government in the international procedure shall be considered, it is of no interest whether a point of law is appealable and thus may give right to a local remedy on the basis of that point, if the point is not maintained by the claimant Government in the international procedure as a basis of their claim.

The second rule that the contentions maintained shall be held as well founded has no application as to the question of whether there are appealable points of law in the judgement, as this depends, firstly on the question whether there is a case of a point of law or of a question of fact, a matter which lies under the decision of the Arbitrator, and secondly whether the contention of law is overruled by the Board, a matter which depends on the view which the Board took of the point. In neither case there is room for any presumption as to the contention being well founded.

The third rule that the local remedy shall be considered to be ineffective only where recourse is obviously futile has, of course, no application on the question whether there are, in fact, any appealable points of law or not. This rule comes in only when a decision upon this question is taken.

These three rules are therefore applicable chiefly as regards the second part of the matter of appeal, viz. whether the appealable points of law, which are considered to exist, were obviously insufficient or not to reverse the decision of the Arbitration Board, but they may also be of interest as regards the other local remedies, relied on by the British Government, which the Arbitrator will later on take into consideration.

Were there any appealable points of law in the judgement of the Arbitration Board?

As already mentioned, an appeal against a decision of the Arbitration Board lies only on a point of law, decided against the party who wants to appeal.

What a point of law is—as distinguished from a question of fact—is a very doubtful matter and subject to conflicting opinions not only of the parties in the present case but of learned judges and authors in Great Britain and in other countries. The question has been dealt with in a thorough and interesting way in all countries, where it is decisive for the right to go to a higher Court. It is here, however, of course, only a question of what is the law of Great Britain according to British authorities.

In Great Britain the necessity of making a distinction between a point of law and a question of fact has its origin in the British system of the jury, which has —both in civil and criminal cases—to deal only with the question of fact, leaving the point of law to the judge.

ANNEX 167

Strasbourg, 15th March 1960

SECRET
Or. Eng.

APPLICATION No. 343/57

Mr. B. Schouw NIELSEN v. DENMARK

REPORT OF THE COMMISSION

(Article 31 of the Convention)

A 61.198

Annex 167

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DECIDES, in conformity with Article 27, paragraph (2) to reject as manifestly ill-founded that part of the Application which relates to an alleged violation of Article 5, paragraph 1 (c) of the Convention;

As regards the remainder of the Application

WHEREAS the Commission considers it necessary, before deciding upon the admissibility of the remaining parts of the Application, to obtain further explanations from the Parties in regard to the relevant considerations of fact and of law;

DECIDES, under Rule 46, paragraph (1) of the Rules of Procedure, without in any way prejudging its ultimate decision on the admissibility or otherwise of the present Application, to invite the Applicant's Counsel and the representatives of the Danish Government to appear before the Commission on Monday, 31st August 1959, at 10 a.m. at Strasbourg and to submit orally their further explanations and arguments on the question of the admissibility of the remaining parts of the Application."

* * *

DECISION OF 2ND SEPTEMBER 1959

28. "The European Commission of Human Rights, sitting in private on 2nd September 1959, under the Presidency of Mr. C. H. M. WALDOCK, the following members being present;

MM. C. Th. EUSTATHIADES, Vice-President
P. BERG
P. FABER
F. DOMINEDO
A. SUSTERHENN
S. PETREN
Mrs. G. JANSSEN-PEVTSCHIN
MM. M. SØRENSEN
F. ERMACORA

P. MODINOS, Director of Human Rights,
Secretary to the Commission;

HAVING REGARD to the Application lodged on 23rd December 1957, by Bjørn Schouw Nielsen, represented by Mr. Poul Christiansen, barrister at the High Court, against the Government of Denmark and registered on 30th December 1957, under File No. 343/57;

HAVING REGARD to the Declaration made in accordance with Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms on 7th April 1953, whereby the Government of Denmark recognised for a period of two years the competence of the European Commission of Human Rights to receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention; to the further Declarations of 12th March 1955 and 2nd April 1957, whereby the Respondent Government recognised that competence for further periods of two and five years respectively;

HAVING REGARD to the Report provided for in Rule 45, paragraph 1 of the Rules of Procedure of the Commission and dated 20th November 1958;

HAVING REGARD to the Decision of the Commission of 9th January 1959, whereby it ordered the Application to be communicated to the Respondent Government and that Government to be invited to submit to the Commission within a period of six weeks its observations in writing as to the admissibility of the Application;

HAVING REGARD to the written observations of the Respondent Government of 3rd March 1959;

HAVING REGARD to the Report provided for in Rule 45, paragraph 1, of the Rules of Procedure of the Commission and dated 12th March 1959;

HAVING REGARD to the Decision of the Commission of 20th March 1959, whereby it invited the Respondent Government to submit detailed observations with respect to:

(1) the period which elapsed before the Applicant was brought to trial, having regard to Article 5, paragraph 3, and Article 6, paragraph 1, of the Convention;

(2) the alleged omission from the indictment of a detailed statement of the charges against which the Applicant was to defend himself, having regard to Article 6, paragraph 3 (a), of the Convention;

(3) the alleged statements made out of court and before the Applicant's conviction by persons officially connected with the case as to the guilt of the Applicant, having regard to Article 6, paragraph 2 of the Convention;

(4) the alleged statements made by the expert psychiatrists as to the guilt of the Applicant during his trial, having regard to Article 6, paragraph 2, of the Convention;

and to submit within a period of eight weeks any further observations which it deemed appropriate with respect to the admissibility of the Application, having regard to Articles 26 and 27 of the Convention;

HAVING REGARD to the Memorandum of the Respondent Government of 15th May 1959;

HAVING REGARD to the Reply of 22nd June 1959 of the Applicant's Counsel to the above Memorandum;

HAVING REGARD to the Decision of the Commission of 6th July 1959 whereby it rejected as inadmissible those parts of the Application which relate to an alleged violation of Article 6, paragraph 2, of the Convention in so far as it concerns statements made by persons officially connected with the case on 5th and 8th January 1952, and of Article 5, paragraph 1 (c) of the Convention, and invited the Applicant's Counsel and the representatives of the Respondent Government to appear before the Commission on 31st August 1959 to submit orally their further explanations and arguments on the question of the admissibility of the remaining parts of the Application;

HAVING REGARD to the further oral explanations and arguments submitted by the Parties to the Commission on 31st August and 1st and 2nd September 1959,

The Applicant being represented by:

Mr. Poul Christiansen, barrister at the High Court,

The Respondent Government being represented by:

Mr. V. U. Hammershaimb, Permanent Representative of the Respondent Government to the Council of Europe

as Agent;

Mr. Erik Bech, Public Prosecutor at Copenhagen,
Mr. Niels Madsen, Head of Division, Ministry of Justice,
Mr. Orla Graulund Hansen, Head of Section, Ministry of Justice,
Mr. Frants Sporon-Fiedler, Head of Section, Ministry of Foreign Affairs,

as Counsel;

THE COMMISSION, having deliberated,

THE FACTS

WHEREAS the principal facts of the case, as presented by the Parties, appear to be as follows:

On 29th March 1951, a certain Palle Wischmann Hardrup, a tool-maker, killed two bank clerks in the course of an attempted robbery of the Nørrebro Branch of "Den Danske Landmandsbank" in Copenhagen. He was arrested shortly afterwards and declared at the police enquiry that he had wanted to commit the robbery in order to procure funds for a political party, which was to be founded by himself. He stated that he had acted alone and upon his own initiative.

On 30th March 1951 the Applicant was arrested. The grounds for his arrest appear to be the following. Both Hardrup and the Applicant had previous convictions. Hardrup had been sentenced in September 1946 to 14 years' imprisonment for collaboration with the German Police ("Hipokorps") during the second World War. The Applicant had been sentenced in January 1947, to 12 years' imprisonment for having served in the German army and for having blackmailed

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various persons during the German occupation of Denmark. Hardrup and the Applicant became acquainted in the spring of 1947 when they shared a cell in the State prison of Horsens and they continued seeing each other after their release on probation in 1949. After the attempted robbery by Hardrup, certain former fellow prisoners informed the police that the Applicant was probably the instigator of the robbery in view of the close relationship which had existed at the time when the Applicant and Hardrup were in prison at Horsens.

Hardrup, however, at first denied that the Applicant was in any way connected with the robbery but later confessed in a written statement of December 1951, (the so-called "exercise book confession"), that the Applicant had planned and instigated by hypnotic suggestions (a) the robbery of the Hvidovre branch of the Folkebank in Copenhagen in August 1950, and (b) the attempted robbery of 29th March 1951 and stated that he (Hardrup) had not acted of his own free will.

On 2nd April 1951, the Copenhagen Town Court (Københavns Byret) ruled that no sufficient basis for charging the Applicant existed. This ruling was on 3rd April 1951, reversed by the High Court which ordered the remand of the Applicant in custody.

On 1st May 1951, the Applicant was released from custody although he was still formally charged with being an accessory to the attempted robbery.

During 1951 Hardrup was submitted to a mental observation by the chief psychiatrist of police, Dr. Max Schmidt, who on 17th December 1951 submitted a report. The gist of this report was that the Applicant had no doubt possessed a "decisive and fateful" influence over Hardrup and that the latter was to be considered as a dangerous lunatic who should be detained in a remand home for psychopaths.

Hardrup had already declared, a few days after his arrest on 29th March 1951 that he believed that he had a "guardian spirit" which had ordered him to commit the robbery for the above political purposes and that this spirit had guided his life and determined his actions since the time he first became aware of it in the prison of Horsens. In the statement which he made in December 1951, Hardrup identified the Applicant with the guardian spirit and stated that the Applicant had planned and induced him to commit two robberies and to kill the two bank clerks.

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In January 1952, Dr. Schmidt made another statement in which he said that Hardrup, after having admitted the part played by the Applicant in the commission of the robberies, had been cured of his former delusions and could no longer be regarded as insane.

On 7th January 1952, the Applicant was re-arrested and from December 1952 to February 1953 submitted to observation in the mental home for criminals at Nyköbing, Sjaelland. Hardrup was then transferred to the municipal hospital of Copenhagen, where for the next 15 months he was observed by Dr. Paul J. Reiter, Chief of the Psychiatric Department of that hospital. In June 1953, Dr. Reiter made a report which, inter alia, stated that Hardrup had been subjected to intensive hypnotic influence on the part of the Applicant and, when committing the crimes, had been acting without a will of his own.

In considering the above-mentioned reports of Dr. Schmidt and Dr. Reiter, the Medico-Legal Council (Retslaegeraad), to which the case had been submitted, declared that it did not consider itself competent to decide whether there was proof of the Applicant's influence on Hardrup and that it did not find any basis for the presumption that the crimes had, strictly speaking, been committed under hypnosis.

By an indictment (Anklageskrift) of 19th March 1954, the Applicant was charged:

(i) with robbery of a particularly dangerous nature under section 288, sub-sections 1 and 2 of the Criminal Code, in that he had instigated and planned the robbery committed by Hardrup in the Hvidovre branch of Folkebanken and immediately thereafter had received from Hardrup the proceeds of the robbery amounting to Kr. 21,520 which he used for his own benefit.

(ii) with attempted robbery of a particularly dangerous nature under section 288, sub-sections 1 and 2 and section 21 of the Criminal Code, and for homicide under section 237 of the Criminal Code, in that he had instigated and planned the attempted robbery and homicide committed by Hardrup in the Nørrebro Branch of "Den Danske Landmandsbank".

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The trial began before the High Court of Eastern Denmark (Østre Landsret) on 16th June and lasted till 17th July 1954. On 17th June 1954, the Applicant's Counsel requested the Court that the Public Prosecutor should be asked to state whether the Applicant was called upon to defend himself on the particular charge of hypnosis. The request was founded on Article 831 of the Administration of Justice Act which prescribes that an indictment must, inter alia, contain "a short account of the misconduct for which prosecution is being instituted with such reference to time, place, object, method of perpetration and other further circumstances as is required for its adequate and explicit description".

By an Order of 22nd June 1954, the High Court ruled that the formulation of the indictment was found to be in accordance with the relevant provisions of the Administration of Justice Act and dismissed the Applicant's request.

On or about 17th July 1954, the Court put three alternative questions to the jury which are summarised as follows:

(i) Is Schouw Nielsen guilty of the robberies and homicide by having planned and by hypnotic influence having instigated the crimes committed by Hardrup?

(ii) Is Schouw Nielsen guilty of the robberies and homicide by having planned and by influence of various kinds, including hypnotic influence, having instigated the crimes committed by Hardrup?

(iii) Is Schouw Nielsen guilty of the robberies and homicide by having planned and instigated the crimes committed by Hardrup?

The jury replied in the negative to the first and in the affirmative to the second question. It did not reply to the third question.

The Court, in its judgment of 17th July 1954, sentenced the Applicant to imprisonment for life on the ground

contained in the second question to the jury and, by the same judgment, ordered that Hardrup be detained in an asylum.

The Applicant appealed from this judgment to the Supreme Court (Højesteret), submitting inter alia:

(a) that the High Court had disregarded the fundamental rule of procedure that the accused was entitled to know exactly whether or not he was called upon to defend himself on a particular charge, in this case, hypnosis; that the Public Prosecutor had refused to make this clear in the written particulars of the offence, but had nevertheless, during the hearing, dealt in detail with that question; that, on this point, the Court had found for the prosecution; that the presiding judge, in his summing up, had admittedly tried to diminish the effect of the prosecutions' attitude but that the jury had already been influenced, as was apparent by their verdict.

(b) that, notwithstanding continuous objections on the part of the Counsel for the Defence, Dr. Reiter was allowed to address the jury during two days for seven hours, in the course of which he repeatedly dealt with the question of guilt of the Applicant; that it followed from Articles 872, 874 and 875 of the Administration of Justice Act that witnesses and experts in giving their evidence should not deal with the question of guilt of the accused; that Dr. Reiter's statements had, by obvious presumption of guilt, seriously influenced the jury and that the attempt of the presiding judge to reduce the effect of the psychiatrist's statement had been made too late and was otherwise inadequate.

On 18th November 1955, however, the Supreme Court upheld the judgment of the High Court.

The Danish Administration of Justice Act provides for the possibility of a criminal case being re-opened and resumed under certain circumstances by a decision of the Special Court of Revision. Under Section 1a of that Act the Special Court of Revision is to consist of three ordinary members appointed by the King on the recommendation of the Minister of Justice.

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In matters concerning the resumption of a criminal case the Court is to be reinforced by the addition of two persons of whom one is to be a practising advocate appointed from among four candidates proposed by the General Council of the Danish Bar and the other a University teacher of jurisprudence or a jurist with a special scientific training. These two members, as well as the three ordinary members, are appointed for a term of ten years, are eligible for re-appointment, and may not be removed from office except by a judgement of a court of law.

Sections 976 and 977 of the above-mentioned Act lay down the grounds on which the resumption of a criminal case may be ordered at the instance respectively of the State Prosecutor and a convicted person:-

Section 976

The resumption of a case which has been tried by the Supreme Court or by a High Court sitting with a jury or upon appeal and in which the accused was acquitted, may be effected at the request of the State Prosecutor:

1. if, according to a confession the accused had made later or other evidence which later has come to light, it must be presumed that he has committed the crime;

2. if false evidence or statements have been made in the case by witnesses or by experts appointed by the Court, or if forged or faked documents have been used in the case, or if any offence aiming at influencing or deciding the outcome of the case has been committed either by the accused or by anybody who, by virtue of his office or public function, has assisted at the trial of the case, and in the circumstances there is good reason to presume that such an offence has caused or contributed to, the acquittal of the accused.

Under similar conditions a case may be resumed where it is alleged that the accused has committed a materially more severe crime than the one of which he was convicted.

Section 977

On the petition of a convicted person a case tried by the Supreme Court or by a High Court sitting with a jury or upon appeal may be resumed:

1. if new evidence is produced and it is considered likely that if this evidence had been available at the trial, it might have caused the acquittal of the accused or the application of an essentially milder provision of the Criminal Code;

2. if any offence mentioned in paragraph 2 of Sect. 976 is proved, and it is considered likely that such an offence may have caused, or contributed to, the conviction;

3. if in other respects special circumstances exist which make it overwhelmingly likely that the available evidence was not judged correctly;

.....

The following Section of the Act provides that a case cannot be resumed as long as an appeal is open to the accused under the general law or as long as an appeal is undecided.

On 2nd December 1955, the Applicant filed a petition with the Special Court of Revision (Den saerlige Klagoret) for the re-opening of the case (Genoptagelse), relying on Article 977 of the Administration of Justice Act. It was submitted by the Applicant that fresh evidence had come to light, in particular letters, dated 18th December, from Hardrup to the Applicant's Counsel and to the police solicitor (Politiadvokat) in which Hardrup stated, inter alia, that his former accusation against the Applicant was untrue and that the Applicant had not in any way directly planned or contributed to the two robberies or homicide. It was further submitted that special circumstances existed which made it very probable that the available pieces of evidence had not been properly appreciated by the jury at the High Court.

At several hearings in 1956, Hardrup maintained the substance of his submissions in the above-mentioned letters.

On 29th June 1957, the Special Court which had before it a new report of the Medico-Legal Council, dismissed the Applicant's petition. It held the charge of hypnosis to be unfounded but retained that part of the High Court's decision which found that the Applicant had planned the crimes and had influenced Hardrup to commit them.

The relevant portion of the judgment is as follows:

"Apart from the evidence given by Hardrup, practically no direct evidence has been obtained with respect to the hypnotic experiments of Schouw Nielsen with Hardrup.

The contents of the medical opinions given in this case and the other statements do not enable the Court to accept the opinion advanced by Dr. Reiter that Schouw Nielsen, through suggestions of a hypnotic nature, has instigated Hardrup to commit the crimes.

The Court does not, however, find it overwhelmingly probable that the available evidence on which the jury based its verdict, namely that Schouw Nielsen by influencing Hardrup has instigated the commission of the crimes, has been judged incorrectly."

Summary of the Applicant's Alleged Grounds of Complaint

WHEREAS it is now alleged by the Applicant that the following provisions of the Convention have been violated:

(i) Article 5, paragraph 1 (c) in that his arrest and detention were the result of the so-called "exercise book confession", written by Hardrup in December 1951 in which the latter had stated that he had been influenced and hypnotised by the Applicant; that in view of the finding of the Special Court of Revision (not accepting that the Applicant had instigated the commission of the crimes through suggestions of a hypnotic nature), there had not been "any sufficiently well-founded suspicion" against the Applicant to justify his arrest and detention at that time;

(ii) Article 6, paragraph 2, in that, while the case matter was before the Courts, statements concerning the Applicant's guilt and character had been made by the Police: that, in particular, the chief police psychiatrist, Dr. Max Schmidt, had referred, on 5th January 1952, to the Applicant as "a scoundrel" and that on 8th January 1952 the police solicitor had stated to a Copenhagen newspaper that the Applicant was the instigator of the crimes committed by Hardrup; that at the Applicant's trial before the High Court in June-July 1954, Dr. Schmidt again stated in evidence that he would "not mind saying three times that the Applicant was a scoundrel".

(iii) Article 5, paragraph 3, and Article 6, paragraph 1, in that, although arrested on 7th January 1952, he was not brought to trial until 16th June 1954, and that this period of detention of nearly two and a half years was unreasonable and excessive;

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(iv) Article 5, paragraph 2, and Article 6, paragraph 3, in that the Public Prosecutor had refused to indicate in the indictment whether the Applicant would be called upon to defend himself against the charge of having instigated by the use of hypnotic influence the robberies and murder but had, nevertheless, at the Applicant's trial dealt with the question of hypnosis in detail and the verdict of the jury mentioned the accusations with regard to hypnosis;

(v) Article 6, paragraph 1, in that the psychiatrists called by the Prosecution had been allowed to dominate the proceedings and to state to the jury that it was a proven fact that the Applicant had by means of hypnosis instigated Hardrup to commit the crimes; that the finding of the jury that the Applicant had instigated Hardrup, inter alia by means of hypnosis, was ultimately held by the Special Court of Revision to have been unfounded but that despite this fact the maximum penalty imposed on the Applicant had been maintained;

As regards Article 26 (The Six Months Rule)

The contentions of the Parties

WHEREAS the Respondent Government submits that the Application should be rejected in toto in accordance with Article 27, paragraph 3, of the Convention on the ground that the Applicant did not lodge his Application within a period of six months from the date on which the final decision was taken;

And Whereas the Respondent Government, in support of this submission, contends that it was the judgment of the Supreme Court of 18th November 1955 and not the decision of the Special Court of Appeal of 29th June 1957 which constituted a "final decision" within the meaning of Article 26 of the Convention; that this submission is based on the fact that the Special Court of Revision is an extraordinary Court outside the ordinary system of the Danish Courts of Law and that, consequently a petition to the Special Court is not a domestic remedy according to the generally recognised rules of international law; that, in particular, a petition to the Special Court cannot be described as an appeal and that, in regard to

the filing of petitions with that Court, the law does not impose any time limit; that, if the Commission was to consider that a petition to the Special Court is an ordinary remedy, criminal cases, dating back from many years, could be submitted to the Commission by the simple expedient of first petitioning the Special Court in this respect and then applying to the Commission within six months from the date of the decision of the Special Court; that this practice would give rise to the filing with the Special Court of many ill-founded petitions and also to the non-application to many Danish criminal cases of the time limit of six months; that a further consequence of the view that the Special Court is an ordinary remedy would be that applicants before lodging a complaint with the Commission would have to petition the Special Court; that this, however, appears to be untenable because the Special Court will not normally be competent to decide whether the rights guaranteed by the Convention have been infringed; that, for example, complaints relating to the duration of detention or to the justification of an arrest may be dealt with by the Commission but fall outside the competence of the Special Court; that, on the other hand, the principal function of the Special Court, namely the assessment of evidence, falls outside the competence of the Commission;

And Whereas the Respondent Government contends that, for these reasons, the Application, in order to be entertained by the Commission, should have been brought within a period of six months as from 18th November 1955, being the date on which the judgment of the Supreme Court was delivered; that the Application was, however, lodged on 23rd December 1957, and is, therefore, in accordance with Article 27, paragraph 3 of the Convention inadmissible, by reason of non-compliance with the 'six months rule' provided for in Article 26 of the Convention;

WHEREAS the Respondent Government alternatively submits that, if contrary to its principal submission, the Commission should consider the petition to the Special Court of Revision to be a domestic remedy according to the generally recognised rules of international law, then it is necessary to distinguish between those matters of complaint alleged by the Applicant in regard to which there was a right of recourse to the Special Court and those matters in regard to which there was no such right of recourse to the Special Court and in regard to which therefore the final tribunal of appeal was the Supreme Court;

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And Whereas the Respondent Government contends that the Application is inadmissible with respect to any matters falling in the latter category by reason of the Applicant's failure to lodge his complaint within a period of six months from the date of the Supreme Court's judgment.

WHEREAS the Applicant submits that the petition to the Special Court of Revision is a domestic remedy according to the generally recognised rules of international law and that, therefore, the decision of the Special Court constitutes the final decision in the present case within the meaning of Article 26 of the Convention; that, in fact, the petition to the Special Court was made immediately after the Supreme Court had given its judgment and that it was logical to await the decision of the Special Court before lodging an application with the Commission; that a State which established a Special Court of Revision must recognise the element of time taken up by the proceedings before such Court and cannot validly assert that an application is inadmissible on the ground that a time limit has been exceeded as a result of such proceedings taking place;

Decision of the Commission

WHEREAS Article 26 of the Convention provides that the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken;

WHEREAS the Danish Government contends that the Applicant has not fulfilled the second condition laid down in Article 26 on the ground that he did not submit his Application to the Commission within a period of six months from 18th November 1955, the date of the decision of the Supreme Court dismissing his appeal from the judgment of the High Court of Eastern Denmark;

WHEREAS, however, fourteen days after the delivery of the Supreme Court's decision, namely, on 2nd December 1955, the Applicant filed a petition with the Special Court of Revision under Article 977 of the Administration of Justice Act, asking for the re-opening of his case on grounds falling within the terms of the said Act; and whereas the decision of the Special Court of Revision dismissing his petition was rendered on 29th June 1957; whereas, moreover, the Applicant then proceeded to submit the present Application to the Commission after the elapse of some five months and three weeks from the date of this decision; whereas it follows that the present Application was submitted within six months from the date of the decision of the Special Court of Revision but not within six months of the date of the decision of the Supreme Court;

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WHEREAS, therefore, the question at once arises whether the decision of the Supreme Court or that of the Special Court of Revision is to be regarded as the "final decision" in applying Article 26 of the Convention; whereas in Case No. 214/56 the Commission has previously pointed out that the two rules contained in Article 26 concerning the exhaustion of domestic remedies and concerning the six months' period are closely inter-related, being not only combined in the same Article but in a single sentence whose grammatical construction implies such correlation; that the term "final decision" in Article 26 must, therefore, be considered as referring exclusively to the final decision resulting from the exhaustion of all domestic remedies according to the generally recognised rules of international law; and that the preparatory work of the Convention, in particular, the report prepared in June 1950, by the Conference of Senior Officials, confirms this interpretation; and whereas it follows that:

(a) if the right of recourse to the Special Court of Revision under the Administration of Justice Act was a remedy which the Applicant was required to exhaust under the generally recognised rules of international law, the decision of that Court constitutes the "final decision" for the purposes of Article 26 of the Convention and the conditions laid down in that Article are fulfilled in the present case; but

(b) if the right of recourse to the Special Court of Revision was not a remedy which the Applicant was required to exhaust under the generally recognised rules of international law, the decision of the Supreme Court constitutes the "final decision" for the purposes of Article 26 of the Convention and the conditions laid down in that Article are not fulfilled in the present case;

Whereas, accordingly, the critical point for determination by the Commission is whether in the present case the right of recourse to the Special Court of Revision was or was not a remedy falling within the scope of the generally recognised rules of international law relating to the exhaustion of domestic remedies;

WHEREAS the generally recognised rules of international law in principle require that before an international tribunal is seized of a claim with respect to an alleged injury to an individual the latter shall first have had recourse to all those legal remedies available to him under the local law and capable of providing an effective and adequate remedy; and whereas the Special Court of Revision is manifestly an independent tribunal established by law and empowered to give

decisions binding in law and capable, within the limits of the Court's jurisdiction, of providing an effective remedy; whereas, moreover, under Section 977 of the Administration of Justice Act the Special Court of Revision is empowered to re-open a criminal case on grounds which cover a number of the matters forming the basis of the present Application and under Section 982 of that Act the Court is empowered, if the case so warrants, to order a new trial on any of the grounds specified in Section 977; whereas, accordingly, the right of recourse to the Special Court of Revision must in principle be regarded as having offered to the Applicant the possibility of an effective and adequate legal remedy with regard to some of the matters of which he complains in the present Application;

WHEREAS the Danish Government nevertheless contends that the right of recourse to the Special Court of Revision is an extraordinary remedy and, as such, is not one of those domestic remedies which it is necessary to exhaust under the generally recognised rules of international law; whereas, moreover, it is true that some authorities have sought to distinguish between ordinary and extraordinary remedies and to maintain that even legal remedies need not be exhausted if they are to be considered extraordinary remedies; whereas, in particular, in the Salem Case (Reports of International Arbitral Awards, Volume II, 1926, page 1190) the United States - Egyptian Arbitral Tribunal appears to have held that the recours en requête civile from the Mixed Court of Appeal in Egypt was a remedy which need not be exhausted under the generally recognised rules of international law on the ground that it was "no regular legal remedy" but was intended "to re-open a process which had already been closed by a judgement of last resort"; and whereas in the present case the petition to the Special Court of Revision was also aimed at re-opening a process which had become res judicata on the dismissal of the Applicant's appeal by the Supreme Court;

WHEREAS, however, the rule requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim is founded upon the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual (Interhandel Case, I.C.J. Reports, 1959, page 27); whereas, further, the Arbitrator in the Finnish Ships Arbitration (1934, Reports of International Arbitral Awards, Vol. III, pages 1501-2) and the Arbitral Tribunal in the Ambatielos Arbitration (1956, London, pages 27-8) seem clearly to have assumed that this principle implies that the Respondent State is entitled to insist upon the prior exhaustion of all those domestic remedies of a legal nature which appear to be

capable of providing an effective and sufficient means of redress without differentiating between ordinary and extraordinary remedies; whereas the Institute of International Law in its Resolution of 1954 also appears to have considered that in applying the local remedies rule 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 (Annuaire, 1956, Volume 46, page 364); whereas, moreover, in the Interhandel Case mentioned above, although the United States Government had on several occasions expressed the opinion to the Swiss Government that the domestic remedies in the United States had been exhausted by the Swiss Company, the International Court of Justice upheld the objection to the admissibility of the claim on the ground that the Company had obtained a re-opening of the proceedings in the United States Courts by a writ of certiorari in the Supreme Court and that the re-opened proceedings were still in progress;

WHEREAS it is also to be observed that, whilst the Electricity Company of Sofia Case (1939, Series A/B, No. 77, page 78 - 79) was concerned with the interpretation of a treaty clause in regard to the exhaustion of local remedies which was expressed in a particular form, the Permanent Court of International Justice declined in that case to accept the view that the decision of the Bulgarian Court of Appeal was to be regarded as the "decision with final effect" for the purpose of the treaty clause when it was open to the Company to apply, and the Company had applied, to the Bulgarian Court of Cassation for an annulment of that decision and an order for a retrial of the case; and whereas the Belgian Government had expressly invited the Court to exclude the right of recourse to the Court of Cassation on the basis that it should be considered to be an extraordinary remedy; whereas, therefore, making every reservation in regard to the particular character of the local remedies rule failing to be applied in the Electricity Company of Sofia Case, the attitude of the Permanent Court in that case appears nevertheless to be in harmony with that of the tribunals in the other cases mentioned in showing a disinclination to exclude from the obligation to exhaust local remedies any legal remedy capable of affording adequate and sufficient redress.

WHEREAS the Commission accordingly concludes that the rules governing the exhaustion of domestic remedies, as these are generally recognised today, in principle require 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;

WHEREAS in the present instance, as already stated by the Commission, the right to petition the Special Court of Revision for the re-opening of the proceedings and an order for a new trial must be considered as having offered to the Applicant the possibility of an effective and sufficient legal remedy with regard to some of the matters which form the subject of his complaint before the Commission; whereas, moreover, the Danish Administration of Justice Act has established the Special Court of Revision as a permanent court and has expressly invested it with the power to re-open the proceedings and to order a new trial in certain cases and on certain specified grounds; whereas, therefore, the right of recourse to the Special Court of Revision appears to be an integral and regular part of the Danish system of administration of justice in criminal cases; and whereas it follows that, prima facie, under the generally recognised rules of international law relating to the exhaustion of domestic remedies, there does not appear to be any ground for excluding petitions to the Special Court of Revision from the remedies which must be exhausted before an international tribunal may be seized of the case;

WHEREAS, however, the Danish Government has put forward the following particular objections to considering the right to petition the Special Court of Revision as a remedy to be taken into account in applying the provisions of Article 26 of the Convention:

(a) If the six months' time-limit prescribed in that Article may be reckoned from the decision of the Special Court of Revision, rather than of the Supreme Court, the consequence will be that most persons convicted in Denmark will be able to bring their cases before the Commission virtually without being subject to a time-limit. For under the Administration of Justice Act, a convicted person may petition the Special Court of Revision for the re-opening of his case long after its decision by the trial court and long after the rejection of any appeal in the case by the Supreme Court, and it would therefore be possible for any convicted person, by the simple expedient of filing a petition with the Special Court of Revision and then presenting an Application to the Commission within six months, to bring his case before the Commission during an almost unlimited period. There would thus be a danger both of many ill-founded petitions to the Special Court of Revision and of the six months' time-limit in Article 26 of the Convention being rendered nugatory in most Danish criminal cases;

(b) Similarly, if the six months' time-limit is to be computed from the decision of the Special Court of Revision rather than that of the Supreme Court, it means that any Application to the Commission concerning a case decided by the Supreme Court will have to be rejected by the Commission on the ground that recourse has not also been had to the Special Court of Revision. Such a position is unacceptable, since the Special Court will not normally be competent to give a decision in regard to the human rights which may be the subject of Applications to the Commission. The Special Court, for instance, would not be competent to give a decision in regard to the duration of the preventive custody of an accused or to revoke a decision prescribing the mental examination of an accused which is the cause of the prolongation of such custody.

WHEREAS, however, these objections do not take account of the competence which the Commission has in every case to appreciate in the light of its particular facts whether any given remedy at any given date appeared to offer the Applicant the possibility of an effective and sufficient remedy within the meaning of the generally recognised rules of international law in regard to the exhaustion of domestic remedies and, if not, to exclude it from consideration in applying the six months' time-limit laid down in Article 26 of the Convention; whereas, therefore, the Commission does not find in the above-stated objections put forward by the Danish Government any sufficient ground, in cases where the right to petition the Special Court of Revision offers the possibility of an effective and sufficient means of redress, for leaving that remedy out of account in applying the provisions of Article 26 of the Convention;

WHEREAS the Commission accordingly holds that, in applying the provisions of Article 26 of the Convention to the present case, the decision of the Special Court of Revision, and not that of the Supreme Court, is to be regarded as the "final decision" in the case so far as concerns all those matters with respect to which the remedy before the Special Court of Revision must be deemed to have offered the Applicant the possibility of an effective and sufficient means of redress; and whereas it follows that the Commission rejects the Danish Governments' contention that the whole Application is inadmissible by reason of its not having been submitted to the Commission within six months of the Supreme Court's decision rejecting the Applicant's appeal against his conviction and sentence by the High Court of Eastern Denmark;

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WHEREAS the Danish Government has alternatively contended that, even if the whole Application is not inadmissible under Article 26 of the Convention, still those parts of it relating to matters in regard to which the Special Court of Revision was not competent to give a remedy must be considered inadmissible since with respect to those parts of the Application the final decision was rendered by the Supreme Court;

WHEREAS, however, the Commission considers that, when an Applicant complains that his trial was unsatisfactory on several different grounds for only some of which a further remedy is open to him, the question whether it is permissible for him under Article 26 of the Convention to postpone the submission of all his grounds of complaint to the Commission until he has exhausted the further remedy open to him with regard to some of them or whether he is required in any event to file his Application with regard to the other grounds within six months of the final decision concerning them is one which has to be determined in the light of the nature and the circumstances of each particular ground of complaint; and whereas, accordingly, this question will be examined by the Commission, so far as may prove necessary, in dealing with the different matters alleged by the Applicant to constitute breaches of the Convention;

As regards Article 6, paragraph 2 (presumption of innocence)

The Contentions of the Parties

WHEREAS the Applicant alleges that while the matter was being dealt with by the Courts, statements concerning the Applicant's guilt and character had been made by the police; that, in particular, the chief psychiatrist of police, Dr. Max Schmidt, had referred, on 5th January 1952, during an examination of Hardrup, to the Applicant as "a scoundrel", and that on 8th January 1952, the police solictor had stated to a Copenhagen newspaper that the Applicant was the instigator of the crimes committed by Hardrup;

WHEREAS the Applicant further alleges that at his trial in June - July 1954, the above-mentioned Dr. Max Schmidt again stated in evidence before the jury of the High Court that he would "not mind saying three times that the Applicant was a scoundrel";

WHEREAS these statements of Dr. Max Schmidt and of the police solicitor are contended by the Applicant to have contravened Article 6, paragraph 2, of the Convention under which everyone charged with a criminal offence is to be presumed innocent until proved guilty according to law.

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Decision of the Commission

WHEREAS in regard to the statements of Dr. Schmidt on 5th January 1952, and of the police solicitor on 8th January 1952, it suffices to recall that in its previous decision of 6th July 1959, the Commission has already rejected as inadmissible ratione temporis that part of the Application which relates to an alleged violation of Article 6, paragraph 2, of the Convention by reason of these statements;

WHEREAS, on the other hand, the further statement attributed to Dr. Schmidt of which the Applicant complains is alleged to have been made during the course of the Applicant's trial in 1954 and therefore at a date after the entry into force of the Convention with regard to Denmark; whereas a statement of this kind, assuming that it was made, appears to be inconsistent with the objectivity normally expected of an independent expert witness giving evidence at a criminal trial;

WHEREAS, however, the right to be presumed innocent until proved guilty according to law, which is contained in Article 6, paragraph 2, of the Convention, cannot be understood as guaranteeing to an accused person that he will have no prejudicial opinions concerning the question of his guilt or innocence expressed by a witness at his trial; whereas, therefore, the statement alleged to have been made by Dr. Schmidt during the Applicant's trial does not fall within the scope of Article 6, paragraph 2 of the Convention; and whereas therefore the Applicant's complaint that he was the victim of a violation of Article 6, paragraph 2, by reason of this statement must be considered to be manifestly ill-founded;

Decides, in conformity with Article 27, paragraph 2, of the Convention, to reject as manifestly ill-founded that part of the Application which relates to an alleged violation of Article 6, paragraph 2, in respect of the statement said to have been made by Dr. Schmidt in 1954 during the Applicant's trial.

As regards Article 5, paragraph 1 (c) (Reasonable suspicion of having committed an offence)

The Contentions of the Parties

WHEREAS the Applicant alleges that his arrest on 7th January 1952, and subsequent detention were the result of the so-called "exercise book confession" written by Hardrup in December 1951, in which the latter had stated that he had

stated that he had been influenced and hypnotised by the Applicant; that in view of the finding of the Special Court of Revision that the accusations of hypnotism could not be held well-founded, there had therefore not been any sufficiently well-founded suspicion against the Applicant to justify his arrest and detention at the time;

WHEREAS the Applicant contends that this constitutes a breach of Article 5, paragraph 1 (c) of the Convention under which the lawful arrest or detention of a person may, inter alia, only be effected on reasonable suspicion of his having committed an offence;

WHEREAS the Respondent Government has not submitted specific observations in regard to the Applicant's contentions on this point;

Decision of the Commission

WHEREAS it suffices to recall that in its previous decision of 6th July 1959, the Commission has already rejected as manifestly ill-founded this part of the Application relating to an alleged violation of Article 5, paragraph 1 (c) of the Convention;

As regards Article 5, paragraph 3, and Article 6, paragraph 1 (Right to trial within a reasonable time)

WHEREAS the Applicant alleges that, although arrested on 7th January 1952, he was not brought to trial until 16th June 1954 and that this period of detention lasting nearly two and a half years was unreasonable and excessive;

And whereas in this connection he states that the length of the period of his detention before trial was due to the length of the mental examination of Hardrup and that his Counsel had no possibility of preventing this examination which was ordered by the Courts after consultation with the prosecution and Counsel for Hardrup;

WHEREAS the Applicant contends that the failure to bring him to trial before the lapse of so long a period of time amounted to a breach of Article 5, paragraph 3, of the Convention under which every arrested person is entitled to trial within a reasonable time or to release pending trial, and also of Article 6, paragraph 1, under which everyone against whom a criminal charge is made is entitled to have that charge determined within a reasonable time;

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WHEREAS the Respondent Government submits that the Applicant's complaint regarding the period of time which elapsed before he was brought to trial was not pleaded before the Special Court; that, in view of the extensive investigations required in the case, there is no basis for the Applicant's complaint; that it was the Courts which decided upon the necessity of having a psychiatric examination of Hardrup and of the Applicant; that the duration of the preliminary examination was at all times within the control of the Courts and that it was the Courts which had determined the period of the Applicant's detention before he was brought to trial;

WHEREAS, in regard to the duration of the examination of Hardrup by Dr. Reiter, the Respondent Government further states that the documents of the case were made available to Dr. Reiter on 22nd April 1952 and that Dr. Reiter commenced his hypnotic experiments with Hardrup on 27th May 1952, but did not succeed until 4th July 1952 in bringing Hardrup into a state of deep hypnosis; that during the following months Dr. Reiter continued his experiments and Hardrup was, at the same time, requested to prepare a report on his personal activities; that the extent of Dr. Reiter's work with Hardrup can be seen from his (Dr. Reiter's) statement of 15th June 1953; that, apart from a few brief interruptions, Hardrup was examined three or four times a week and that, as a rule, each examination lasted about an hour; that, concurrently with the examination of Hardrup, Dr. Reiter examined Hardrup's twin brother; that, according to Dr. Reiter's statement, the curative side of the observation was merely incidental to the main purpose of the examination which was not, therefore, protracted for curative reasons; that also, according to a statement of the Medico-Legal Council, the curative aspect of the observation was unavoidable and inherent in the process of examination; that Dr. Reiter, in a letter of 25th July 1953 to the Copenhagen Town Court, stated that he considered it necessary for Hardrup to undergo curative psychiatric treatment which would also serve to maintain Hardrup's hypnotic receptiveness with a view to possible demonstrations during the trial before the High Court; that the Medico-Legal Council, in a statement of 4th August 1953, approved of Dr. Reiter's proposal, but that the Copenhagen Town Court ruled, on 2nd September 1953, that since Dr. Reiter's examination of Hardrup was completed, his request for continued curative treatment could not be approved and that Hardrup should be admitted to another hospital if further medical treatment was considered necessary; and that this ruling was upheld by the High Court on 18th September 1953;

WHEREAS, with reference to the question whether Counsel for the Applicant had himself taken any steps in order to expedite the hearing of the case, the Respondent Government

points out that a petition was presented to the Copenhagen Town Court on the Applicant's behalf on 5th May 1953, requesting his release pending trial; that the Town Court had dismissed the Applicant's petition by a ruling of 16th May 1953, which states inter alia:

> "The Court fully agrees that it is unfortunate, especially when those charged are being held in custody, when a preliminary examination is protracted for such a long time. In the present case, however, a sufficient explanation of this is afforded by the very unusual character conferred on the case by the psychic aspects submitted";

and that this ruling was upheld by the High Court on 12th June 1953;

WHEREAS the Respondent Government submits that the Applicant's complaint of an alleged violation of Article 5, paragraph 3, and Article 6, paragraph 1, of the Convention should therefore be held to be inadmissible under Article 27, paragraph 2, as being manifestly ill-founded;

Decision of the Commission

WHEREAS the Commission notes that after his arrest on 7th January 1952 the Applicant was detained during a period of nearly two and a half years before being brought to trial in the High Court of Eastern Denmark on 16th June 1954; whereas the Commission also notes the explanations furnished by the Respondent Government of the reasons for the delay in bringing the Applicant to trial and the grounds on which it contends that the Applicant's allegation of a violation of his right to trial within a reasonable time is manifestly ill-founded;

WHEREAS in considering whether an Application is inadmissible under Article 27, paragraph 2, of the Convention, the Commission is concerned only to determine whether, on a summary view of the contentions of the Parties in regard to the facts and the law, the Application must be rejected as manifestly ill-founded; and whereas, having regard to the very long period of time which elapsed before the Applicant was brought to trial in the present case and to the general circumstances of the case, the Commission does not consider that the Applicant's complaint of an alleged violation of his right to trial within a reasonable time, under Article 5, paragraph 3, and Article 6, paragraph 1, can be said to be manifestly ill-founded within the meaning of Article 27, paragraph 2;

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WHEREAS, accordingly, the Commission rejects the Respondent Government's submission that the Applicant's complaint in regard to an alleged violation of his right to trial within a reasonable time under Article 5, paragraph 3, and Article 6, paragraph 1, should be rejected as manifestly ill-founded;

WHEREAS, however, it is the duty of the Commission, ex officio, to satisfy itself in every case that it has jurisdiction to entertain the Application under the powers conferred upon it by the Convention; whereas, under a generally recognised rule of international law, the Convention only governs for each Contracting Party those facts which are subsequent to the date of its entry into force with regard to the Party in question; and whereas it was on 3rd September 1953 that the Convention entered into force with regard to Denmark; whereas it follows that the action of the Danish authorities in detaining the Applicant without bringing him to trial during the period between his arrest on 7th January 1952, and 3rd September 1953, does not come within the operation of the Convention; and whereas it further follows that it is only the action of the Danish authorities in continuing to hold the Applicant in detention after 3rd September 1953, without bringing him to trial until 16th June 1954, which is subject to the operation of the Convention;

WHEREAS it was in virtue of orders of the Danish Courts that, pending the completion of the preliminary examination of the charges against him, the Applicant was held in detention during the long period before he was brought to trial; whereas the proceedings in the Danish Courts concerning the preliminary examination of the Applicant's case, which were the cause of the long delay before he was brought to trial, took place before 3rd September 1953; and whereas the same is true of the proceedings before the Town Court of Copenhagen, in which the Applicant's request that his trial should be expedited or that he should be released pending trial was rejected; whereas the same is also true of the decision of the High Court of Eastern Denmark, given on 12th June 1953, in which it dismissed the Applicant's appeal from the decision of the Town Court of Copenhagen;

WHEREAS Article 26 of the Convention provides that the Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was made; whereas after Denmark, on 3rd September 1953, had become bound by the obligations of the Convention, no new proceedings were

instituted by the Applicant or his Counsel in the Danish Courts with a view to expediting the Applicant's trial or to obtaining his release pending trial; whereas the Applicant did not lodge any complaint with the Commission concerning the delay in bringing him to trial until he did so in the present Application, on 23rd December 1957; whereas all the Applicant's proceedings in the Danish Courts were concluded more than six months before this date with the single exception of the proceedings before the Special Court of Revision; and whereas the Special Court of Revision was not competent to deal with the question of the delay in bringing the Applicant to trial; whereas it must accordingly be concluded that the Applicant's complaint in regard to an alleged violation of his right to trial within a reasonable time under Article 5, paragraph 3, and Article 6, paragraph 1, does not comply with the requirements of Article 26 of the Convention;

Decides to reject that part of the Application which relates to an alleged violation of Article 5, paragraph 3, and Article 6, paragraph 1:

(a) as inadmissible ratione temporis with respect to the Applicant's detention prior to 3rd September 1953; and

(b) as inadmissible under Article 26 of the Convention with respect to the Applicant's detention between 3rd September 1953 and the opening of his trial on 16th June 1954.

As regards Article 5, paragraph 2, and Article 6, paragraph 3 (Right to be informed promptly of any charge and of its nature)

WHEREAS the Applicant alleges that he was not informed whether he would be called upon to defend himself against the charge of instigating the robberies and murder by the use of hypnotic influence; that he was arrested and imprisoned as a result of accusations brought against him by Hardrup; that these accusations as well as the medical reports of Dr. Schmidt and, in particular, of Dr. Reiter, referred to the allegation that the Applicant had influenced Hardrup by hypnotic suggestions; that the press, which had given much publicity to the case, had treated the case as being mainly one of

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robbery and murder by hypnosis, that it was evident to the Applicant's Counsel that Counsel for Hardrup would plead hypnosis as part of his Defence; that, on the other hand, the fact that there was an obvious issue of hypnosis did not necessarily mean that the State would adopt hypnosis as a means of proving the Applicant's guilt in regard to the robberies and murder; that, in particular, the indictment drawn up by the Public Prosecutor on 19th March 1952, asked for sentences of life imprisonment not only for the Applicant but also Hardrup; that this appeared to be an indication that the question of hypnosis would not be relied upon by the Public Prosecutor, because if the use of hypnosis by the Applicant upon Hardrup were proved, Hardrup could not be held responsible for the crimes alleged; that the Applicant's Counsel, on 17th June 1954, had, therefore, requested the High Court to ask the Public Prosecutor to clarify this point and to amend the terms of the indictment if he intended to rely upon the question of hypnosis; that this request was based on Article 831 of the Administration of Justice Act, according to which the indictment must indicate inter alia "the name of the crime as provided for in the Act and its characteristics as described therein and, if necessary, the grounds for increasing or decreasing the penalty, as well as a short account of the misconduct for which prosecution is being instituted with such reference to time, place, object, method of perpetration and other further circumstances as is required for its adequate and explicit description ..."; that the Public Prosecutor had declined to explain his intentions in this respect and that the High Court, by a decision of 22nd June 1954 had upheld the position taken up by the Prosecution;

WHEREAS the Applicant further states that the question of hypnosis had nevertheless been dealt with in detail by the Public Prosecutor and by Dr. Reiter and that the verdict of the jury mentioned the accusations made regarding hypnosis; that, if the Public Prosecutor had indicated that he intended to deal with the question of hypnosis, the Applicant's Counsel would have engaged other psychiatric experts and called other witnesses; that, on the other hand, if the Public Prosecutor had indicated that the question of hypnosis would not be dealt with, Dr. Reiter when addressing the jury could have been stopped on each occasion when he alluded to the Applicant's guilt by reason of the use of hypnosis as that issue would not have been relevant; that the adoption by the Public Prosecutor of Dr. Reiter's theory regarding the use of hypnosis by the Applicant upon Hardrup only became clear during the final address to the jury; that any application for a postponement of the trial for the purpose of preparing a defence on

the question of hypnosis was, therefore, excluded and would in any event have had no chance of success; that the complaint regarding this alleged defect in the indictment was one of the grounds of appeal to the Supreme Court, but that the Supreme Court held that the terms of the indictment were in conformity with the relevant provisions of the Administration of Justice Act;

WHEREAS the Applicant contends that these facts establish a breach both of Article 5, paragraph 2, of the Convention under which every person must be informed promptly of any charge against him, and also of Article 6, paragraph 3 (a) under which every person charged with a criminal offence has the right to be informed promptly and in detail of the nature and cause of the accusation against him;

WHEREAS, in regard to the Applicant's complaint of an alleged violation of Article 5, paragraph 2, of the Convention, the Respondent Government contends that the police informed the Applicant, when he was arrested on 7th January 1952, that he was charged with complicity in the bank robberies; and that the decisions delivered on 7th and 12th January 1952, by the Town Court of Copenhagen and the High Court respectively clearly showed that during his custody the Applicant was duly informed of the reasons for his arrest and of the charges brought against him;

WHEREAS in regard to the Applicant's complaint of an alleged violation of Article 6, paragraph 3, the Respondent Government contends that the provisions of section 831 of the Danish Administration of Justice Act concerning the contents of an indictment satisfy the requirements of Article 6, paragraph 3 (a), of the Convention; and that the High Court in its decision of 22nd June 1954, and the Supreme Court in its judgment of 18th November 1955 both held that the indictment in the present case complied with the terms of Section 831 of the said Act;

WHEREAS the Respondent Government further contends that the alleged defects of the indictment did not prejudice the Applicant's possibility of defending himself; that all the evidence on which the indictment was based was made available to the Applicant and his Counsel at the earliest possible moment, that, in the course of the preliminary investigation, the Applicant and his Counsel were present at the Court hearings and had an opportunity to comment on the evidence submitted; that the evidence which the Prosecution and the Defence intended to introduce in the High Court was included

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in the schedule of evidence communicated to the parties prior to the trial and that this schedule was prepared after consultation between the Prosecution and the Defence; that the schedule of evidence included the names of the expert witnesses Doctors Max Schmidt, Reiter and Geert-Jørgensen as well as all the medical reports and statements of the Medico-Legal Council; that it was clear beyond any doubt that Hardrup would plead that he had acted under the hypnotic influence of the Applicant; that the Applicant and his Counsel were present at some of Dr. Reiter's hypnotic sessions with Hardrup and that Dr. Reiter's report on his observations regarding Hardrup was made available to the Applicant; that the question of hypnosis was also discussed on 22nd December 1953, in the Copenhagen Town Court by Dr. Reiter, Dr. Geert-Jørgensen and Counsel for the Defence; that, moreover, the questions which the Applicant's Counsel put to the Medico-Legal Council early in 1954 indicated clearly that the Applicant and his Counsel anticipated that the question of hypnosis was a reality and would be crucial at the trial;

WHEREAS, in regard to the refusal of the Prosecution to clarify its position before the trial, the Respondent Government states that the Public Prosecutor was unable to decide before the production of all the evidence at the trial, whether Hardrup's allegations concerning his being hypnotised were correct and whether there was a connection between that and the crimes committed by him; and that consequently, it was not until the production of evidence had been completed that the accusation could be made precise upon this point;

WHEREAS the Respondent Government submits on the above-stated grounds that the wording of the indictment did not constitute a breach of Article 6, paragraph 3, of the Convention, and that this part of the Application should be rejected as manifestly ill-founded.

Decision of the Commission

WHEREAS Article 5, paragraph 2, provides: "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him";

WHEREAS Article 6, paragraph 3, further provides: "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation against him";

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WHEREAS it is clear from a comparison of the wording of these provisions that the information to which a person is entitled concerning the charges made against him is more specific and more detailed in connection with his right to a fair trial under Article 6 than in connection with his right to liberty and security of person under Article 5; whereas the Applicant does not appear to contest that when he was arrested he was informed in general terms of the reasons for his arrest and of the charge against him; whereas also the Applicant's complaint that he was prejudiced by reason of an alleged insufficiency in the information given to him concerning the charge against him does not appear to relate to his right to liberty and security of person under Article 5 but rather to his right to a fair trial under Article 6; whereas the Commission accordingly concludes that it is only the Applicant's rights under Article 6, paragraph 3, which require to be considered in the present case;

WHEREAS the essence of the Applicant's complaint is that he was not informed at any time before his trial, nor even when his trial opened, whether the charge against him included the accusation that he had instigated Hardrup to commit robbery and murder by the use of hypnotic suggestion and that he was thereby deprived of a proper opportunity to defend himself at his trial; whereas the question whether the Applicant had employed hypnosis to instigate the commission of crimes by Hardrup was an issue in the case, and especially with regard to the charge of instigation to commit murder; whereas the Applicant's Counsel made a request to the High Court on 17th June 1954, shortly after the trial opened to have the indictment clarified upon this point; and whereas the Public Prosecutor declined to amend the indictment or otherwise to clarify the attitude of the Prosecution on this point before the trial opened;

WHEREAS under Article 6, paragraph 3 (a), of the Convention the Applicant was entitled, as a minimum right, "to be informed promptly, ... and in detail, of the nature and cause of the accusation against him"; whereas the Applicant maintains that this provision entitled him to be informed whether or not he was accused of instigation to commit robbery and murder by hypnotic suggestion, as distinct from other forms of instigation; and whereas he maintains that, if he had been given this information, his Counsel would have prepared his defence in a different manner, and, in particular, would have opposed the Prosecutor's case with additional psychiatric evidence;

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WHEREAS, in the opinion of the Commission, the question whether or not the information furnished to the Applicant before his trial concerning the details and the nature of the accusation against him fell short of the information to which he was entitled under Article 6, paragraph 3 (a), can only be decided after a fuller examination of the proceedings in the case; whereas it follows that the Commission does not consider the Applicant's complaint under this head to be manifestly ill-founded;

Decides to declare admissible that part of the Application which relates to an alleged violation of Article 6, paragraph 3, of the Convention;

As regards Article 6, paragraph 1 (Right to a fair hearing)

WHEREAS the Applicant alleges that the psychiatrists called by the Prosecution were allowed to dominate the proceedings before the High Court and to state to the jury that it was a proven fact that the Applicant had instigated Hardrup by hypnotic means to commit the crimes; that, in particular, Dr. Reiter had addressed the jury during two days for a total period of seven hours and had on many occasions dealt with the question of the Applicant's guilt; that it was true that Dr. Reiter's views had been challenged at the trial by Dr. Geert-Jørgensen as an expert witness for the defence; that Dr. Geert-Jørgensen was only able, however, to testify on the theoretical aspect of the case since he had not had the opportunity of examining Hardrup and had no personal knowledge of Hardrup and, moreover, did not appear in an official capacity as did Dr. Reiter, so that his views necessarily made less impact on the jury than those of Dr. Reiter; that the Applicant's Counsel had protested many times against the statements made by Dr. Reiter; but that the Presiding Judge had not intervened and had only attempted to reduce the effect of Dr. Reiter's statements in his summing up, which was too late;

WHEREAS the Applicant also contends that the decision of the Special Court of Revision refusing to order the re-opening of his case constituted a further infringement of his right to a fair trial; and whereas in support of this contention he invokes the following considerations:

(a) the indictment, despite the request of the Applicant's Counsel, did not make clear whether instigation to robbery and murder by the use of hypnosis was to be charged against him;

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(b) the presiding judge at the trial had said in his summing up that the only evidence as to the Applicant's having instigated Hardrup to commit homicide consisted in a statement made by Hardrup himself when under hypnotic treatment, and had warned the jury that, as there were no other elements of direct evidence in the case, it was doubtful if in the circumstances they would dare to find that the Applicant was an accessory to the homicide;

(c) the jury had found the Applicant guilty of having instigated Hardrup by various means, including hypnosis, to commit both robbery and homicide;

(d) after the Applicant's conviction in the High Court and the rejection of his appeal by the Supreme Court, Hardrup had admitted to having invented the whole story that the Applicant had induced him by hypnotic suggestion to commit the robbery and homicide and stuck to this admission in the subsequent proceedings before the Special Court of Revision;

(e) the Special Court itself had finally rejected the view of Dr. Reiter that the Applicant had instigated Hardrup by hypnotic suggestion to commit the crimes;

(f) the Special Court had nevertheless refused to re-open the case and order a new trial, saying that it did not "find it overwhelmingly probable that the available evidence on which the jury based its verdict, namely that Schouw Nielsen, by influencing Hardrup, had instigated the commission of the crimes, has been judged incorrectly";

WHEREAS, with reference to the above-stated considerations, the Applicant represents that, when the case was before the jury in the High Court, the onus of proving his guilt was upon the Prosecution, which had satisfied the jury that the onus had been discharged partly upon the basis of the evidence of instigation by hypnotic means; that, when the case was considered by the Special Court of Revision, it was governed by Section 977, paragraph 3, of the Administration of Justice Act which allows a case to be re-opened "if in other respects special circumstances exist which make it overwhelmingly likely that the available evidence was not judged correctly;" that the effect of this provision is to place upon an appellant the onus of showing that there is an overwhelming probability that the jury's finding of his guilt was incorrect; that, in consequence, when at last the Applicant succeeded before the Special Court in getting the evidence of instigation by hypnotic

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means put out of the case, he was placed in the position of, in effect, having the onus of proving his innocence; and, finally, that, if a new trial had been ordered, he would not have been placed in that unfair position;

WHEREAS the Respondent Government contends that the Applicant had not, at any time during the proceedings prior to his trial before the High Court, made any objection to Hardup's examination by the psychiatrists; that on the basis of that examination the psychiatrists arrived at the conclusion that the Applicant had hypnotised Hardup to commit the crimes; that the Court was informed of this conclusion and it was, therefore, necessary for the psychiatrists to give evidence concerning the basis of their opinions on this point; that at the time no protest was made against calling the psychiatrists as witnesses for the Prosecution; that the Court was in session for nineteen full days; that Dr. Schmidt made a statement during the morning of 6th July 1954; that Dr. Reiter made a brief statement on the afternoon of the same day, continued his statement during the whole of the following day and concluded it on 8th July in the morning; that the major part of Dr. Reiter's evidence consisted of an extensive scientific exposé of the theoretical problems of hypnotism and of a report of the examination which he had made of Hardup; that Dr. Reiter's evidence did contain a clear and unambiguous expression of opinion as to the correctness of Hardup's assertion of his hypnotic dependence on the Applicant and its connection with his criminal acts; that Dr. Reiter did state on more than one occasion that there was proof of the Applicant having hypnotised Hardrup; that it does not, however, appear from the record of the proceedings in the High Court that Dr. Reiter made repeated statements to the effect that he had proved the guilt of the Applicant; and that, in any event, Dr. Geert-Jørgonsen who had formed the opinion that the Applicant had not hypnotised Hardrup to commit the crimes appeared as an expert witness for the defence and gave evidence to that effect on 8th July 1954;

WHEREAS the Respondent Government represents that the whole question of hypnosis had been submitted to the Medico-Legal Council which found, with reference to Dr. Reiter's Report of 15th June 1953, that there did not appear to be any basis for the assumption that Hardrup's crimes were committed under hypnosis and the thesis that they had been committed under post-hypnotic suggestion had not been firmly substantiated; that these findings of the Medico-Legal Council had been placed in evidence before the jury; that, in addition, the Public Prosecutor had warned the jury against giving an affirmative reply to question 1, namely, whether the Applicant had planned and by hypnotic

influence instigated the crimes committed by Hardrup, and had invited them to reply affirmatively to question 3, namely, whether the Applicant had planned and instigated the crimes; that the presiding judge, in his summing up, had also pointed out to the jury that it was essential for them to consider how far the statements of Hardrup and of the Applicant were corroborated by other evidence in the case;

WHEREAS the Respondent Government further represents that in his appeal to the Supreme Court the Applicant made it one of his grounds of complaint that Dr. Reiter had expressed himself before the jury in an inadmissible manner; that in its judgment of 10th November 1955, however, the Supreme Court had held that neither Dr. Reiter's Report of 18th June 1955, nor the nature of his evidence at the trial provided any basis for setting aside the judgment of the High Court; and that the Supreme Court in reaching this conclusion had said that Dr. Goert-Jørgensen had had an opportunity to contradict Dr. Reiter's statements during the trial and that the presiding judge had given sufficient guidance to the jury in his summing up;

WHEREAS, in regard to the decision of the Special Court of Revision not to order the re-opening of the case, the Respondent Government contends that this decision reflects a shift of emphasis from the evidence of hypnosis to other evidence concerning the instigation of Hardrup by the Applicant and that the Court did not see in this shift of emphasis any sufficient reason for re-opening the case and ordering a new trial;

WHEREAS for the reasons above-stated the Respondent Government submits that the Applicant's complaint of an alleged violation of his right to a fair hearing under Article 6, paragraph 1, should be rejected as manifestly ill-founded;

Decision of the Commission

WHEREAS the Applicant's complaint of an alleged violation of his right to a fair hearing under Article 6, paragraph 1, by reason of the Prosecution's psychiatric witnesses being allowed to dominate the proceedings in an illegitimate manner is in some degree inter-connected with his complaint in regard to the insufficiency of the indictment which the Commission has found to be admissible; whereas, in the opinion of the Commission, the question whether or not the evidence given by the Prosecution's psychiatric witnesses amounted to a denial of the Applicant's right to a fair hearing can only be decided

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after a fuller examination of the proceedings in the case, and whereas it follows that the Commission does not consider the Applicant's complaint under this head to be manifestly ill-founded;

Decides to declare admissible that part of the Application which relates to an alleged violation of the right to a fair hearing under Article 6, paragraph 1."

The Secretary to the Commission:

P. MODINOS

The President of the Commission:

C.H.M. WALDOCK

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Annex 167

ANNEX 168

DIPLOMATIC PROTECTION

[Agenda item 4]

DOCUMENT A/CN.4/523 and Add.1

Third report on diplomatic protection, by Mr. John Dugard, Special Rapporteur

[*Original: English/French*]
[*7 March and 16 April 2002*]

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Convention on Rights and Duties of States (Montevideo, 26 December 1933)	League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19.
American Treaty on Pacific Settlement (Pact of Bogotá) (Bogotá, 30 April 1948)	United Nations, *Treaty Series*, vol. 30, No. 449, p. 55.
Convention on the settlement of investment disputes between States and nationals of other States (Washington, D.C., 18 March 1965)	*Ibid.*, vol. 575, No. 8359, p. 159.
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Agreement on Andean subregional integration (Cartagena Agreement or Andean Pact) (Bogotá, 26 May 1969)	ILM, vol. VIII, No. 5 (September 1969), p. 910.
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Convention on international liability for damage caused by space objects (London, Moscow, Washington, D.C., 29 March 1972)	*Ibid.*, vol. 961, No. 13810, p. 187.
Convention establishing the Multilateral Investment Guarantee Agency (Seoul, 11 October 1985)	*Ibid.*, vol. 1508, No. 26012, p. 99.
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believes it should consider this topic, it should do so as a separate study. The Special Rapporteur would welcome such a decision, as such a study would draw on and complement the present articles. During the previous quinquennium this issue was frequently raised, with a clear majority of members opposed to the inclusion of functional protection in the present study. The time has come for an immediate and final resolution of the matter.

CHAPTER I

Exceptions to the general principle that local remedies must be exhausted

"Article 14

"Local remedies do not need to be exhausted where:

"(*a*) The local remedies:

"(i) Are obviously futile (option 1)

"(ii) Offer no reasonable prospect of success (option 2)

"(iii) Provide no reasonable possibility of an effective remedy (option 3);

"(*b*) The respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement;

"(*c*) There is no voluntary link between the injured individual and the respondent State;

"(*d*) The internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State;

"(*e*) The respondent State is responsible for undue delay in providing a local remedy;

"(*f*) The respondent State prevents the injured individual from gaining access to its institutions which provide local remedies."

A. Futility (art. 14 (*a*))

"*Article 14*

"Local remedies do not need to be exhausted where:

"(*a*) The local remedies:

"(i) Are obviously futile (option 1)

"(ii) Offer no reasonable prospect of success (option 2)

"(iii) Provide no reasonable possibility of an effective remedy (option 3) …"

1. PRELIMINARY REMARKS

18. The second report on diplomatic protection proposed that a State might not bring an international claim arising out of an injury to a national before the injured individual had exhausted "all available local legal remedies" (art. 10, para. 1).[19] In debates in the Commission and in the Sixth Committee of the General Assembly, it was suggested that this provision should be amended to require the exhaustion of "all available *adequate and effective** local legal remedies".[20] This suggestion was understandable as the second report had made no reference to the requirement that remedies should be "effective" (or that they not be "ineffective") other than in the paragraph dealing with future work,[21] which served notice that the matter would be dealt with in the third report.

19. There is no objection to including a reference to the need for adequate and effective available remedies in article 10, provided a separate provision deals with the subject of ineffective or futile remedies. As shown in article 15, the burden of proof in respect of the availability and effectiveness of local remedies will in most circumstances be on different parties. The respondent State will be required to prove that local remedies are available, while the burden of proof will be on the claimant State to show that such remedies are ineffective or futile. Ineffectiveness therefore belongs to the category of exceptions to the local remedies rule and is treated as such in this provision.

20. A local remedy is ineffective when it is "obviously futile", "offers no reasonable prospect of success" or "provides no reasonable possibility of an effective remedy" (art. 14 (*a*) above). These phrases are more precise than the generic term "ineffective" and are therefore preferred by courts and writers in describing the phenomenon of the ineffective local remedy. The test of "obvious futility" is higher than that of "no reasonable prospect of success", while the test of "no reasonable possibility of an effective remedy" occupies an intermediate position. All three options are presented for the consideration of the Commission. All enjoy some support among the authorities.

21. Denial of justice is a concept that belongs largely to the realm of the primary rule. It is, however, inextricably linked with many features of the local remedies rule, including that of ineffectiveness, and as such may be said to have a secondary character. As suggested in the second report on diplomatic protection,[22] it may be seen as a secondary rule when it excuses recourse to further local remedies and as a primary rule when it gives rise to international responsibility. The two faces of denial of justice are well illustrated by the articles adopted on first reading

[19] *Yearbook ... 2001* (see footnote 13 above), sect. B, p. 100.

[20] *Yearbook ... 2002*, vol. II (Part Two), p. 56, para. 177.

[21] *Yearbook ... 2001* (see footnote 13 above), p. 114, para. 67.

[22] *Ibid.*, pp. 101–102, para 10.

by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930), which in article 9 defined denial of justice as a primary rule when a 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"[23] and then gave it a secondary character in exempting an injured foreigner from exhausting local remedies when the person had been subjected to such a denial of justice (art. 4, para. 2).

22. Every effort will be made to avoid the language of denial of justice in this comment. This will not, however, always be possible, as the local remedies rule and denial of justice are historically intertwined. As the introduction to this report indicates, the place of denial of justice in the present draft articles will be considered in due course.

2. Introduction

23. There is no need to exhaust local remedies when such remedies are ineffective or the exercise of exhausting such remedies would be futile. The reason for this is that a claimant is not required to exhaust justice in a foreign State "when there is no justice to exhaust".[24] This principle is endorsed by judicial decisions,[25] legal doctrine,[26] State practice[27] and codifications of the local remedies rule.[28] Article 22 of the draft articles on State responsibility adopted on first reading required the exhaustion only of those remedies which are "effective".[29] Although this principle is accepted, its precise formulation is subject to dispute, as will be shown below.

24. The futility of local remedies must be determined at the time at which they are to be used.[30] Moreover, the decision on the futility of such remedies must be made on the assumption that the claim is meritorious.[31]

25. It would seem obvious that the competent international tribunal should decide on the issue of the effectiveness *vel non* of local remedies. As Amerasinghe states:

> Broadly speaking, there are three possible alternatives. The tribunal may accept the word of the claimant State as to the effect of the remedy or it may accept the word of the respondent State or it may investigate the matter on the evidence presented to it and come to its own conclusion. Looking to reason and good sense, it would seem that this is a matter of law and fact which the tribunal must ordinarily investigate and decide on the evidence before it. To determine the effect of the remedy an estimate of probabilities has to be made and there is no reason why a tribunal should not be competent to make such an estimate.[32]

This obvious truth may appear to be contradicted by the following PCIJ dictum in the *Panevezys-Saldutiskis Railway* case:

> The question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian courts alone can pronounce a final decision. It is not for this Court to consider the arguments which have been addressed to it for the purpose either of establishing the jurisdiction of the Lithuanian tribunals by adducing particular provisions of the laws in force in Lithuania, or of denying the jurisdiction of those tribunals by attributing a particular character (seizure *jure imperii*) to the act of the Lithuanian Government.[33]

That the Court did not intend to leave the final determination of such matters to domestic courts is, however, clear from its comment in the same judgment that "[t]here can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief".[34] The view that an international tribunal is the appropriate body to pronounce on questions of futility is confirmed by Lauterpacht[35] and García Amador.[36]

3. Formulating the exception

26. While it is agreed that local remedies need not be exhausted when they are futile or ineffective, there is no agreement as to how this exception is to be formulated. Some choose to formulate it in terms of a denial of justice: local remedies need not be exhausted when there is a denial of justice. Others prefer to require that the remedies be effective, not obviously futile; offer a reasonable prospect of success; or provide a reasonable possibility of an effective remedy. These tests will be expounded, after which the principal examples of futility or ineffectiveness recognized by judicial decisions will be considered. Once this has been done, a proposal will be made for the most appropriate formulation of the exception.

27. Early codifications excused compliance with the local remedies rule when there was a denial of justice. As shown above, the articles adopted on first reading by the Third Committee of the Conference for the Codifica-

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[23] *Yearbook ... 1956* (see footnote 14 above), report on international responsibility by Mr. F.V. García Amador, p. 226.

[24] *Robert E. Brown (United States)* v. *Great Britain* (1923), UNRIAA, vol. VI (Sales No. 1955.V.3), p. 129; see also Mr. Fish, United States Secretary of State, to Mr. Pile (29 May 1873), *in* Moore, *A Digest of International Law*, vol. VI, p. 677; and *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war* (1934), UNRIAA, vol. III (Sales No. 1949.V.2), p. 1497.

[25] See the cases referred to above in footnote 24 and *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 19; the *Ambatielos Claim* (1956), UNRIAA, vol. XII (Sales No. 63.V.3), pp. 122–123; and *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, pp. 27–29.

[26] See below, particularly footnotes 64–65, 70–71, 75 and 77.

[27] For statements on American and British State practice respectively, see *Restatement of the Law Second: Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute, 1965), para. 207 (*b*), pp. 615–616; *ibid. Third*, vol. 2 (St. Paul, Minn., American Law Institute, 1987), chap. II, para. 713. (*f*), p. 219; and Warbrick, "Protection of nationals abroad", p. 1008.

[28] See footnotes 37–38 and 41–42 below. The exception to this is the Guerrero report of 1926, which excused compliance from local remedies only where access to domestic courts was denied to foreigners (*Yearbook ... 1956* (see footnote 14 above), annex 1, pp. 221–222). See also the *Supplement to the American Journal of International Law*, vol. 20, July and October 1926, pp. 202–203.

[29] *Yearbook ... 1996*, vol. II (Part Two), p. 60.

[30] Amerasinghe, "The exhaustion of procedural remedies in the same court", p. 1312.

[31] *Finnish Ships Arbitration* (see footnote 24 above), p. 1504; and the *Ambatielos Claim* (footnote 25 above), pp. 119–120. See also Schwarzenberger, *International Law*, p. 609; Fitzmaurice, "Hersch Lauterpacht—the scholar as judge: part I", p. 60; O'Connell, *International Law*, p. 1057; and Borchard, "The local remedy rule", p. 730.

[32] "The exhaustion of procedural remedies …", p. 1307.

[33] *Panevezys-Saldutiskis Railway* (see footnote 25 above).

[34] *Ibid.*, p. 18.

[35] *The Development of International Law by the International Court*, p. 101. See also Law, *The Local Remedies Rule in International Law*, pp. 66–67.

[36] *Yearbook ... 1956* (see footnote 14 above), p. 205, para. 169.

tion of International Law provided that the claimant was excused from exhausting local remedies when he was "hindered by the judicial authorities in the exercise of his right to pursue judicial remedies" or had "encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice".[37] The Seventh International Conference of American States held in Montevideo in 1933 likewise excepted "those cases of manifest denial or unreasonable delay of justice" from the local remedies rule.[38] García Amador adopted a similar approach.[39]

28. The simple test of "effectiveness" enjoys some support in codifications. The Institute of International Law stated in its resolution adopted at the Granada session in 1956 that the local remedies rule applied only "if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be *effective** and *sufficient*.*"[40] Article 22 of the draft articles on State responsibility adopted by the Commission on first reading requires "effective local remedies" to be exhausted.[41] In a similar vein, Kokott proposed in her report of 2000 to the Committee on Diplomatic Protection of Persons and Property of the International Law Association that the claimant was exempt from the local remedies rule where, "for whatever reason, no remedy is available to him, which would effectively redress the violation incurred".[42]

29. The stringent test of "obvious futility" for release from the local remedies rule has its origin in the following statement by Arbitrator Bagge in the *Finnish Ships Arbitration* case:

> As regards finally the third question, whether the local remedy shall be considered as not effective only where it is obviously futile on the merits of the case which are to be taken into account, to have recourse to the municipal remedy, or whether, as the Finnish Government suggest, it is sufficient that such a step only appears to be futile, a certain strictness in construing this rule appears justified by the opinion expressed by Borchard when mentioning the rule applied in the prize cases. Borchard says (a.a. § 383): "In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief."[43]

This formulation of the test for exemption from the local remedies rule was subsequently accepted by the majority of the commissioners in the *Ambatielos*[44] arbitration and accords substantially with the strict test expounded in the *Panevezys-Saldutiskis Railway* case—that the ineffectiveness of the remedy be "clearly shown".[45]

30. The "obvious futility" test has been strongly criticized by some writers and was not followed in the *ELSI* case[46] in which an ICJ chamber was ready to assume the ineffectiveness of local remedies. Amerisinghe has argued that it was wrong for Arbitrator Bagge to import the strict test expounded in prize cases, arising in the context of war and in respect of which States have special powers of jurisdiction, to the law of diplomatic protection,[47] while Mummery has submitted that the test of obvious futility "contributes very little to precision and objectivity of thought".[48] Amerasinghe adds that:

> The real objection, however, to the strict criterion enunciated in the *Finnish Ships Arbitration* would seem to lie in the absence of justification for applying such a strict criterion to the resort by aliens to local remedies when, pragmatically speaking, litigants can in normal circumstances be expected not to spend time and money exercising available recourse, if it appears reasonably rather than highly probable that they are not likely to succeed. The argument in the case of the alien is even more cogent. In his case what is involved is really not a choice between resorting to remedies and completely failing to secure redress by not so resorting, as is the case with the ordinary litigant. It is a choice between resorting to remedies both at the local level and at the international level and not resorting to remedies at the local level while invoking an international remedy which could result in adequate redress.[49]

31. Exemption from the local remedies rule on the ground of ineffectiveness may be better achieved by a formulation which renders the exhaustion of local remedies unnecessary when the remedies offer no reasonable prospect of success to the claimant. Support for this formulation is to be found in tests which stress the reasonableness of the claimant pursuing domestic remedies. This test is less demanding than that of "obvious futility", which requires evidence not only that there was no reasonable prospect of the local remedy succeeding, but that it was obviously and manifestly clear that the local remedy would fail.

32. The clearest support for this test comes from the jurisprudence of the European Commission on Human Rights, which on several occasions has applied the

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[37] *Ibid.*, p. 226, annex 3. See also Law, *op. cit.*, p. 71.

[38] *Yearbook ... 1956* (see footnote 14 above), , p. 226, annex 6, para. 3.

[39] *Yearbook ... 1961*, vol. II, document A/CN.4/134 and Addendum, sixth report on international responsibility, pp. 46–48, arts. 3, para. 2, and 18, para. 2. See also García Amador, "State responsibility: some new problems", p. 452; see further the separate opinion of Judge Tanaka in *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 145.

[40] *Annuaire de l'Institut de Droit International*, vol. 46 (Granada session, 1956), p. 364.

[41] See footnote 29 above.

[42] "The exhaustion of local remedies", p. 630.

[43] UNRIAA (see footnote 24 above), p. 1504. According to Judge Tanaka in his separate opinion in the *Barcelona Traction* case, the local remedies "rule does not seem to require from those concerned a clearly futile and pointless activity" (see footnote 39 above).

[44] UNRIAA (see footnote 25 above), p. 119.

[45] See footnote 25 above. This test seems to reflect British practice, which requires that the ineffectiveness of the remedy must be "clearly established" (Warbrick, *loc. cit.*, p. 1008). The United States of America, in an opinion of 1930 by the Solicitor for the Department of State, also required that it be "shown" that local remedies were ineffective (Hackworth, *Digest of International Law*, p. 511).

[46] The Chamber stated:

> "With such a deal of litigation [lasting from 1968 to 1975 before various Italian courts] in the municipal courts about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted."

(*Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 46, para. 59)

> "In the present case … it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden."

(*Ibid.*, p. 47, para. 62)

[47] Amerasinghe, "The local remedies rule in an appropriate perspective", p. 752; and Borchard's approval of Arbitrator Bagge's approach in Borchard, "The local remedy rule", pp. 732–733.

[48] "The content of the duty to exhaust local judicial remedies", p. 401.

[49] "The local remedies rule …", p. 752.

standard of "real" or "reasonable prospect of success".[50] Commentators are divided as to whether the Commission intended to substitute this test for that of "obvious futility" and have raised doubts about the application of this test to the general law of diplomatic protection.[51] The American Law Institute's *Restatement of the Law Second: Foreign Relations Law of the United States*, provides some support for this test:

> Exhaustion of a remedy does not require the taking of every step that might conceivably result in a favorable determination, but the alien must take all steps that offer a *reasonable possibility, even if not a likelihood*,* of success… The expense or delay involved, if substantial in relation to the amount or nature of the reparation sought, may be relevant in determining what steps should reasonably be taken to exhaust the available remedies. The alien is not required to incur substantial expense and delay in trying to invoke a remedy where there is no *reasonable possibility** that the remedy would be available.[52]

33. As shown above,[53] article 22 of the draft articles on State responsibility adopted by the Commission on first reading simply requires local remedies to be effective. The commentary to the provision does, however, support the "reasonable prospect of success" formulation:

> From the standpoint of the person with whom that initiative lies, it seems plain that the action to be taken relates to all avenues which offer a *real prospect* of still arriving at the result originally aimed at by the international obligation or, if that has really become impossible, an equivalent result. But it seems equally plain that only avenues which offer such a prospect should be explored.[54]

34. While the "obvious futility" test is too strict, that of "reasonable prospect of success" is probably too generous to the claimant. It seems wiser, therefore, to seek a formulation that invokes the concept of reasonableness but which does not too easily excuse the claimant from compliance with the local remedies rule. A possible solution is to be found in option 3, that there is an exemption from the local remedies rule where there is "no reasonable possibility of an effective remedy" before courts of the respondent State. This formulation avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that, in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective remedy. This is a stricter test than that of "no reasonable prospect of success", the test employed in some legal systems for refusing leave to appeal to a higher court.

35. This test is adopted from the separate opinion of Sir Hersch Lauterpacht in the *Certain Norwegian Loans* case, in which he stated, after considering the grounds on which it might be doubted that the Norwegian courts could afford any effective remedy:

> 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 Norwegian courts.[55]

A number of writers have endorsed this view.[56] Perhaps the best exposition of the test is given by Fitzmaurice:

> 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 appear to be even a reasonable possibility that it will afford an effective remedy. This test is acceptable provided it is borne in mind that what there must be a reasonable possibility of is the *existence* of a possibly effective remedy, and that the mere fact that there is no reasonable possibility of the claimant *obtaining* that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule.[57]

36. The text proposed arguably accords more with the reasoning of Arbitrator Bagge in the *Finnish Ships Arbitration* than that of "obvious futility". This is made clear by Simpson and Fox:

> The use of such terms as "obviously futile" and "obviously insufficient" in relation to rights of appeal is, however, misleading. In the *Finnish Ships* case the arbitrator heard lengthy argument about the shipowners' right of appeal from the decision of the Arbitration Board to the Court of Appeal and their failure to exercise it, and in his award entered into most detailed reasoning before arriving at the conclusion that the appealable points of law were "obviously" insufficient to secure a reversal of the decision of the Arbitration Board. *"Obvious" is therefore not to be understood in the sense of immediately apparent.** To judge from the *Finnish Ships* case, the test is whether the *insufficiency of the grounds of appeal has been conclusively, or at least convincingly, demonstrated.**[58]

This interpretation is consistent with Bagge's own views, expressed in another context, where he argued, referring to the *Finnish Ships Arbitration* decision, that

> it would not be reasonable to require that the private party should spend time and money on a recourse which *in all probability** would be futile.
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> …

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[50] *Retimag S.A.* v. *Federal Republic of Germany*, application No. 712/60, decision of 16 December 1961, *Yearbook of the European Convention on Human Rights, 1961*, p. 400; *X, Y and Z* v. *the United Kingdom*, application Nos. 8022/77, 8025/77 and 8027/77, decision of 8 December 1979, *European Commission of Human Rights*, *Decisions and Reports*, vol. 18, p. 76.

[51] Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: its Rationale in the International Protection of Individual Rights*, p. 97; and Amerasinghe, *Local Remedies in International Law*, p. 202.

[52] *Restatement of the Law Second* ... (see footnote 27 above). It should, however, be noted that in paragraph 208 the terms "apparent" and "clearly ineffective" are used (*ibid.*, p. 618). See also *Restatement of the Law Third* ... (footnote 27 above), which requires United States nationals to exhaust local remedies "unless such remedies are clearly sham or inadequate". Earlier statements of United States officials demonstrate a stricter requirement, namely that "there appears to be no adequate ground for believing that sufficient remedy is afforded", that "[t]he Department … can not assume that the regularly established courts of a country will not administer justice until *it has been shown** that such is the case" (Hackworth, *op. cit.*, p. 511), or that "[t]he policy of the Department has always been, and is, not to intervene when the claimant has his day in court, unless the courts are of such a character *as to preclude hope of a possibility** of justice" (letter of 27 February 1907 by the Department, quoting an opinion of the Solicitor concerning a claim against Canada, *ibid.*, p. 520.)

[53] Para. 28.

[54] *Yearbook ... 1977*, vol. II (Part Two), p. 47, para. (48). See also Law, *op. cit.*, pp. 78–79, who formulates the test as "reasonable expectation of success".

[55] *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 39.

[56] Brownlie, *Principles of Public International Law*, p. 499. Mummery prefers to ask whether the local remedy in question "may reasonably be regarded as incapable of producing satisfactory reparation" (*loc. cit.*, p. 401).

[57] *Loc. cit.*, pp. 60–61. See also Herdegen, "Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen", p. 70.

[58] *International Arbitration: Law and Practice*, p. 114.

Even if the facts alleged by the intervening State in the diplomatic correspondence as to damage caused by an act for which the defendant State is responsible may seem to the international tribunal firmly established, there may be other bases required by the municipal law, which are decisive for the acceptance or dismissal on the national plane of the private claim, and whose existence may be a subject for different opinions. *Only where such a difference of opinion seems reasonably not possible [i.e. where there is no reasonable prospect of success], … ought an application of the local remedies rule to be held unnecessary by reference to the merits of the claim*.*[59]

37. The objection to the "obvious futility" test that it suggests that the ineffectiveness of the local remedy must be *ex facie* "immediately apparent"[60] is overcome by introducing the element of "reasonableness" into the test. This allows a court to examine whether, in the circumstances of the particular case, an effective remedy was a reasonable possibility. The necessity to do this was stressed by Mr. Manley O. Hudson in his dissenting opinion in the *Panevezys-Saldutiskis Railway* case[61] and by Sir Hersch Lauterpacht in his separate opinion in the *Certain Norwegian Loans* case.[62] The correct approach is admirably put by Mummery:

The international tribunal should look not merely at the paper remedy but also at the circumstances surrounding the remedy. If these are instrumental in making an otherwise effective remedy ineffective, and if they are more the outgrowth of the state's activity than that of the claimant, then the remedy must be regarded as ineffective for the purposes of the rule. This flexibility of approach is consonant with the social function of the rule …—to give primacy of jurisdiction to the local courts, not absolutely but in cases where they can reasonably accept it and where the receiving state is reasonably capable of fulfilling its duty of providing a remedy. Thus the result in any particular case will depend on a balancing of factors. For example, in a situation in which the best local legal advice suggests that it is "highly unlikely" that further resort to local remedies will result in a disposition favorable to the claimant, the correct conclusion may well be that local remedies have been exhausted if the cost involved in proceeding further considerably outweighs the possibility of any satisfaction resulting; otherwise, if little or no trouble or cost is involved in proceeding further.[63]

4. Circumstances in which local remedies have been found to be ineffective or futile

38. *The local court has no jurisdiction over the dispute in question.*[64] This principle has been widely accepted both in jurisprudence and in the literature.[65] The *Panevezys-Saldutiskis Railway* case does not negate this principle. There PCIJ held that it was not satisfied that the courts of Lithuania had no jurisdiction over an act of State, as argued by Estonia, in the absence of a Lithuanian court decision.[66] On the facts this was an extremely cautious,[67] possibly timid approach, but the Court made it clear that it accepted the principle that there was "no need to resort to the municipal courts if those courts have no jurisdiction to afford relief".[68]

39. A necessary corollary of this principle is that it is not necessary to exhaust appellate procedures when the appeal court has limited jurisdiction. Thus in the *Finnish Ships Arbitration* Arbitrator Bagge held that local remedies had been exhausted where the disputed issue was a question of fact and the Court of Appeal had competence to decide questions of law only.[69]

40. *The national legislation justifying the acts of which the alien complains will not be reviewed by the courts.* Where, for instance, legislation has been adopted to confiscate the property of an alien and it is clear that the courts are obliged to enforce this legislation, there will be no need to exhaust local remedies. Thus in the *Arbitration under article 181 of the Treaty of Neuilly*, concerning the confiscation of forests by Bulgaria under a Bulgarian law passed in 1904, Arbitrator Undén held that:

The Ministry of Agriculture, in proceeding definitely to confiscate the forests, relied upon the … Bulgarian law of 1904 according to which all the *yaïlaks* were to be considered as domains of the state. Considering that this law was not modified so as to admit of the application of a special régime in the annexed territories, the claimants had reasons for considering as useless any action before the Bulgarian courts against the Bulgarian Treasury.[70]

41. *The local courts are notoriously lacking in independence*.[71] The leading authority in support of this principle

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[59] "Intervention on the ground of damage caused to nationals, with particular reference to exhaustion of local remedies and the rights of shareholders", pp. 166–167.

[60] Simpson and Fox, *op. cit*., p. 114.

[61] *P.C.I.J.* (see footnote 25 above), p. 48.

[62] *I.C.J. Reports 1957* (see footnote 55 above), p. 39.

[63] Mummery, *loc. cit.*, pp. 400–401. See also Herdegen, *loc. cit.*, p. 71.

[64] See Kokott, *loc. cit*., p. 622; Amerasinghe, *Local Remedies …*, pp. 197–198; Jennings and Watts, eds., *Oppenheim's International Law*, p. 525; Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, p. 884; and Mummery, *loc. cit*, pp. 396–397.

[65] See "International arbitral awards of Östen Undén: arbitration under article 181 of the Treaty of Neuilly", *American Journal of International Law*, vol. 28 (1934), p. 789 ("the rule of exhaustion of local remedies does not apply generally when the act charged consists of measures taken by the government or by a member of the government performing his official duties. There rarely exist local remedies against the acts of the authorized organs of the state"); *Claims of Rosa Gelbtrunk and the "Salvador Commercial Company"* et al. (1902), UNRIAA, vol. XV (Sales No. 66.V.3), pp. 467–477; *The* Lottie May *Incident* (1899), *ibid.*, p. 31; Sir Hersch Lauterpacht's separate opinion in *Certain Norwegian Loans* (footnote 55 above), pp. 39–40; Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, p. 823; Jennings and Watts, *op. cit.*, p. 525; Brownlie, *op. cit.*, p. 500; Amerasinghe, *Local Remedies …*, p. 198, and "Whither the local remedies rule?", p. 306; Jiménez de Aréchaga, "International responsibility", pp. 587–588; Verzijl, "La règle de l'épuisement des recours internes", p. 266; *Affaire des Forêts du Rhodope Central (fond)*, decision of 29 March 1933, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1420; *Interhandel* case (footnote 25 above), p. 27; Verdross and Simma, *op. cit.*, p. 883; Law, *op. cit.*, p. 69; and Schwarzenberger, *op. cit.*, p. 608.

[66] See footnote 25 above.

[67] See Lauterpacht, *op. cit.*, p. 101.

[68] *Panevezys-Saldutiskis Railway* case (see footnote 25 above), p. 18.

[69] UNRIAA (see footnote 24 above), p. 1535. See also Schwarzenberger, *op. cit.*, p. 609; Jiménez de Aréchaga, "International responsibility", p. 588; Brownlie, *op. cit.*, p. 499; Mummery, *loc. cit.*, p. 398; and Law, *op. cit.*, p. 68.

[70] "International arbitral awards of Östen Undén …" (footnote 65 above). See also *Affaire des Forêts du Rhodope Central* (footnote 65 above), p. 1405; the *Ambatielos Claim* (footnote 25 above), p. 119; the *Interhandel* case (footnote 25 above), p. 28; Amerasinghe, *Local Remedies …*, p. 198; Jennings and Watts, *op. cit*., p. 525; Jiménez de Aréchaga, "International responsibility", p. 589; Law, *op. cit.*, pp. 66 and 70; Doehring, "Local remedies, exhaustion of", p. 240; Schwarzenberger, *op. cit.*, p. 608; and *Yearbook … 1977*, vol. II (Part Two), p. 48, para. (50).

[71] Jiménez de Aréchaga, "International responsibility", p. 589; Amerasinghe, *Local Remedies …*, p. 198; Borchard, *The Diplomatic Protection …*, p. 823 (referring to courts controlled by a hostile mob); Jennings and Watts, *op. cit.*, p. 525; Brownlie, *op. cit.*, p. 500; *Velásquez Rodríguez* case, ILM, vol. 28 (1989), pp. 304–309; Whiteman, *Digest of International Law*, p. 784; separate opinion by Judge Tanaka in the *Barcelona Traction* case (see footnote 39 above), p. 147; dissenting

is the *Robert E. Brown* claim.[72] Here the President of the South African Republic, Paul Kruger, had dismissed the Chief Justice for finding in favour of Brown's claims to certain mining rights, and both the President and the legislature of the Republic had denounced the decision of the Chief Justice. In these circumstances Brown was advised by his counsel that it was pointless to proceed with his claim for damages as the reconstituted High Court was clearly hostile to him.[73] The tribunal that heard the international claim rejected the argument that Brown had failed to exhaust local remedies, holding that "the futility of further proceedings has been fully demonstrated, and that the advice of his counsel was amply justified". It was not necessary, said the tribunal, "to exhaust justice … when there is no justice to exhaust".[74]

42. *There is a consistent and well-established line of precedents adverse to the alien*. It is not "necessary again to resort to those [municipal] courts if the result must be a repetition of a decision already given".[75] The mere likelihood of an adverse decision is insufficient: there must be "something more than probability of defeat but less than certainty".[76]

43. *The courts of the respondent State do not have the competence to grant an appropriate and adequate remedy to the alien*.[77]

44. *The respondent State does not have an adequate system of judicial protection*. In *Mushikiwabo and Others* v. *Barayagwiza* a United States District Court held that the local remedies rule could be dispensed with in the case as "the Rwandan judicial system is virtually inoperative and will be unable to deal with civil claims in the near future".[78] During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies.[79] Notions of a fair trial and due process of law carry greater weight in contemporary international law, as a result of the influence of international human rights jurisprudence, than they did in the first 60 years of the twentieth century when many of the seminal decisions on the exhaustion of local remedies were given. This exception to the local remedies must therefore be accorded greater weight today.

5. Conclusion

45. The above examples of circumstances in which recourse to local remedies has been excused suggest that the claimant is required to prove more than that the local remedies offer no reasonable prospect of success (option 2). On the contrary, they suggest that the claimant must prove their futility. They do not, however, lend support to the test of "obvious futility" (option 1), which suggests that the futility of local remedies must be "immediately apparent".[80] Instead they require a tribunal to examine circumstances pertaining to a particular claim which may not be immediately apparent, such as the independence of the judiciary, the ability of local courts to conduct a fair trial, the presence of a line of precedents adverse to the claimant and the conduct of the respondent State. The reasonableness of pursuing local remedies must therefore be considered in each case.[81] This all points in the direction of option 3: a claimant is not obliged to exhaust local remedies where the courts of the respondent State provide "no reasonable possibility of an effective remedy" (art. 14 (*a*) above).

opinion of Judge Levi Carneiro in *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 165; Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. II, pp. 1655 and 1657, vol. III, pp. 3076 *et seq*., vol. V, p. 4902; and *A Digest of International Law*, p. 287; Mummery, *loc. cit.*, p. 403; Law, *op. cit.*, p. 68; Cançado Trindade, *op. cit.*, p. 78; Fitzmaurice, *loc. cit.*, p. 59; *Yearbook ... 1977* (see footnote 70 above); Daillier and Pellet, *Droit International Public*, p. 776.

[72] UNRIAA (see footnote 24 above), p. 120.

[73] For a history of this case, see Dugard, "Chief Justice versus President: does the ghost of Brown v Leyds NO still haunt our judges?", p. 421.

[74] UNRIAA (see footnote 24 above).

[75] *Panevezys-Saldutiskis Railway* case (see footnote 25 above), p. 18. See also Borchard, *The Diplomatic Protection …*, pp. 823–824; *S.S. "Lisman"* (1937), UNRIAA, vol. III (Sales No. 1949.V.2), p. 1773; *S.S. "Seguranca"* (1939), *ibid.*, p. 1868; *Finnish Ships Arbitration* (footnote 24 above), p. 1495; *X* v. *Federal Republic of Germany* (1955), European Commission of Human Rights, *Documents and Decisions: 1955–1956–1957*, p. 138; *ibid.* (1958), *Yearbook of the European Convention on Human Rights: 1958–1959*, p. 344; *X.* against *Austria* (1959), *ibid.: 1960*, p. 202; Jiménez de Aréchaga, "International responsibility", p. 589; Amerasinghe, *Local Remedies …*, pp. 196–197; Brownlie, *op. cit.*, p. 499; Kokott, *loc. cit*., p. 622; Mummery, *loc. cit.*, p. 402; Law, *op. cit.*, p. 66; Cançado Trindade, *op. cit.*; *Restatement of the Law Second ...* (footnote 27 above), p. 618, para. 208; Doehring, p. 240; Schwarzenberger, *op. cit.*, p. 609; *Yearbook ... 1977* (footnote 70 above).

[76] Amerasinghe, *Local Remedies …*, p. 196.

[77] *Finnish Ships Arbitration* (see footnote 24 above), pp. 1496–1497; *Velásquez Rodríguez* case (see footnote 71 above), pp. 304–309; Borchard, *The Diplomatic Protection ...*, p. 332; Jennings and Watts, *op. cit.*, p. 525; Kokott, *loc. cit*., p. 622; *Yağci and Sargin* v. *Turkey* case, application No. 16426/90 (1995) European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 319, p. 17, para. 42; *Hornsby* v. *Greece* case, application No. 18357/91, European Court of Human Rights, *Reports of Judgments and Decisions*, No. 33 (1997–II), p. 509, para. 37; Mummery, *loc. cit.*, pp. 401–402; Cançado Trindade, *op. cit.*, pp. 76–78; Verdross and Simma, *op. cit.*, p. 884; art. 19, para. 2 (*a*) of the 1960 draft convention on the international responsibility of States for injuries to aliens prepared by the Harvard Law School, reproduced in Sohn and Baxter, "Responsibility of States for injuries to the economic interests of aliens", p. 577; Amerasinghe, *Local Remedies …*, pp. 198–199.

[78] Decision of 9 April 1996, ILR, vol. 107, p. 460.

[79] Resolution 01a/88, case 9755 (12 September 1988), *Annual Report of the Inter-American Commmission on Human Rights 1987–1988*, p. 137. See also Amerasinghe, *Local Remedies ...*, p. 200, and "Whither the local remedies rule?", p. 308; Borchard, *The Diplomatic Protection ...*, p. 822; Mummery, *loc. cit.*, p. 404; *Restatement of the Law Second ...* (footnote 27 above), p. 618, para. 208; Doehring, *loc. cit.*, p. 239; and Schwarzenberger, *op. cit.*, p. 609.

[80] Simpson and Fox, *op. cit.*, p. 114.

[81] Mummery states in this connection:

> "As international jurisprudence develops on this subject, the analysis of cases will call for the best skills of the discipline of comparative law; for the various jurisdictions of the common and civil law have developed differing concepts of what is essential to an effective municipal remedy, and from these concepts criteria may be extracted for the purposes of the international standard involved in the local remedies rule. Hence it is important to see all the cases in the context of an underlying, unifying principle of reasonableness." (*Loc. cit.*, p. 404)

ANNEX 169

The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners

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PART II

The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners

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RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS

ARTICLE 1

A state is responsible, as the term is used in this convention, when it has a duty to make reparation to another state for the injury sustained by the latter state as a consequence of an injury to its national.

ARTICLE 2

The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.

ARTICLE 3

A state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent to which the national government, according to its constitution, has control of the subdivision. For the purposes of this article, a dominion, a colony, a dependency, a protectorate, or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.

ARTICLE 4

A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a state has a duty to use the means at its disposal for the performance of these obligations.

ARTICLE 5

A state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals.

ARTICLE 6

A state is not ordinarily responsible (under a duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted.

ARTICLE 7

(a) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

(b) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if,

without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.

ARTICLE 8

(a) A state is responsible if an injury to an alien results from its nonperformance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

(b) A state is not responsible if an injury to an alien results from the nonperformance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.

ARTICLE 9

A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

ARTICLE 10

A state is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

ARTICLE 11

A state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice.

ARTICLE 12

A state is responsible if an injury to an alien results from an act of insurgents, if the state has failed to use due diligence to prevent the injury and if local remedies have been exhausted without adequate redress for such failure.

ARTICLE 13

(a) In the event of an unsuccessful revolution, a state is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the state of which the alien is a national.

(b) In the event of a successful revolution, the state whose government is established thereby is responsible under Article 7, if an injury to an alien

has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution.

ARTICLE 14

A state is responsible if an injury to an alien results from an act, committed within its territory, which is attributable to another state, only if it has failed to use due diligence to prevent such injury.

ARTICLE 15

(a) A state is responsible to another state which claims in behalf of one of its nationals only insofar as a beneficial interest in the claim has been continuously in one of its nationals down to the time of the presentation of the claim.

(b) A state is responsible to another state which claims in behalf of one who is not its national only if

(1) the beneficiary has lost its nationality by operation of law, or

(2) the interest in the claim has passed from a national to the beneficiary by operation of law.

ARTICLE 16

(a) A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national.

(b) A state is not relieved of responsibility if injury is sustained by a foreign corporation, or if a claim is made on behalf of a foreign corporation, because one or more of the shareholders of such corporation possessed or possesses its nationality.

(c) A state is not relieved of responsibility as a consequence of any provision in its own law that an alien should be considered its national for a particular purpose.

ARTICLE 17

A state is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the state of which he is a national.

ARTICLE 18

Any dispute between states parties to this convention, with respect to the interpretation or application of the provisions of this convention, which is not settled by negotiation and which is not referred to arbitration under a general or special arbitration treaty, shall be referred to the Permanent Court of International Justice, and may be brought before the Permanent Court of International Justice by either party to the dispute.

1444: "It is true that he had not the means of doing so, there being at hand no naval or military force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation." See also Eagleton, Responsibility of States (1928) 15–16 and authorities cited on *p. 16, note 32.*

ARTICLE 5

A state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals.

COMMENT

It is, of course, an admitted principle that an alien must comply with the local law. Apart from special treaty to the contrary, an alien establishing himself abroad must accept for his protection the institutions which the inhabitants of the state find suitable to themselves, and is subject to the local courts and authorities.

The alien should not only have the same protection as the national and be able to enjoy those rights which the local law may grant him, but he should have at least as effective means of redress for injuries as nationals have. The local law does not, of course, have to be uniform as to nationals and aliens. For example, it is quite possible for aliens to be denied the privilege of owning real estate; but if the alien is not protected in the enjoyment of those rights which the local law does grant him, an independent basis for an international claim is established, provided local remedies have been exhausted. The object of Article 5 is to indicate the minimum measure of the state's obligation. Under no circumstances is the redress given to aliens to be substantially less than that which is accorded to nationals. For example, if nationals may sue wrongdoing officers or even the state in its own courts, aliens should have the same privilege. Slight variations in form would not militate against the rule. For example, aliens may be required to give security for costs; and in some states, as in the United States, claims against the government may be conditioned upon evidence of reciprocity on the part of the claimant's state in permitting aliens to sue that state. Aliens may also occasionally sue in different courts. For example, in the United States they may sue in the federal courts. But in substance, the redress and means of redress available must not be less adequate than that which nationals possess.

The protection secured by the local law is, however, the minimum of the state's duty of protection. The redress afforded to nationals may be so inadequate that it will not satisfy the state's international obligation. In that event, the state may be under a duty to give to aliens a greater degree of redress than to nationals. Under normal conditions, if the alien receives equal treatment with the national, there would be no basis for international responsibility of the state.

Westlake, *Chapters on International Law*, 103; Pradier-Fodéré, Traité de Droit International, III, Sec. 1365; 7 Op. Atty. Gen. 229, 235 (Cushing).

Discriminations against the alien, such as graver punishment than that inflicted upon nationals, prejudicial irregularity in judicial proceedings, are dealt with under the head of Denial of Justice (Art. 9).

The article embodies in general the substance of Rules IV and VIII of the Institute of International Law, Article 1 of the Rio de Janeiro Project No. 16 and Articles 1, 2, and 4 on the status of aliens of the Havana Convention, 1928. Certain nations which have had claims brought against them most freely have insisted upon the conclusiveness of the doctrine of the equality of national and alien. As already observed, the general principle is admitted; but it is subject to qualifications which some states have either not admitted or been reluctant to admit. Certain states do admit that it is subject to the qualification of the establishment of a denial of justice, which they then undertake, however, to define in extremely narrow terms. Denial of justice will be dealt with more fully in Article 9.

The subjection of the alien to the local law and remedies is necessarily based upon the assumption that the local law and remedies measure up to the standard required by international law.

See Lord Palmerston, in Don Pacifico's case, 39 British and Foreign State Papers, 332 *et seq.* and Moore's Dig. VI, 681.

The charge against a country that its local law or remedies do not meet this standard is not a light one to make; and it would ordinarily be reserved for the most exceptional cases. The mere fact, for example, that a state adopts a system of land tenures different from that prevailing in the majority of countries, or that its system of property differs from that usual in the majority of countries, provided the system is uniformly applied to nationals and aliens alike, would not alone sustain the charge. International law should not be deemed to prohibit social experiments if undertaken in good faith, and not for the purpose of spoliation.

The International Conferences of American States in 1889 and 1901 passed a formal resolution, which subsequently found its way into constitutions and statutes of some of the Latin-American States, to the effect that foreigners had "the same civil rights as the citizens of the nation" and that "the American nations have not, nor do they recognize in favor of foreigners, any other obligations and responsibilities than those which by their laws they have toward their own citizens."

See article by Alvarez, *Latin-America and International Law*, 3 A. J. I. L. (1909), pp. 269, 329, 333.

The delegate of the United States to the first Conference of American States, 1889, Mr. Trescott, declined to subscribe to this resolution on the ground that it gave the alien "no right in protection of his interests other than such as the Government may have provided in the way of judicial trial or executive appeal to its own citizens and this principle once admitted, of course there follows the absolute exclusion of diplomatic reclamation."

Report of Mr. Trescott in Sen. Ex. Doc. 224, 51st Cong., 1st sess., 28–29.

The United States has usually denied that an alien who acquires a residence in a country does so at his peril and assumes the risk of ill-treatment or injury identically with citizens.

Mr. Bayard, Secretary of State, to Mr. Buck, Minister to Peru, Aug. 24, 1886, Moore's Dig. VI, 252, in case of United States citizen Young, killed in Peru, in 1884, by a Peruvian soldier. See also Eagleton, Responsibility of States in International Law, p. 83, note 25.

It has been argued that one reason why the alien is not bound to submit to unjust and unredressed treatment equally with nationals is because the latter is presumed to have a political remedy, whereas the alien's inability to exercise political rights deprives him of one of the principal safeguards of the citizen. In place thereof, the alien may initiate an international claim.

See brief of J. B. Moore in *Constancia Sugar Refg. Co.* v. *United States*, No. 196, before Spanish Treaty Claims Commission. See also Pinheiro-Ferreira in Pradier-Fodéré, I, sec. 405.

Thus, a state is not obliged to accept for its nationals the treatment accorded to citizens if that treatment can be shown to be in violation of the ordinary principles of civilized justice, notwithstanding the fact that the citizen may have no immediate remedy against the injustice. The alien, in the case assumed, would not have had the protection required by international law.

ARTICLE 6

A state is not ordinarily responsible (under a duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted.

COMMENT

When a state is entitled to reparation from another state it is because the claimant state has suffered an injury to itself. The loss or damage sustained by the claimant state's national is not directly the reason for the defendant state's responsibility and responsibility will not always arise where an alien sustains loss or damage. The state in which he is injured may offer to the alien himself adequate means of redress for the damage which he suffers. In this case no injury will be suffered by the alien state and no duty to make reparation from state to state (international responsibility) will arise. The question must always be answered, therefore, whether the claimant state has been injured and ordinarily, though not necessarily always, it is a condition precedent to establishing such injury that it should be shown that the national of the claimant state has exhausted the local remedies which were made available to him by the law of the state from which he is alleged to have suffered injury. Article 5 posits the duty of a state to make available to the

given rise to responsibility, notwithstanding the contractual origin of the claim.

Lord John Russell, British Foreign Sec'y, to Sir C. L. Wyke, Mar. 30, 1861, 52 St. Pap. 238, quoted also in Moore's Dig. VI, 719; *Claim of Waring Brothers, railroad contractors (Gt. Brit.)* v. *Brazil,* in which Great Britain insisted on the carrying out by Brazil of a decree which appropriated an indemnity for the loss sustained by the Waring Brothers due to the government's rescission of the contract, Moore's Dig. VI, 720–721, For. Rel., 1887, 54, 55. *Sparrow claim* v. *Peru,* For. Rel., 1895, II, 1036–1055; 1896, 492–494. The French claims against Venezuela liquidated under the convention of July 29, 1864, Moore's Dig. VI, 711–712. See also the settlement of the claim of *W. R. Grace (U. S.)* v. *Peru,* in which the failure of the government to pay a judgment against it was construed as a denial of justice warranting diplomatic interposition. Mr. Neill to Mr. Hay, Sec'y of State, Nov. 19, 1903, For. Rel., 1904, 678.

6. It need hardly be added that contract claims have been freely submitted to international arbitration and that claims commissions have interpreted the protocols conferring jurisdiction broadly so as to include contract claims.

See Hyde, International Law (1922), I, 559; Eagleton, *op. cit.* Ch. VII; and the recent case of *Illinois Central Railroad Co. (U. S.)* v. *Mexico,* Sept. 8, 1923, Opinions of the Commission, 15.

ARTICLE 9

A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

COMMENT

A state has a duty under international law to administer justice with respect to aliens, and the failure to perform this duty may result in its becoming responsible to other states of which such aliens are nationals. A denial of justice may arise in various ways. An alien may be denied access to the courts or the administration of justice may be polluted by corruption, negligence or intentional wrongdoing, or he may be denied those guaranties which have generally been deemed indispensable to the effective administration of justice. The term "justice" is used in the sense of the administration of the remedial process, which though usually in the hands of courts and judicial authorities may occasionally be vested in administrative or executive officials. An exact definition seems neither possible nor advisable.

The claimant's state should not, and generally does not, make representations in the causes of its citizens brought before 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. This comment, therefore, will undertake to set out a number of precedents which indicate under what circumstances a denial of justice may be said to have occurred.

The Guerrero draft defines "denial of justice" as a "refusal 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.'"

The Institute defines the term as follows:

1. "When the tribunals necessary to assure protection to foreigners do not exist or do not function." [This contingency is dealt with under Article 4 of the present convention.]

2. "When the tribunals are not accessible to foreigners." [This presumably is embodied in the first proposal of the Guerrero draft.]

3. "When the tribunals do not offer the guaranties which are indispensable to the proper administration of justice." [This possibility would not be excluded by the Guerrero draft, but it does not mention it. This provision is quite general, and does not clearly indicate whether the "offer" of "guaranties" presupposes a general condition of defective justice, or an ineffective administration of justice in a particular case.]

Article 6 of the Institute draft provides that "the State is likewise responsible if the procedure or the judgment is manifestly unjust, especially if it has been inspired by ill-will toward foreigners, as such, or as citizens of a particular state." Perhaps the inclusion of "manifestly unjust" "procedure" would cover the case of specific maladministration of justice in a particular case. In the present draft "a manifestly unjust judgment" has been assimilated to a denial of justice. What is meant by the term will be explained below.

Denial of justice has been used popularly in several senses. On the one hand it has been employed as an expression equivalent to international wrongdoing or international delinquency or some outrageous act attributable to the State. This view seems somewhat too broad and it has seemed preferable to employ the term in a narrower sense, indicating some serious defect in the administration of the remedial process. In the *Janes* and in the *Chattin* cases before the Mixed Claims Commission, United States and Mexico (Opinions of the Commission, page 108, 427) an exhaustive discussion of the term took place. The presiding commissioner favored the view that the term should be employed only to describe a gross deficiency in the administration of justice when invoked by the alien as a plaintiff, or in the prosecution by the state of a wrongdoing individual or subordinate officer who is charged with having injured an alien. This seems somewhat too narrow a use of the term, for the alien may well be denied justice even when he is a

defendant. In a general way, the failure to apprehend a criminal, denial of free access to the courts, failure to render a decision or undue delay in rendering judgment, corruption in the judicial proceedings, discrimination or ill-will against the alien as such, or as a national of a particular state, the refusal in bad faith to apply the local law, executive or legislative interference with the freedom or impartiality of the judicial process, failure to execute the judgment, denial of an appeal where local law ordinarily permits it, negligently permitting a prisoner to escape, refusal to prosecute the guilty, or the premature pardon of a convicted person, have all been deemed, under particular circumstances, instances of "denial of justice." Precedents will be cited hereafter.

The article of the Institute of International Law on this subject is fairly broad. It includes inadequacy of tribunals insuring protection to foreigners, inaccessibility to such tribunals, and a lack of the ordinary guaranties for the proper administration of justice. The Institute rules also impose, as distinct from denial of justice, responsibility for a "manifestly unjust" procedure or judgment, especially if inspired by ill-will toward foreigners or particular foreigners.

This enumeration, like the rule in the text, seeks to attain a description or definition of "bad faith" or gross defectiveness in the judicial or remedial process. For mere error (not involving bad faith) of courts, functioning properly in applying local law, no one has suggested international responsibility.

> See Pomeroy, Lectures on International Law in Time of Peace (Woolsey's ed. 1886), p. 249, to the effect that no state warrants "the infallibility of its own tribunals." See also Anzilotti in 13 R. G. D. I. P. (1906) 22.

Where administrative officials deny or block access to the courts, responsibility would, of course, be incurred under the rules stated.

The views adopted in the Guerrero draft and report are quite different. Conclusions 6 and 7 read as follows (appendix No. 7):

> "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.*"

These rules proceed from the belief that a state has fully complied with its international duties, if it establishes independent courts for the administration of justice. No matter what the decision, even if intentionally erroneous and though it grossly misinterpret the law, and though it be "unjust" or "manifestly unjust," foreigners have, according to the proposals of the report, no ground to complain or seek an appeal to the diplomatic or international forum. To do so, would be to infringe the "sovereignty" of the state. Only if the state provides no courts, or if it refuses foreigners access to the courts on the same terms with nationals (*cautio judicatum solvi* excepted?), or if the court refuses to proceed with the case or render a decision, is a "denial of justice" established, entailing international responsibility. The mere rendering of a decision, regardless of its character, refutes the possibility of a "denial of justice." Delay would not be equivalent to a denial of justice.

This view has been occasionally advanced in diplomatic controversy, but it is not generally accepted. It seems unlikely that a mere argument based on the "equality of states" and "sovereignty" will persuade all states to bind themselves to such narrow definition of "denial of justice." This convention has adopted a broader definition under which states whose administration of justice invites general confidence, will seldom be responsible.

Errors of Courts. The Department of State of the United States has on a number of occasions expressed its adherence to the rule of this convention that a government is not responsible for the mistakes or errors of its courts not constituting a denial of justice.

> Mr. Marcy, Sec'y of State, to Chevalier Bertinatti, Dec. 1, 1856, Moore's Dig. VI, 748 (court exceeding jurisdiction). See also Mr. Marcy, Sec'y of State, to Baron de Kalb, July 20, 1855, 2 Wharton's Dig. 505, and Mr. Bayard, Sec'y of State, to Mr. Morrow, Feb. 17, 1886, Moore's Dig. VI, 280. Manfield's opinion in the Silesian loan case, cited by Randolph, Atty. Gen., in Pagan's case, 1 Op. Atty. Gen. 25, 32. Mr. J. C. B. Davis to Mr. Chase, Jan. 10, 1870, Moore's Dig., 6, 750; *United States* v. *Dunningham*, 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. See also the correspondence of Lord Salisbury and Lord Granville (1879–1881) in the case of the *City of Mecca*, held liable by a Portuguese court for negligently sinking a Portuguese steamer eighteen miles off the Tagus River, 74 Brit. and For. St. Pap. 1163 ff., summarized by Baty, International Law 172–175.
>
> The rule has been supported by international tribunals. *Barron, Forbes and Co. (Gt. Brit.)* v. *United States*, 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 Mss. Dept. of State (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 Hertslet'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 responsibility. In addition, the government declined to investigate, on remonstrance.

Professor de Martens in the Costa Rica Packet case, 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.

Costa Rica Packet (Gt. Brit.) v. *Netherlands*, May 16, 1895, Moore's Arb. 4948–4954; 89 Br. & For. St. Pap. 1181, *et seq.*, 1284.

Few arbitral awards have been more severely criticized than the decision in the Costa Rica Packet case.

Baty, International Law, 197, 227–231. See also the following articles on the case: A. E. Bles in 28 R. D. I. (1896), 452–468; Jules Valery in 5 R. G. D. I. P. (1898), 57–66; Gustave Regelsperger in 4 *ibid.* (1897); Tchernoff, *op. cit.*, 290. See also reference to the correspondence arising out of the decision of a Portuguese court in the case of the British S. S. *City of Mecca, supra.*,

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,

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 edition, section 391. This view is approved by Wheaton and Triepel.

the failure of the higher courts to disapprove violations of national or international law by minor officials or other authorities has served to render the state responsible.

Many decisions of prize courts support unlawful captures. Dana's Wheaton, secs. 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 Br. & For. St. Pap. 838, and Danish indemnities under treaty of March 28, 1830, Dana's Wheaton, sec. 397.

A flagrant or notorious injustice is not easily distinguishable from a denial of justice. In this convention the two are assimilated.

While in theory an unjust judgment reached by proper observance of national law and the forms of civilized justice does not render the state responsible, it will be noticed hereafter under the head of "manifestly unjust judgment" (infra, p. 61) that the rule is subject to the qualification that the unjust judgment be not a travesty upon justice or grotesquely unjust, in which event state responsibility may be incurred.

The judgment of a court in violation of a treaty

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 Br. & For. St. Pap. 841; La Fontaine, 377–385.

or of international law serves to render the state responsible.

See Costa Rica Packet Case, *supra* and Article 2 of this convention.

The regularity of a court's practice and procedure are to be judged in first instance by the local law. For example, 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 reasonable principles 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.

E.g., in *Trumbull (Chile)* v. *United States*, 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'y of State, to the President in Thrasher's case, 2 Wharton 613, and other extracts in 2 Wharton, secs. 230 and 230a.

As in the case of other officials the state is responsible in the case of wrongful acts of its judges or courts which it negligently fails to prevent or punish, or against which judicial recourse is closed to the injured individual.

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 the 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, sections 339, 340; Calvo, I, sec. 348; Pradier-Fodéré, I, section 402; Bluntschli, sec. 340.

Conditions Incident to Responsibility. It is interesting to observe that a claimant government has occasionally undertaken to determine for itself whether a denial of justice has taken place as a condition of the espousal of a claim. Thus, Secretary of State 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." 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, Moore's Dig. VI, 668.

It has also sometimes been denied that the defendant state can judge whether a denial of justice has taken place. Thus, Secretary of State Blaine 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." Mr. Blaine, Sec'y of State, to Mr. Dougherty, Jan. 5, 1891, Moore's Dig. VI, 805.

Before taking up specific examples of denial of justice in international practice, it may be well to recall certain fundamental 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.

Mr. Forsyth, Sec'y of State, to Mr. Semple, Feb. 12, 1839, 6 Moore's Digest, 249.

Secretary of State Bayard in 1886 stated 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."
>
> Mr. Bayard, Sec'y of State, to Mr. Morrow, Feb. 17, 1886, Moore's Dig. VI, 280, 2 Wharton 649. See also Grotius III, ch. 2, sec. 5; Vattel, II, ch. 18, sec. 350; Pradier-Fodéré, sec. 403; G. F. de Martens, Précis, sec. 96; Baty, 163, *et seq.*, 172, 233; Phillimore, 3rd ed. II, 4.

The limitations implied in the latter principle must be clearly understood. They restrict formal claims 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 different from that applied in American courts; *e.g.*, the inquisitorial system prevails in many countries, and trial by jury, habeas corpus and certain safeguards which American laws provide for the benefit of the accused are unknown.

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, sec. 230a.

Yet an American national who resorts to such a country is bound to submit to its law and judicial system, and his own government is justified in advancing an international claim 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 subverted by the courts so as to discriminate against him as an alien or otherwise to perpetrate a technical denial of justice.

See *e.g.*, Mr. Marcy, Sec'y of State, to Mr. Fay, Nov. 16, 1855, 6 Moore's Dig., 655. Same to Mr. Jackson, Apr. 6, 1855, *ibid.* 275. Same to Mr. Starkweather, Aug. 24, 1855, *ibid.* 264.

Treaties usually stipulate that nationals 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 are provided by the local law for natives. But apart from treaty obligations, aliens must be accorded appropriate judicial recourse for the due protection of their rights. (See Article 5.)

Even those states which seek to confine the diplomatic interposition of foreign governments on behalf of their nationals to the narrowest limits admit that a denial or undue delay of justice is a valid ground for such interposition. 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."

Honduras, Law of April 10, 1895, Art. 35, 87 Brit. & For. St. Pap. 706; Salvador, Law of Sept. 29, 1886, Arts. 39, 40 and 41, 77 Brit. & For. St. Pap. 116–118, For. Rel. 1887, 69 *et seq.* See 6 Moore's Dig., 267, *et seq.*

The law of Salvador of September 29, 1886, for example, provides (Art. 40):

> "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 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 not 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."

Mr. Bayard to Mr. Hall, November 29, 1886, For. Rel. 1887, 80–81.

It is hardly to be supposed that any other state, even among those which have concluded treaties providing for a renunciation of diplomatic claims in all cases except denial of justice,

See treaty between Germany and Mexico, Dec. 5, 1882, Art. 18, 59 Marten's N. R. G., 474; treaty between Sweden and Norway and Mexico, July 29, 1885, Art. 21, 63 *ibid.* 690; France and Mexico, Nov. 27, 1886, Art. 1, 65 *ibid.* 843; Germany and Colombia, July 23, 1892, Art. 20, 69 *ibid.* 842; Italy and Colombia, Oct. 27, 1892, Art. 21, 72 *ibid.* 313; Spain and Peru, July 16, 1897, Art. 6, 12 Olivart Coleccion, 348; France and Venezuela, Nov. 26, 1885, Art. 5, 62 Martens 684; United States and Peru, Sept. 6, 1870, Art. 37, 51 Martens 107; Great Britain and Bolivia, August 1, 1911, Art. 10, British Treaty Series, 1912, p. 223.

Art. 3 of the Convention on the rights of aliens adopted by the Second International Conference of American States, 1901, provides: "Wherever an alien shall have claims or complaints either civil, criminal or administrative, whether against a state or its citizens, he shall present his claims to a competent court of the country and such claims shall not be made through diplomatic channels except in the cases where there shall have been on the part of the court a manifest denial of justice or unusual delay, or evident violation of the principles of international law." (Sen. Doc. 330, 57th Cong., 1st sess., 228.)

would consider itself bound by a municipal legislative definition or interpretation of the term "denial of justice." Diplomatic representations against these municipal laws have in fact been made.

Denial of Justice in International Practice. The absence of any impartial tribunal from which justice may be sought,

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, 1886, 6 Moore's Dig., 267.

the arbitrary control of the courts by the government,

Idler (*U. S.*) v. *Venezuela*, Dec. 5, 1885, Moore's Arb. 3517; *Neer* (*U. S.*) v. *Mexico*, Sept. 8, 1923, Opinions, 78 (dictum); *Chattin* (*U. S.*) v. *Mexico*, *ibid.* 427.

the inability or unwillingness of the courts to entertain and adjudicate upon the grievances of a foreigner,

Phillimore, II, 4, cited by Mr. Bayard, Sec'y of State, to Mr. McLane, June 23, 1886, 6 Moore's Dig., 266; *Tagliaferro* (*Italy*) v. *Venezuela*, Feb. 13, 1903, Ralston, 765; *Swinney* (*U. S.*) v. *Mexico*, Sept. 8, 1923, Opinions, 131.

or the use of the courts as instruments to oppress aliens and deprive them of their just rights,

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, 6 Moore's Dig., 273; Mr. Marcy, Sec'y of State, to Mr. Clay, May 24, 1855, *ibid.* 659.

have all been regarded as denial of justice, 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.

Fabiani (*France*) v. *Venezuela*, Feb. 24, 1891, Moore's Arb. 4878 at 4895.

Such denial of justice may result from the action of authorities acting in a judicial or quasi-judicial capacity.

Akerman. Atty. Gen., in 13 Op. Atty, Gen. 547; *Poggioli* (*Italy*) v. *Venezuela*, Feb. 13, 1903, Ralston, 869; *Neer* (*U. S.*) v. *Mexico*, Sept. 8, 1923, Opinions, 78.

The cases are very diverse in which a denial of justice has been asserted to exist by the government of an injured individual or by an arbitral commission. The cases fall roughly into three groups: (1) the denial of justice arising prior to the trial or hearing of a case; (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, which have been construed as a denial of justice.

Among the first class of acts, in which denial of justice has been predicated upon wrongs inflicted by governmental authorities prior to trial, in wilful disregard of due process of law, may be mentioned the arbitrary annulment of concession contracts without recourse to judicial proceedings; the seizure or confiscation of property without legal process;

2 Wharton, sec. 235, For. Rel., 1885, 525 (trespasses and evictions); Mr. Bayard, Sec'y of State, to Mr. Thompson, Mar. 9, 1886, 6 Moore's Dig., 704; Mr. Bayard, Sec'y of State, to Mr. Buck, Jan. 19, 1888, *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).

unlawful arrest or detention of a person; the unduly long detention or imprisonment without trial or allegation of offense of persons accused of crime,

Mr. Frelinghuysen, Sec'y of State, to Mr. Lowell, Apr. 25, 1882, For. Rel., 1882, 230, 6 Moore's Dig. 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; *Faulkner* (*U. S.*) v. *Mexico*, Sept. 8, 1923, Opinions, 86.

either in violation of municipal law

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, ms. Opinions, 312 (not in Moore).

or of treaty;

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.

the execution of an accused person without trial;

Portuondo (*U. S.*) v. *Spain,* Feb. 12, 1871, Moore's Arb. 3307.

the detention and confiscation of vessels without legal process;

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).

inexcusable delay in investigating the circumstances of a charged offense preliminary to a criminal prosecution;

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; *Faulkner* (*U. S.*) v. *Mexico,* Sept. 8, 1923, Opinions, 86; *Roper* (*U. S.*) v. *Mexico, ibid.* 210; *Richards* (*U. S.*) v. *Mexico, ibid.* 412.

permitting a guilty person to escape or failure to institute proceedings against such a person;

Cases of Robert, in 1876 and of Captain Cornwall in 1871, G. de Leval, Protection des Nationaux à l'Etranger, sec. 99; *Janes* (*U. S.*) v. *Mexico,* Sept. 8, 1923, Opinions, 108; *Richards* (*U. S.*) v. *Mexico, ibid.* 412; *Galvan* (*Mexico*) v. *United States, ibid.* 408; *Massey* (*U. S.*) v. *Mexico, ibid.* 228.

the intentional obstruction of claimant's attempt to obtain judicial redress;

Mr. Evarts, Sec'y of State, to Mr. Fairchild, Jan. 17, 1881, 6 Moore's Dig., 656; *Ballistini* (*France*) v. *Venezuela,* Feb. 19, 1902, Ralston, 503.

unlawful change of venue;

Bark Jones (*U. S.*) v. *Great Britain,* Feb. 8, 1853, Moore's Arb. 3048 (Opinion by Upham).

fixing an unreasonably brief time in which to sue;

Mr. Hay, Sec'y of State, to Mr. Dudley, Mar. 28, 1899, 6 Moore's Dig., 1003.

or illegal change in the personnel of the court or the use of other unlawful means to influence the court's decision.

Idler (*U. S.*) v. *Venezuela,* Dec. 5, 1885, Moore's Arb. 3517.

The acts which have been asserted to constitute denial of justice 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 injustice,

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, 1886, 6 Moore's Dig. 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, 1885, 6 Moore's Dig., 666–668 (United States did not press this case to successful settlement). Dictum in *Neer* (*U. S.*) v. *Mexico*, Sept. 8, 1923, Opinions, 78.

or in violation of the settled forms of law or of those rules for the maintenance of justice which are sanctioned by international law,

Vattel, Chitty-Ingraham ed., 165; Mr. Bayard, Sec'y of State, to Mr. Morrow, Feb. 17, 1886, 6 Moore's Dig. 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; *Chattin* (*U. S.*) v. *Mexico*, Sept. 8, 1923, Opinions, 422.

have been held to create responsibility. Thus, for example, a violation of the rules of municipal procedure or of treaties, by which injustice is perpetuated or an alien is unduly discriminated against;

Mr. Marcy, Sec'y of State, to Mr. Fay, Nov. 16, 1855, 6 Moore's Dig., 655; Mr. Marcy to Baron de Kalb, July 20, 1855, 2 Wharton, 505; Mr. Bayard to Mr. Morrow, Feb. 17, 1886, 6 Moore's Dig., 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 wrongful invoking of obsolete remedy by government ending claimant's litigation in court); *Brig 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); *Pradel* (*U. S.*) v. *Mexico*, July 4, 1868, *ibid.* 3141 (fine in course of illegal trial). 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. See *Bullis* (*U. S.*) v. *Venezuela*, Feb. 17, 1903, Ralston, 169, 170 (dictum) for criteria of denial of justice.

by the refusal to hear testimony on behalf of a defendant charged with crime,

Mr. Conrad, Acting Sec'y of State, to Mr. Peyton, Oct. 12, 1852, 2 Wharton, 613, 6 Moore's Dig., 275; Mr. Bayard to Mr. Jackson, Sept. 7, 1886, 6 Moore's Dig., 680; *The Schooner Good Intent* v. *United States*, 36 Ct. Cl. 262.

or an undue or needless delay in the trial or decision of a case,

Mr. Frelinghuysen, Sec'y of State, to Mr. Morgan, Mar. 5, 1884, 6 Moore's Dig., 277, 2 Wharton, 637; Protocol between France and Venezuela, Feb. 11, 1913, Suppl. to 7 A. J. I. L. 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; *Chattin* (*U. S.*) v. *Mexico*, Sept. 8, 1923, Opinions, 422.

have all been construed as denials of justice. 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 its nationals have not been considered as a ground for interposition by the United States.

Mr. Marcy, Sec'y of State, to Mr. Starkweather, Aug. 24, 1855, 6 Moore's Dig., 264; Mr. Olney, Sec'y of State, to the President, Feb. 5, 1896, For. Rel., 1895, I, 257.

It may not always be easy to determine when an irregularity is sufficiently gross so as to become a denial of justice.

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.

A denial of justice after trial has been held to occur when the proper authorities have refused to execute the laws as interpreted by the courts or to give effect to the decisions of the courts;

E.g., neglect or refusal to execute judgment. *Montano* (*Peru*) v. *United States*, 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; *Polak* v. *Egypt*, *3 Clunet* (1876) 499; *Lord Nelson* (*Gt. Brit.*) v. *United States*, Aug. 18, 1910, Nielsen's Report 432; *Putnam* (*U. S.*) v. *Mexico*, Sept. 8, 1923, Opinions, p. 222; *Youmans* (*U. S.*) v. *Mexico*, *ibid.* 150; *Mallen* (*Mexico*) v. *United States*, *ibid.* 254; *Venable* (*U. S.*) v. *Mexico*, *ibid.* 329, 369.

when they have failed to punish guilty offenders, or have meted out inadequate punishment; when they have granted a pardon or amnesty by which the alien plaintiff was deprived of redress; when they have unlawfully prevented an appeal by the alien;

Garrison (*U. S.*) v. *Mexico*, July 4, 1868, Moore's Arb. 3129; *West* (*U. S.*) v. *Mexico*, Sept. 8, 1923, Opinions, 404; *Kennedy* (*U. S.*) v. *Mexico*, *ibid.* 289; *Mallen* (*Mexico*) v. *United States*, *ibid.* 254; *Massey* (*U. S.*) v. *Mexico*, *ibid.* 228; *Putnam* (*U. S.*) v. *Mexico*, *ibid.* 222.

or have inflicted unnecessarily harsh, cruel, or arbitrary punishment upon an alien.

A grossly unfair or notoriously unjust decision has been considered a denial of justice.

Mr. Evarts, Sec'y of State, to Mr. Foster, April 19, 1879, 6 Moore's Dig., 696 (collusive judgment); *Bronner* (*U. S.*) v. *Mexico*, July 4, 1868, Moore's Arb. 3134; *Barron* (*Gt. Brit.*) v. *United States*, 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* (1828), 1 Peters, 193.

According to the older writers, a judicial sentence notoriously unjust, to the prejudice of an alien, entitles his state to demand reparation.

Pradier-Fodéré, note to edition of Vattel, II, c. 18, Sec. 351; Wheaton, Dana's ed., secs. 391–393, quoting Grotius, Bynkershoek, and Vattel. (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.)

Manifestly Unjust Judgment. One of the most difficult questions in international practice involves the extent to which an unjust judgment of a municipal court is internationally conclusive. As already observed, when the court merely errs as to fact or the interpretation of its municipal law there appears to be, on principle, no ground for asserting responsibility, provided the court was competent and observed the regular forms of law.

Grotius, Bk. III, ch. 7, sec. 84; Vattel, II, ch. 18, sec. 350; Klüber, 2nd ed., 1874, sec. 57; Fiore, Dr. int. pub., Antoine's trans., secs. 404–405; G. F. de Martens, Précis du droit des gens, sec. 94; Pradier-Fodéré, I, sec. 403; Pomeroy, Boston ed. (1886); Woolsey, sec. 205; Baty, 1909 ed., 77 *et seq.*

Given good faith, a fair opportunity to the alien to be heard, and the absence of discrimination between national and alien, it would seem that the judgment of a national court interpreting national law is and ought to be conclusive, even if there is error, and that the State incurs no responsibility. In practice, however, governments have often protested against the judgments of foreign courts affecting their nationals which they considered grossly unjust. The present draft assimilates manifestly unjust judgments to denial of justice.

Responsibility because of a manifestly unjust judgment reached by the observance of the regular forms of law is not common, but it is asserted more frequently in the diplomatic prosecution of claims than in the decisions of arbitral tribunals. 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.

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 a valid ground of international reclamation, was published by A. de Busschere, the Belgian jurist, in 3 Rev. de derecho y legislacion (Caracas, Oct., 1913), pp. 3–6. European governments have generally considered "notorious injustice" a ground for reclamation.

The effect of a notoriously unjust judgment is discussed in *Chattin (U. S.)* v. *Mexico*, Sept. 8, 1923, opinions of the U. S. Mexican Commission, p. 422; *Cotesworth and Powell (Great Britain)* v. *Colombia* (1872), Moore's Arb., 2050, 2057, 2083. See also *Brown (U. S.)* v. *Great Britain* (1910), Nielsen's Report, 187, 198.

ARTICLE 10

A state is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

COMMENT

It is the duty of a state to exercise due diligence to prevent injury to aliens. Its failure to exercise this diligence, if unredressed, renders it responsible. Remedies afforded by local law to redress the failure must ordinarily be resorted to (Article 6); but as the injury is in this case due to the state's own lack of diligence, mere failure of redress, which may not be a denial of justice, should suffice to found an international claim for reparation.

"Due diligence" assumes that the state has jurisdiction to act. It would usually be impossible for a state to take measures to prevent injuries from being inflicted by its nationals in the territory of other states. The phrase "due diligence" implies, therefore, jurisdiction to take measures of prevention as well as an opportunity for the state to act, consequent upon knowledge of impending injury or circumstances which would justify an expectation of probable injury. Due diligence is a standard, and not a definition. Specific applications of the standard are provided for in Articles 11, 12, and 14 of this convention.

A greater degree of care and protection, usually by reason of treaty, but even without treaty, would ordinarily be demanded if the injured alien is the representative of another state, either the head of state or a public minister or consul. It is thus generally easier to show lack of due diligence when the injured alien is a public minister or consul; when, however, as often happens, the attack upon a public minister or consul is spontaneous and clearly occurs without any negligence on the part of the Government, it is hard to find a legal basis for any modification of the usual rule that a state is responsible only for some fault or delinquency of its own. Reparation has sometimes been made in such cases as a result of political considerations.

The failure of a state to use due diligence to prevent injury to an alien is a well-recognized ground of responsibility.

Grotius, liv. II, ch. 17; *Hubbell, et al.* v. *United States*, 15 Ct. Cl. 546 (Chinese indemnity); the case of the *Alabama*, in which Great Britain was held liable for failing to prevent individuals from violating British neutrality, 6 Moore's Dig., 999; *Evertsz (Netherlands)* v. *Venezuela*, Feb. 28,

ANNEX 170

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-9/87
OF OCTOBRER 6, 1987

JUDICIAL GUARANTEES IN STATES OF EMERGENCY
(ARTS. 27(2), 25 AND 8
AMERICAN CONVENTION ON HUMAN RIGHTS)

REQUESTED BY THE GOVERNMENT OF URUGUAY

Present:

Rafael Nieto-Navia, President
Héctor Gros Espiell, Vice President
Rodolfo E. Piza E., Judge
Thomas Buergenthal, Judge
Pedro Nikken, Judge
Héctor Fix-Zamudio, Judge

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. By note of September 17, 1986, the Government of Uruguay (hereinafter "the Government") submitted to the Inter-American Court of Human Rights (hereinafter "the Court") an advisory opinion request on the scope of the prohibition of the suspension of the judicial guarantees essential for the protection of the rights mentioned in Article 27(2) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention").

2. The Government asked the Court "to interpret the scope of the Convention's prohibition of the suspension of 'the judicial guarantees essential for the protection of such rights.' Because even 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party' (Art. 27(1)) it is not possible to suspend 'the judicial guarantees essential for the protection of such rights,' the Government of Uruguay requests the Court's opinion, in particular, regarding: (a)

which of these judicial guarantees are 'essential' and (b) the relationship between Article 27(2), in that regard, and Articles 25 and 8 of the American Convention. "

3. By note of October 29, 1986, acting pursuant to Article 52 of the Rules of Procedure of the Court (hereinafter "the Rules"), the Secretariat requested written observations on the issues involved in the instant proceedings from the Member States of the Organization of American States (hereinafter "the OAS") as well as, through the Secretary General, from the organs listed in Chapter X of the Charter of the OAS.

4. By telex of April 1, 1987, the President asked the Government, pursuant to Article 49(2)(a) of the Rules, to present any additional considerations or reasons that it took into account in deciding to request the advisory opinion. The Government responded by telex of April 24, 1987, in which it expressed the following:

> Under normal circumstances in democratic systems of law in which human rights are respected and regulated, the judicial protection afforded by internal norms is generally recognized in practice.
>
> This is not the case in those systems or situations in which the violation of fundamental rights is not only of a substantive nature but also affects the judicial guarantees which have developed alongside them.
>
> As recognized by the Inter-American Commission and by the Inter-American Court of Human Rights in its Advisory Opinion OC-8, of January 30, 1987, the political history of Latin America shows that it is during states of exception or of emergency that the failure of these judicial guarantees is most serious insofar as the protection of the rights that cannot be suspended even in such situations.

5. On that same date, the Government appointed Dr. Didier Opertti, Director of the Legal Adviser's Office of the Ministry of Foreign Affairs, as its Agent.

6. The President of the Court directed that the written submissions and other relevant documents be filed with the Secretariat before January 26, 1987. He later extended this deadline to June 8, 1987.

7. The Governments of Bolivia and Panama replied to the communication from the Secretariat.

8. The International Human Rights Law Group, the International Commission of Jurists, the Lawyers Committee for Human Rights and Amnesty International, all non-governmental organizations, submitted **amicus curiae** briefs.

9. The Court set a public hearing for June 18, 1987 for the purpose of enabling the Member States and OAS organs to present to the Court their arguments on the issues raised in the request for an advisory opinion. It continued the hearing at the Government's request made by telex of June 12, 1987.

10. By telex of September 22, 1987, the Government made the following clarifications regarding the continuance of the hearing originally set for June 18, 1987, and the telex of the President of the Court, dated June 16, 1987:

> 1. The scope of the request by the Government of Uruguay refers, specifically, to the interpretation of the expression "essential" judicial guarantees found in Article 27 (2) of the American Convention on Human Rights, as related to Articles 25 and 8 of the Convention.
>
> 2. In the opinion of the Government of Uruguay, the definition of the scope of that expression for the purposes of international law and in particular of the American Convention is without prejudice to that of the legal system of the State requesting the opinion and its condition as a democratic State.

11. That telex does not modify the terms of the request as they were originally presented. Paragraph one reiterates the questions posed and the second paragraph merely reserves the point of view of the Government.

I
PROCEDURE

12. The Court continued the public hearing set for June 18, 1987, at the Government's request. Since the Government has already informed the Court by telex of the clarifications it deemed necessary, the Court finds that setting another hearing would serve no purpose and that it should take up consideration of the request for an advisory opinion without further delay.

II
ADMISSIBILITY

13. The Government has submitted this request under the authority of Article 64(1) of the Convention. Uruguay is a Member State of the OAS and,therefore, has the right to submit requests for advisory opinions to the Court.

14. The second question posed by the Government refers specifically to the interpretation of norms of the Convention, being the relationship among Articles 27(2), 25 and 8 Therefore, the request falls within the subject matter suitable for an advisory opinion, that is, "the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." (Art. 64(1)).

15. The Court finds, therefore, that the request meets the requirements of admissibility.

16. The terms of the request and the considerations which, according to the Government, prompted the request, show that the matter submitted to the Court is a juridical question which does not refer, specifically or concretely, to any particular fact situation. The Court recognizes that these circumstances could, in certain cases, lead it to make use of the discretionary powers implied in its advisory jurisdiction and to abstain from responding to a request formulated in those terms (**"Other treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights**), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 30 and **Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights**), Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 10). As the Court has said, the advisory jurisdiction of the Court is "an alternative judicial method" (**Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American**

Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 43) for the protection of internationally recognized human rights, which shows that this jurisdiction should not, in principle, be used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion.

17. Nevertheless, the question raised in the request of the Government is related to a specific juridical, historical and political context, in that states of exception or emergency, and of human rights and the essential judicial guarantees in those moments, is a critical problem in the Americas. From that perspective, the Court understands that its opinion could be useful within a reality in which the basic principles of the system have often been questioned. Therefore, it sees no reason to refrain from rendering an opinion. Thus, the Court admits the request.

III
THE MERITS

18. The Government's request refers to Article 27 of the Convention which reads as follows:

> **Article 27. Suspension of Guarantees**
>
> 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
>
> 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from **Ex Post Facto** laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
>
> 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

19. The Government makes the following request:

> 3. The Government of Uruguay asks the Court to interpret the scope of the Convention's prohibition of the suspension of "the judicial guarantees essential for the protection of such rights."

> Because even "in time of war, public danger, or other emergency that threatens the independence or security of a State Party" (Art. 27(1)) it is not possible to suspend "the judicial guarantees essential for the protection of such rights," the Government of Uruguay requests the Court's opinion, in particular, regarding: (a) which of these judicial guarantees are "essential", and (b) the relationship between Article 27 (2), in that regard, with Articles 25 and 8 of the American Convention.

20. The Court shall first examine what are, according to the Convention, the "essential" judicial guarantees alluded to in Article 27(2). In this regard, the Court has previously defined in general terms that such guarantees are understood to be "those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment" (**Habeas Corpus in Emergency Situations, supra** 16, para. 29). Likewise, it has emphasized that the judicial nature of those guarantees implies "the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency" (Ibid., para. 30).

21. From Article 27(1), moreover, comes the general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it.

22. The Convention provides other criteria for determining the basic characteristics of judicial guarantees. The starting point of the analysis must be the obligation of every State Party to "respect the rights and freedoms recognized (in the Convention) and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" (Art. 1(1)). From that general obligation is derived the right of every person, set out in Article 25(1), "to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention."

23. As the Court has already pointed out, Article 25(1) of the Convention is a general provision that gives expression to the procedural institution known as amparo, which is a simple and prompt remedy designed for the protection of all the fundamental rights (**Habeas Corpus in Emergency Situations, supra** 16, para. 32). This article also establishes in broad terms the obligation of the States to provide to all persons within their jurisdiction an effective judicial remedy to violations of their fundamental rights. It provides, moreover, for the application of the guarantee recognized therein not only to the rights contained in the Convention, but also to those recoqnized by the Constitution or laws. It follows, **a fortiori**, that the judicial protection provided by Article 25 of the Convention applies to the rights not subject to derogation in a state of emergency.

24. Article 25(1) incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights. As the Court has already pointed out, according to the Convention:

> ... States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions (Art. 1) **(Velásquez Rodríguez, Fairen Garbi and Solís Corrales and Godínez Cruz Cases, Preliminary Objections,** Judgments of June 26, 1987, paras. 90, 90 and 92, respectively).

According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.

25. In normal circumstances, the above conclusions are generally valid with respect to all the rights recognized by the Convention. But it must also be understood that the declaration of a state of emergency --whatever its breadth or denomination in internal law-- cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency.

26. Therefore, any provision adopted by virtue of a state of emergency which results in the suspension of those guarantees is a violation of the Convention.

27. Article 8(1) of the Convention points out that

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

In the Spanish text of the Convention, the title of this provision, whose interpretation has been specifically requested, is "Judicial Guarantees."* This title may lead to confusion because the provision does not recognize any judicial guarantees, strictly speaking. Article 8 does not contain a specific judicial remedy, but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees under the Convention.

---

* "Right to a Fair Trial" in the English text.

28. Article 8 recognizes the concept of "due process of law", which includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination. This conclusion is justifiable in that Article 46(2)(a) uses the same expression in establishing that the duty to pursue and exhaust the remedies under domestic law is not applicable when

> the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated.

29. The concept of due process of law expressed in Article 8 of the Convention should be understood as applicable, in the main, to all the judicial guarantees referred to in the American Convention, even during a suspension governed by Article 27 of the Convention.

30. Reading Article 8 together with Articles 7(6), 25 and 27(2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees. This result is even more clear with respect to habeas corpus and amparo, which are indispensable for the protection of the human rights that are not subject to derogation and to which the Court will now refer.

31. Paragraph 6 of Article 7 (Right to Personal Liberty) recognizes and governs the remedy of habeas corpus. In another opinion, the Court has carefully studied habeas corpus as a guarantee not subject to derogation. It said in that regard:

> (H)abeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment (**Habeas Corpus in Emergency Situations, supra** 16, para. 35).

32. Regarding amparo, contained in Article 25(1) of the Convention, the Court asserted the following in the advisory opinion just mentioned above:

> The above text (Art. 25(1)) is a general provision that gives expression to the procedural institution known as "amparo," which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention. Since " amparo " can be applied to all rights, it is clear that it can also be applied to those that are expressly mentioned in Article 27(2) as rights that are non-derogable in emergency situations (**Ibid**., para. 32).

33. Referring to these two judicial guarantees essential for the protection of the non-derogable rights, the Court held that

> the writs of habeas corpus and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose

> derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society (**Ibid**., para. 42).

34. The Court adds that, moreover, there are other guarantees based upon Article 29(c) of the Convention, which reads as follows:

> **Article 29. Restrictions Regarding Interpretation**
>
> No provision of this Convention shall be interpreted as:
>
> ...
> c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.

35. The Court has already referred to the rule of law, to representative democracy, and to personal liberty, and has described in detail how essential they are to the inter-American system and in particular to the system for the protection of human rights contained in the Convention (see **Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights**), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 66; **The Word " Laws " in Article 30 of the American Convention on Human Rights**, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 30 and 34 and **Habeas Corpus in States of Emergency, supra** 16, para. 20). The Court considers it relevant to reiterate the following:

> In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning (**Habeas Corpus in Emergency Situations, supra** 16, para. 26).
>
> When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law (**Ibid**., para. 24; see also **The Word " Laws ", supra**, para. 32).

36. The Court also said that the suspension of guarantees must not exceed that strictly required and that

> any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would also be unlawful... (**Habeas Corpus in Emergency Situations, supra** 16, para. 38).

> (I)t follows that the specific measures applicable to the rights or freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if theywere manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power (**Ibid.**, para. 39).

37. Thus understood, the "guarantees... derived from representative democracy as a form of government" referred to in Article 29(c) imply not only a particular political system against which it is unlawful to rebel (**Ibid**., para. 20), but the need that it be supported by the judicial guarantees essential to ensure the legality of the measures taken in a state of emergency, in order to preserve the rule of law (**Ibid**., para. 40).

38. The Court holds that the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.

39. When in a state of emergency the Government has not suspended some rights and freedoms subject to derogation, the judicial guarantees essential for the effectiveness of such rights and liberties must he preserved.

40. It is neither possible nor advisable to try to list all the possible "essential" judicial guarantees that cannot be suspended under Article 27(2). Those will depend in each case upon an analysis of the juridical order and practice of each State Party, which rights are involved, and the facts which give rise to the question. For the same reasons, the Court has not considered the implications of other international instruments (Art. 27(1)) that could be applicable in concrete cases.

41. Therefore,

THE COURT IS OF THE OPINION

Unanimously,

1. That the "essential" judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention.

Unanimously,

2. That the "essential" judicial guarantees which are not subject to suspension, include those judicial procedures, inherent to representative democracy as a form of government (Art. 29(c)), provided for in the laws of the States Parties as suitable for guaranteeing the full exercise of the rights referred to in Article 27(2) of the

Convention and whose suppression or restriction entails the lack of protection of such rights.

Unanimously,

3. That the above judicial guarantees should be exercised within the framework and the principles of due process of law, expressed in Article 8 of the Convention.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this sixth day of October, 1987.

Rafael Nieto-Navia
President

Héctor Gros Espiell

Rodolfo E. Piza E.

Thomas Buergenthal

Pedro Nikken

Héctor Fix-Zamudio

Charles Moyer
Secretary

_____

Judge Jorge R. Hernández Alcerro participated in the discussion and preliminary vote of this Advisory Opinion. He was not present, however, when it was signed.

ANNEX 171

International Centre for Settlement of

Investment Disputes

DUKE ENERGY ELECTROQUIL PARTNERS
&
ELECTROQUIL S.A.

("Duke")

CLAIMANTS

v.

REPUBLIC OF ECUADOR

("Ecuador")

RESPONDENT

ICSID Case No. ARB/04/19

AWARD

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Dr. Enrique Gómez Pinzón, Arbitrator

Prof. Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal:

Mr. Gonzalo Flores

Date of Dispatch to the Parties: August 18, 2008

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TABLE OF ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Bilateral investment treaty; specifically "Agreement Between the United States of America and the Republic of Ecuador Concerning the Reciprocal Promotion and Protection of Investments" of 27 August 1993
Cl. Exh.	Claimants' Exhibit [Documentary evidence & legal materials]
Cl. 1st PHB / 2nd PHB	Claimants' First Post-Hearing Brief of 30 June 2006 / Second Post-Hearing Brief of 21 July 2006
Cl. Mem.	Claimants' Memorial in Chief of 2 September 2005
Cl. Rejoinder	Claimants' Rejoinder on Jurisdiction of 31 March 2006
Cl. Reply	Claimants' Reply Memorial and Counter-Memorial on Jurisdiction of 18 January 2006
ER	Expert Report
Exh. C-	Claimants' Exhibit [Request for Arbitration]
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
MEM	Ministry of Energy and Mines
PPAs	Power Purchase Agreements (PPA 95 and PPA 96)
R. 1st PHB / 2nd PHB	Respondent's First Post-Hearing Brief of 30 June 2006 / Second Post-Hearing Brief of 21 July 2006
R. Answer	Respondent's Answer to the Memorial in Chief of 22 November 2005 ("Memorial de Contestación a la Demanda")
R. Exh.	Respondent's Exhibit [Documentary evidence & legal materials]
R. Reply	Respondent's Reply on Jurisdiction and Rejoinder on the merits of 6 March 2006
RforA	Request for Arbitration
Tr.	Transcript of the Hearing of 24-28 April 2006
WS	Witness Statement

- It was not involved in the making of the award of March 2002. The local arbitration was conducted under the auspices of the Guayaquil Chamber of Commerce, a private entity which has no connection with the State.

- Relying on *Waste Management*, the Respondent submits that a defense raised in local proceedings cannot amount to a denial of justice.

- In any event, the local arbitral tribunal observed the standards of due process. The award of 20 September 2001 was only a preliminary decision and the Claimants could have sought the annulment of the award of March 2002, a remedy existing under Ecuadorian law, of which the Claimants chose not to make use. The Claimants thus failed to exhaust local remedies and cannot allege any denial of justice. In any event, the dispute is now submitted to this Tribunal by consent of both parties, which rules out a denial of justice.

389. With respect to the customs duties claim, the Respondent contends that any alleged delay in the local proceedings was due to Electroquil, whose counsel did not appear at the hearing set on 29 January 2005. It further explains that the Ecuadorian Supreme Court was reinstated on 30 November 2005 and that a delay between April and November 2005 cannot amount to a denial of justice.

b) Tribunal's determination

390. Article II(7) of the BIT reads as follows:

> *Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.*

391. Such provision guarantees the access to the courts and the existence of institutional mechanisms for the protection of investments. As such, it seeks to implement and form part of the more general guarantee against denial of justice.

392. As a preliminary comment, the Tribunal notes that the existence and availability of the Ecuadorian judicial system and of recourse to arbitration under the Mediation and Arbitration Law are not at issue here. What is at issue and must be reviewed by the Tribunal is how these mechanisms performed, as well as the alleged failure of the State to respect its promise to arbitrate.

393. The Tribunal will examine these issues with respect to the local arbitration, which was between the MEM and Electroquil (and not Duke Energy as the Claimants seem to suggest in their Reply, ¶ 212). It will not entertain the same issues in connection with

the tax claims as it has determined that it has no jurisdiction over tax matters. Admittedly, one might argue that the present claim deals with access to courts primarily and with taxation only secondarily and that it is therefore covered by the BIT. The Tribunal is disinclined to follow this avenue. It is of the opinion that jurisdiction should not be accepted unless the related intent of the Contracting States can be clearly proven, which is not the case here.

394. It appears not to be seriously disputed, and rightly so, that the acts of the local arbitral tribunal and of the local arbitral institution cannot be attributed to Ecuador. These are private actors whose conduct does not engage the responsibility of the State. The Tribunal will thus focus its inquiry on the behavior of the MEM and of the Attorney-General. In this respect, it notes that it has not been established that the Government exercised pressure on the local arbitrators to reverse the decisions on jurisdiction. It is true that the sequence of events in the local arbitration is puzzling. After having dismissed the Attorney-General's objection to jurisdiction in two decisions on 3 August 2001 and upon reconsideration again on 20 September 2001, the local arbitral tribunal issued a final award denying jurisdiction six months later on 11 March 2002. The evidence given by the president of the tribunal in the present arbitration failed to convince the Tribunal of the merits of such a course of action. This said, the Tribunal does not find that there are sufficient elements on record to conclude that undue influence was exerted.

395. Turning now to the behavior of the MEM and the Attorney-General, the Claimants' argument that the State had participated in the mediation without raising an objection as to the validity of the Med-Arb Agreements does not appear relevant in the present context. Indeed, the rule which is generally accepted in comparative law pursuant to which a defense of lack of jurisdiction must be raised in *limine litis* does not apply to pre-arbitral stages.

396. The Claimants argue that it is widely accepted under international law that a State which refuses to respect its promise to arbitrate with a foreign party commits a denial of justice. Doing so, it fails to recognize that Ecuador's promise related to a domestic arbitration with a local company. The arbitration had its seat in the country, was governed by the local arbitration law, and conducted under local institutional rules. The alleged ground for nullity arose under the law governing the arbitration. This situation differs from that in which a State agrees to international arbitration with a foreign party and then raises a defense of lack of jurisdiction arising from an incapacity under its own law while the arbitration agreement is valid under the law governing the arbitration.

397. By contrast, the Respondent asserts that the mere fact that a State raises a defense of lack of jurisdiction in a proceeding does not amount to a denial of justice. It relies on *Waste Management II*. As aptly summarized by Paulsson: "*The City [of Acapulco] was clearly entitled to raise jurisdictional objections without being deemed to commit an international delict. Even if the objection had been absurd, the delict would have arisen only if the Mexican legal system had upheld it*"[47]. The question therefore is whether the Ecuadorian legal system has upheld the Attorney-General's objection.

398. The short answer is that Electroquil did not challenge the final award of 11 March 2002 issued by the local arbitral tribunal before the courts of Ecuador and that, as a consequence, the Ecuadorian legal system never came into play to rule on the award of the local tribunal.

399. The Claimants contend that their claim for denial of justice is founded even though they did not challenge the local award because the requirement to exhaust local remedies does not apply when a State reneges on its promise to arbitrate and when no effective and adequate remedies existed in any event. Citing Paulsson, they state that the "*victim of a denial of justice is not required to pursue improbable remedies*" (Cl. Reply, ¶ 217). By contrast, the Respondent insists on the exhaustion of local remedies and contends that Article 31 of the Ecuadorian Mediation and Arbitration Law contains remedies in the event of excess of power or violation of due process.

400. The Claimants are right to point out that there is no obligation to pursue "improbable" remedies. Article 31 of the Mediation and Arbitration Law provides for an action for annulment of arbitral awards on several grounds[48]. The Respondent contends that this

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47 See Jan Paulsson, Denial of Justice in International Law, Cambridge, 2006, p.153-154.

48 *NULIDAD DE LOS LAUDOS*

Art. 31.- Cualquiera de las partes podrá intentar la acción de nulidad de un laudo arbitral, cuando:

a) No se haya citado legalmente con la demanda y el juicio se ha seguido y terminado en rebeldía. Será preciso que la falta de citación haya impedido que el demandado deduzca sus excepciones o haga valer sus derechos y, además, que el demandado reclame por tal omisión al tiempo de intervenir en la controversia; o,

b) No se haya notificado a una de las partes con las providencias del tribunal y este hecho impida o limite el derecho de defensa de la parte; o,

c) Cuando no se hubiere convocado, no se hubiere notificado la convocatoria, o luego de convocada no se hubiere practicado las pruebas, a pesar de la existencia de hecho que deban justificarse; o,

d) El laudo se refiera a cuestiones no sometidas al arbitraje o conceda más allá de lo reclamado.

and in English translation provided by the Claimants with notes in brackets by the Tribunal.

provision permits challenges on the ground that a tribunal exceeded its powers by declining jurisdiction (R. Reply, ¶ 247). On the face of the text, none of the grounds expressly address jurisdiction. They appear to deal with instances of breach of due process (a-c) and of excess of powers (d). The decision of the Superior Court of Quito, which the Respondent cites in support of its contention, also deals with an excess of power, the tribunal having ruled on a claim not before it, a situation different from the one at issue.

401. In other words, it is established that an award may be annulled on grounds such as excess of power and breach of due process. It is unclear from the record, however, whether Ecuadorian courts would assimilate an erroneous decision dismissing jurisdiction to an excess of power, as would be for instance the case under Art. 52(1)(b) of the ICSID Convention. Yet, lack of clarity it is not sufficient to demonstrate that a remedy is futile. In other words, the Claimants have not established to the satisfaction of the Tribunal that it was improbable that the Ecuadorian courts would have made such an assimilation.

402. On this basis, the Tribunal concludes that the Claimants have failed to show that no adequate and effective remedies existed.

403. For all these different reasons, the Tribunal concludes that Ecuador has not breached Article II(7) of the Treaty.

NULLITY OF AWARDS

Article 31. Either of the parties may file a nullity appeal against the arbitration award in the following cases:

a) When a party was not notified of the arbitration request as provided by law, and the arbitration was carried out and concluded in default of appearance; and the lack of notification prevented the respondent from submitting exceptions or enforcing his rights. The respondent must request time to participate in the controversy due to such omission; or

b) If either of the parties were not notified of the court's decisions, and this fact prevented or restricted the party's right to defense; or [recte: the procedural actions taken by the tribunal]

c) When the hearing was not announced or notification of the announcement was not made or, after notification, evidence was not submitted in spite of the need for justification of events; or

d) The award refers to questions not submitted to arbitration or goes beyond the arbitration request. [recte: what is claimed or the request for relief] (Exh. C 71)

ANNEX 172

J. L. BRIERLY

THE LAW OF NATIONS

AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE

SIXTH EDITION

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Annex 172

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policy, but it is difficult in these days to hold that it may in no circumstances be required to yield to some higher public interest. 'Whatever may be our views as to the relative merits of socialist and individualist doctrines, it is impossible to assert that modern civilization requires all states to accept unreservedly the theories of one side in the great economic conflict.'

In certain circumstances the wrongful act of an official may involve his state in responsibility to the state of an injured alien. In the first place the official must have acted within the scope of his office; otherwise his act would be like that of a private individual. Secondly, a state has a higher responsibility for the acts of superior officials than for those of subordinates. For the former it is responsible, provided only that the local remedies, if any, have been exhausted without redress being secured. Thus in *The Sidra*[1] the Anglo-American Claims Tribunal awarded damages to Great Britain in respect of injury to a British merchant vessel to which the negligent navigation of an American government vessel in Baltimore harbour had contributed; and in the *Zafiro*[2] the same tribunal awarded compensation for British property looted by the Chinese crew of an American supply ship at Manila, on the ground that in the circumstances the American officers were at fault in letting the crew get out of hand; there would have been no liability for the action of the crew as such. For the actions of subordinate employees of the state, such as

[1] *Nielsen's Report*, p. 452. [2] *Nielsen's Report*, p. 578.

unofficered soldiers, members of a crew, policemen, and the like, some further act or omission is necessary to fix the state with responsibility, that is to say, something more than a mere failure to redress the wrong. There must be either a 'denial of justice' in the sense defined below, or something which indicates the complicity of the state in, or its condonation of, the original wrongful act, such as an omission to take disciplinary action against the wrongdoer.

The term 'denial of justice'[1] is sometimes loosely used to denote *any* international delinquency towards an alien for which a state is liable to make reparation. In this sense it is an unnecessary and confusing term. Its more proper sense is an injury involving the responsibility of the state committed by a court of justice, and on the question what acts of this kind do involve the state in responsibility there are two views. Most Latin-American states insist on a very narrow interpretation, and contend in effect that if the courts give a decision of any kind there can be no denial of justice and consequently no responsibility of the state for their conduct. Nothing but the denial to foreigners of access to the courts can be properly regarded as a denial of justice. This view, which involves the virtual rejection of the principle of an international standard applicable to the action of courts of law towards foreigners, cannot be accepted. There are many possible ways in which a court may fall below the standard fairly to be demanded of a civilized state without

[1] See Fitzmaurice, 'Meaning of the Term Denial of Justice', *B.Y.I.L.*, 1932, p. 93.

literally closing its doors. Such acts cannot be exhaustively enumerated, but corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, are instances. Possibly it is convenient also to include in the term certain acts or omissions of organs of government other than courts, but closely connected with the administration of justice, such as execution without trial, inexcusable failure to bring a wrongdoer to trial, long imprisonment before trial, grossly inadequate punishment, or failure to enforce a judgment duly given. But no merely erroneous or even unjust judgment of a court will constitute a denial of justice, except in one case, namely where a court, having occasion to apply some rule of international law, gives an incorrect interpretation of that law, or where it applies, as it may be bound by its municipal law to do, a rule of domestic law which is itself contrary to international law.

It will be observed that even on the wider interpretation of the term 'denial of justice' which is here adopted, the misconduct must be extremely gross. The justification of this strictness is that the independence of courts is an accepted canon of decent government, and the law therefore does not lightly hold a state responsible for their faults. It follows that an allegation of a denial of justice is a serious step which states, as mentioned above, are reluctant to take when a claim can be based on other grounds.

The desire of certain states to limit their inter-

national responsibility as strictly as possible in the matter of the treatment of foreigners has already been referred to; it appears clearly in the decisive importance which they try to attach to the absence of discrimination between foreigners and nationals, and in the narrow sense which they give to a denial of justice. But besides contending for a restricted interpretation of their legal obligations, some states have attempted to exclude their responsibility altogether by a term in the contract which they make with the alien whereby the latter purports to waive the protection of his own state. Such a term is known as a 'Calvo Clause'. It takes different forms, but the following is a typical illustration:

'The contractor and [his employees] shall be considered as Mexicans in all matters within the Republic of Mexico concerning . . . the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans. . . . They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted.'[1]

The validity of a Calvo clause has often been considered by international tribunals and their decisions are not uniform. The objection to it is that the individual who enters into the contract cannot waive a right which belongs not to himself but to his government;

[1] *North American Dredging Co. of Texas* v. *Mexico*. Opinions of U.S.-Mexican Claims Commission, p. 21.

and if the clause is so framed as to make him purport to do this, to that extent at any rate it should be held to be a nullity. 'Such government', as the Commission said in the case from which the clause above is taken, 'frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract tie in this respect the hands of his government.'

It is apparent from the preceding discussion that a state incurs no responsibility for an injury suffered by an alien unless some fault either of commission or omission can be attributed to itself. It follows that it is not responsible for an injury which results from the act of a private individual. Such an act, however, may be an occasion out of which state responsibility may indirectly arise, but only if it is accompanied by circumstances which can be regarded as in some way, by complicity before or condonation after the event, making the state itself a party to the injurious act of the individual. It is therefore necessary in such a case to ask, firstly, whether the state ought to have prevented the injurious act, and secondly, whether it has taken the remedial steps which the law requires of it. Thus where the injury in question would not have occurred if the state through its officers had been reasonably diligent, responsibility will be incurred. The standard of diligence naturally varies with circumstances. For example, the fact that the individual was one of a mob of rioters or of a body of insurgents might, according to circumstances, indicate either

that special precautions ought to have been taken, or that the authorities were faced with a situation so difficult that they could not reasonably be expected to do more than they did.[1]

The application of this principle to *political* crimes was authoritatively defined by a Committee of Jurists appointed by the Council of the League after the murder of the Italian General Tellini on Greek territory in 1923, in the following terms:

'The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest, and bringing to justice of the criminal. The recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf.'

If there has been no failure of diligence on the part of the state in its preventive measures, it may still incur responsibility through the injurious act of a private individual, but only in the event of a denial of justice in the sense already discussed. A state is not required to *guarantee* the effectiveness of its remedial machinery, and therefore the mere failure of the injured person to secure adequate redress through the courts, if it falls short of a denial of justice, is not enough to fix the state with liability.

[1] Compare the case *Youmans* v. *Mexico*, U.S.–Mexican Claims Commission Reports, p. 150, with that of the *Home Missionary Society*, before the Anglo-American Claims Tribunal, *Nielsen's Report*, p. 421.

ANNEX 173

Denial of Justice in International Law

Jan Paulsson

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of investors, must extend to the protection of foreign investors from private parties when they act through the judicial organs of the State.[14]

The 'circumstances' referred to in the third paragraph of this passage were left undefined, but obviously included the circumstances that amounted to the miscarriage of justice alleged in this case (and which the subsequent final award found to have existed; see Chapter 6).

One of the last vain attempts by a state to avoid having to account for the actions of its judiciary occurred in *The Last Temptation of Christ* case,[15] involving censorship, where the Government of Chile tried to argue that an act of the judiciary in violation of international law could be attributed to the state only if the executive branch acquiesced in it. The Inter-American Court of Human Rights had no hesitation in holding that 'the international responsibility of the State may be engaged by acts or omissions of any power or organ of the State, whatever its rank, that violate the American Convention'.

Denial of justice by non-judicial authority

In the past, some authors sought to define denial of justice in such a fashion as to limit it to the conduct of judicial officials. This approach is indefensible. If justice has been denied by officials whose conduct is imputable to the state, it makes no sense to exclude liability because those officials do not have a particular title as a matter of national regulation. The purpose of the delict is to oblige states 'not to administer justice in a notoriously unjust manner' – to repeat Irizarry y Puente's formulation.[16] If it is established that justice has been so maladministered, it is impossible to see why the state should escape sanction because the wrong was perpetrated by one category of its agents rather than another.[17] Surely it would be a denial of justice for the executive to refuse

[14] *Ibid.* at paras. 53–58.

[15] *Olmedo Bustos et al.* v. *Chile* (Merits), 5 February 2001, Inter-American Court of Human Rights, Series C, No. 73 at para. 72 (prior censorship of a motion picture held to be a violation of freedom of expression).

[16] Irizarry y Puente, 'Denial of Justice', at p. 406.

[17] To dispose of a trivial issue, obviously formal titles are not decisive; the adequacy of a state's judicial machinery is to be assessed by reference to the conduct of those of its officials who serve in a judicial capacity. Thus, for example, the Portuguese administrative officials who were charged with the registration of deeds which were the focus of the *Croft* case, *UK* v. *Portugal*, 7 February 1856, A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, vol. II, at p. 22 (see the section on 'No responsibility for misapplication of national law' in Chapter 4) were found by the arbitral tribunal to have acted judicially.

to appoint judges to the only jurisdiction competent to hear a particular type of case, or to adopt a decree that has the effect of invalidating the contractual terms of a single contract to the benefit of the government and the detriment of its alien co-contractant; just as it would be a denial of justice for the legislature to edict astronomical filing fees for foreigners. Yet in no such case would the act or omission be that of a judicial officer.

It is impossible to discern any logic behind this approach except an *a priori* objective of reducing the scope of state liability by any means. If that is so, it should be admitted as such and seen for what it is.

As de Visscher wrote:

> The important thing as an international matter is not the determination of the state organ to which one may attribute, under constitutional law, the origin of the state's failure in its duty: the sole decisive element is the act in which this failure manifested itself in international relations. If it partakes of the jurisdictional order, one is in the presence of a denial of justice in the meaning we attribute to this expression.[18]

If it is unclear whether a given function 'partakes of the jurisdictional order', de Visscher's view was simply that jurisdictional action is one which leads to a legal conclusion, which, as a matter of national law, is considered to have *res judicata* effect.[19]

Commissioner Van Vollenhoven's opinion in the *Chattin* case of 1927[20] insisted at some length on the need to limit the ambit of denial of justice to claims of wrongdoing by judicial officers and no others. Freeman criticised this approach in 1938.[21] Half a century later, *Amco II* squarely confronted commissioner Van Vollenhoven's statement in *Chattin* to the effect that acts of the judiciary alone can constitute denial of justice, and repudiated it in these terms:

> Most arbitral awards do not make this distinction in the context of denial of justice ... the Tribunal sees no provision of international law that makes impossible a denial of justice by an administrative body.[22]

Of course the delict must be circumscribed in such a way as to allow us to identify it and to achieve a useful understanding of the way the

[18] De Visscher at p. 391. [19] *Ibid.* at p. 396.
[20] *USA* v. *Mexico*, 23 July 1927, IV RIAA 282. [21] Freeman at p. 21.
[22] *Amco II* at para. 137. *See also* Secretary of State Fish's instructions to his minister in Mexico City on 2 January 1873: 'Where a claimant on a foreign country has, by the law of such country, "the choice of either the judicial or the administrative branch of the Government through which to seek relief," and selects the latter, this does not make the arbitrary decision of the latter against him final and conclusive' (J. B. Moore, *A Digest of International Law* (8 vols., Washington, DC: US Government Printing Office, 1906), vol. VI, at p. 696).

abstraction is intended to affect reality. It is not helpful to postulate, as some writers once were said to have done, that denial of justice corresponds to all violations owed to foreigners under international law.[23] The proposition is so broad that it would become a synonym for *breach*, and therefore meaningless.

But once one accepts as the fundamental postulate of the delict that states have an obligation to maintain a decent and available system of justice, it simply cannot be accepted that the state should be freed from its obligation by the simple expedient of preventing or perverting the judicial process by executive or legislative fiat.[24]

Reading the old awards from the late nineteenth or early twentieth century, one needs to be very careful about arguments or holdings to the effect that the executive and legislative branches of government should be

[23] The popular culprits, cited over and over again in the literature, are Professor C. C. Hyde and Dr Fred K. Nielsen. In his two-volume treatise published in 1922, *International Law Chiefly as Interpreted and Applied by the United States*, Hyde wrote as follows: 'A denial of justice, in a broad sense, occurs whenever a state, through any department or agency, fails to observe with respect to an alien, any duty imposed by international law or by treaty with his country.' (2 vols., Little, Brown and Co., Boston, 1922), vol. I, at p. 491.

Nielsen, a US appointee on the US–Mexican Claims Commission, stated in the *Neer* case that: 'a denial of justice may, broadly speaking, be properly regarded as the general ground of diplomatic intervention' (*L. F. H. Neer and Pauline Neer (US* v. *Mexico)*, 15 October 1926, IV RIAA 60, at p. 64; further similar expressions are quoted in Freeman at p. 98).

Commentators seem to have enjoyed demolishing the 'broad view' of Hyde and Nielsen. Thus, 'If denial of justice is used to refer to all governmental acts ... the expression would be robbed of all value as a technical distinction' (Freeman at p. 105). Under this definition, wrote Eagleton, 'the term "denial of justice" would appear to be superfluous and confusing and proper to be eliminated' (*The Responsibility of States in International Law* (New York University Press, 1928), at p. 112). De Visscher wrote, at 386: 'used this way, the expression loses all intrinsic value and is but a source of confusion'. Even President Van Vollenhoven of the Mexican Claims Commission was moved in the *Chattin* case to write that under this conception 'there would exist no international wrong which would not be covered by the phrase "denial of justice"' (*US* v. *Mexico*, 23 July 1927, IV RIAA 282, at p. 286).

Fitzmaurice was no less critical. 'The main objection to this definition', he wrote, 'is that it converts the term into a species of synonym for international delinquency'; he observed that it would appear to cover the imposition of a tax in contravention of a treaty provision, or the failure to provide police protection; Fitzmaurice at p. 95. Yet he was perhaps fairer in acknowledging that Hyde and Nielsen's incidental comments, which Fitzmaurice referred to as 'dicta', but which appear to have sprouted wings and relegated their authors to the role of straw men for several generations, were 'limited by the context' of examining the conditions of diplomatic intervention in the event of failure to give redress for prior wrongful conduct.

[24] Unambiguous support for this conclusion is to be found in Eagleton, *Responsibility of States*, at p. 545; Fitzmaurice, at p. 105; Irizarry y Puente, 'Denial of Justice', at p. 403. The latter refers, *ibid.*, to 'deficiency in the local legislation or arbitrary executive action'.

equally susceptible to engaging the international responsibility of the state as the judicial branch. Often such statements were made against a historical background which gave rise to the view that denial of justice by courts was the only form of injury to foreigners that legitimised international protection. Thus, in ordinary cases of executive action which we would today instantly recognise as expropriatory, the sponsors of the claim, strenuously arguing that the acts of administrative organs of the state could give rise to international responsibility for denial of justice, were seeking to bring the claim within the scope of denial of justice because they did not know what other terms to use to justify the espousal of a claim by the mechanism of diplomatic protection. And so, for example, the US Government in the *Chase* case found itself complaining of the Panamanian Government's failure 'to provide the protection to which the claimant's property rights were entitled under the established principles of international law',[25] and this grievance was naturally thought of as sounding in denial of justice. Many of these cases have nothing to do with denial of justice.[26] Today the alleged wrong would be articulated as a wrongful taking,[27] or a failure of protection.[28] The words 'denial of justice' would never be uttered.[29]

[25] *William Gerald Chase* (*US* v. *Panama*), 29 June 1933, VI RIAA 352; the passage quoted from the US memorial appears in B. L. Hunt, *American and Panamanian General Claims Arbitration under the Conventions between the United States and Panama of July 28, 1926, and December 17, 1932*, (US Department of State Arbitration Series, No. 6 (Washington, DC: 1934), 341, at p. 356. The claim was unsuccessful; while governmental authorities adopted inconsistent positions *vis-à-vis* Chase's land rights, there was little discussion of any miscarriage of justice given the fact, acknowledged by the commissioners, that Chase's alleged title had never been clear.

[26] De Visscher at p. 385, perceived precisely this source of misunderstanding in the legal literature, and anticipated its clarification. 'Little by little, however, the authors have come to acknowledge that international responsibility is not reduced to cases of denial of justice, but indeed that denial of justice, even in the domain of protection of foreigners, is but one category among others of conduct giving rise to international responsibility.'

[27] See, e.g., *Wena Hotels Ltd* v. *Egypt*, award, 8 December 2000, 6 *ICSID Reports* 89 (Fadlallah, Wallace, Leigh (presiding)).

[28] See, e.g., *Asian Agricultural Products Ltd* v. *Sri Lanka*, award, 27 June 1990, 4 *ICSID Reports* 245 (Goldman, Asante, El-Kosheri (presiding)); *American Manufacturing and Trading, Inc.* v. *Zaire*, award, 21 February 1997, 5 *ICSID Reports* 11 (Golsong, Mbaye, Sucharitkul (presiding)).

[29] As it happens, the *Chase* case did involve an element within the purview of denial of justice, namely the failure of executive authorities to respect a Supreme Court judgment alleged to be dispositive of Mr Chase's title to disputed lands. The judgment was, however, ambiguous, and this was but an incidental aspect of the case.

This is the context in which it is useful to consider the two famous awards rendered in the *El Triunfo* and *Robert E. Brown* cases.

El Triunfo[30] involved an exclusive navigation concession granted by the Government of El Salvador to a corporation whose principal shareholders were US nationals. The concession, which was part of a scheme of macroeconomic importance to develop the port of El Triunfo, took the form of a contract which, after competitive bidding, was signed by the Government in October 1894 and ratified in accordance with the Constitution by the legislature in May 1895. The obligations of the concession holder were fully carried out and the relevant ministers and inspector-general so acknowledged. The port was quickly opened, and from the beginning of 1896 to late 1898 the volume of business of the port was larger than even the most optimistic forecasts, increasing by between 400 per cent and 500 per cent. By the beginning of 1898, the concession holder, called the El Triunfo Company, showed steady net profits (this too acknowledged by the Government's official accountant).

Yet on 14 February 1899 the President of the Republic issued a decree closing the port of El Triunfo, effectively making the concession agreement a dead letter. Three months later, the same concession was granted to citizens of El Salvador.

The ensuing claim is notable in that it involved the breach of a direct contractual relationship with the Government. (*El Triunfo* is one of the classic precedents, cited time and again throughout the twentieth century, in connection with claims relating to international state contracts.) It could also have been articulated as a claim sounding in expropriation or discrimination. The award itself explains the basis of liability as the finding that the concession had been 'arbitrarily and unjustly revoked, destroyed, and cancelled by the Republic of Salvador'.[31] The expression 'denial of justice' does not appear in the award, but figures prominently in the opinion of the two arbitrators forming the majority. They conceived the role of denial of justice in two ways.

First, they noted that before the US could validly exercise its rights of diplomatic protection, it must be shown that the US claimants 'having appealed to the courts of the Republic, have been denied justice by those courts'. This notion gives us the key to a fundamental conceptual

[30] *US* v. *El Salvador*, 8 May 1902, XV RIAA 455. Arbitral Tribunal composed of Sir Henry Strong, Chief Justice of the Dominion of Canada; Donald M. Dickinson (US) and Don José Rosa Pacas (El Salvador). Award rendered by a majority (Strong and Dickinson).

[31] *Ibid.* at p. 469.

problem. For in this sense, denial of justice is merely a requirement for diplomatic protection, i.e. a way of restating the need to exhaust local remedies. The arbitrators thus considered that a denial of justice occurred because the wrongful cancellation of the concession was not corrected by national judicial authorities. This approach misapprehends both the exhaustion requirement and the delict of denial of justice.

To exhaust local remedies, it is necessary to attempt to do so, or at least to prove that any attempt would have been futile (see Chapter 5). That may have been the case with respect to the El Triunfo Company, but neither the award nor the majority opinion gives any indication that this issue was explored and evaluated. As for denial of justice, it cannot be a matter of *res ipsa loquitur*; wrongs unconnected with the administration of justice do not automatically become denial of justice because the courts do not correct them. Some act or omission constituting a miscarriage of justice is required.

This brings us to the second way in which the award uses the expression 'denial of justice'. We need to revert momentarily to the facts of this case, which intriguingly anticipated the *Barcelona Traction* saga: foreign owners of an important and prospering enterprise dispossessed by a conspiracy of local rivals abusing corporate procedures to instigate meretricious bankruptcy proceedings. Thus a cabal including a certain Simon Sol, who had led a consortium which had presented an unsuccessful bid at the inception of the project, had taken advantage of the absence of the Company's president; Sol 'assumed the office of president by clear usurpation' and proceeded to adopt an extraordinary resolution to petition for the bankruptcy of the company; within five days, a local court appointed a receiver who immediately took possession of all corporate documents (these were never restored, not even in the course of the arbitration). The American members of the board 'were driven from Salvador in fear of their lives'.

Reacting to these events, on 12 February 1899 the US shareholders called for a meeting for the purpose of restoring the Company's rights by 'turning out the conspirators and installing a representative directorate'. On 13 February, notice of the meeting was published in the Official Journal of the Republic. On 14 February, the President of the Republic, as seen, closed down the port, putting an effective end to the concession. Thus, the majority arbitrators held, 'the Government of Salvador came to the aid of the conspirators and by executive act destroyed the only thing of value worth retrieving through the courts'.

This action may readily have been attacked as a breach of contract or as an unlawful dispossession, and there is every reason to think that it was

so perceived by the arbitrators. What is ambiguous is the opinion's approving reference to a US contention to the effect that: 'Justice may as much be denied when it would be absurd to seek it by judicial process as if denied after being so sought'. This comment is apposite with respect to a debate about the need to exhaust local remedies as a precondition to the diplomatic espousal of the claim, or with respect to the sufficiency of an initial miscarriage of justice if there is no reasonable prospect of an effective appellate remedy (see Chapter 5). But to make a lawsuit pointless is not *per se* a miscarriage of justice; conduct having that effect may have no relation to the administration of justice. When the arbitrators went on to say that 'the obligation of parties to a contract to appeal for judicial relief is reciprocal', they showed that they were proceeding on a contractual footing, reproving the Government's unilateral executive abrogation of the concession. In sum, *El Triunfo* is not a precedent which properly belongs in the field of denial of justice. If such a case were to arise today in circumstances of direct access, without the need to show exhaustion of local remedies, the words 'denial of justice' would be out of place in the debate absent any suggestion that the claimants were actually stymied in their efforts to petition the local courts.

Robert E. Brown[32] provides an illuminating contrast. Brown was a US national and engineer who had applied in 1895 for 1,200 gold-prospecting licences in South Africa pursuant to a system established under a proclamation by President Kruger of the South African Republic. Kruger withdrew his proclamation on the day following Brown's application. Six days thereafter, the legislature (*Volksraad*) issued a resolution approving the withdrawal of the first proclamation and decreeing that no person who had suffered damage should recover compensation. The High Court of the Republic in due course rendered a judgment in favour of Brown, declaring the *Volksraad* resolution to be unconstitutional, ordering the issuance of the licences, and inviting Brown to sue for damages in the event he were physically prevented from pegging off the 1,200 plots.

An epic battle ensued between President Kruger and Chief Justice Kotzé. Kotzé denounced Kruger as an 'oily old Chadband' and defended his attempts to establish judicial review of the constitutionality of legislation along the lines of what US Supreme Court Chief Justice Marshall had done in the venerable precedent *Marbury* v. *Madison*.[33] Kruger

[32] *United States* v. *Great Britain*, 23 November 1923, VI RIAA 120.

[33] US Supreme Court, 5 US (1 *Cranch*) 137 (1803), holding that to determine the constitutional conformity of legislation is 'the very essence of judicial duty'.

countered by describing Kotzé as a lunatic fit for capture and incarceration in an asylum, asserting in his fourth inaugural address in 1889 that 'the testing right [i.e. judicial review] is a principle of the devil', and advised other judges not to follow Kotzé in the devil's way. In the end, might prevailed and Kotzé was removed from office. A reconstituted and more compliant High Court dismissed Brown's motion to determine damages on a technicality in 1898.[34]

Brown successfully appealed to his own government to espouse his claim against Great Britain, as suzerain over the Republic. (The South African Republic was conquered and annexed by Great Britain in 1902.) After protracted negotiations had failed, the claim was disposed of by an international arbitral tribunal in 1923.[35] Like the claimants in the *Loewen* case exactly eighty years later, Brown found to his mortification that his claim for denial of justice was 'undoubtedly' well founded, but that it was inadmissible because Great Britain was not liable for the wrongful acts of the Republic with respect to a pending claim, as opposed to a liquidated debt; the Attorney General of the Colony (as it had become) declared that its courts were still open to Brown.

The tribunal's finding of denial of justice is therefore dictum, but it is still a leading case. (This comment, as we shall see in the section on 'Fundamental breaches of due process' in Chapter 7, is also likely to apply in all respects to *Loewen*.) The arbitrators noted that Brown's claim had consistently been referred to as the 'turning point' in the move to destroy the independence of the High Court. They further found a 'disposition to defeat Brown's claim at any cost', and that his pursuit of damages was rejected, with an assessment of costs against him, although the judgment in his favour had invited him so to proceed. (Another frustrated applicant alleging 'almost identical facts' had been allowed to proceed; the arbitrators had difficulty perceiving the possible technical distinctions between the two cases.) Although Brown was given leave to start a new action, he was advised by his counsel that the effect of the new decision 'was to throw him out of court and deprive him of the benefit of his previous judgment'. A new suit would fly in the face of the *Volksraad*'s edict that no compensation would be due, and the oath of

[34] A fuller account of this episode was published by Professor John Dugard in 'Chief Justice versus President: Does the Ghost of Brown v. Leyds NO Still Haunt Our Judges?' *De Rebus* (September 1981), 421, where the author observes that arguably 'this decision and its consequences have contributed more to current South African judicial attitudes than any other episode in our legal history'.

[35] 23 November 1923, VI RIAA 120.

office now required of judges was to the effect that they would defer to the legislature.

The arbitrators concluded that 'if this proceeding were directed against the South African Republic, we should have no difficulty awarding damages on behalf of the claimant'. They noted that there were a number of technical issues as to whether Brown ever held title to specific rights, and that it was correct that 'his legal remedies were not completely exhausted', but:

> Notwithstanding these positions, all of which may, in our view, be conceded, we are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps taken by the Government of the South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place. We can not overlook the broad facts in the history of this controversy. All three branches of the Government conspired to ruin his enterprise. The Executive Department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions ... In the actual circumstances ... we feel that the futility of further proceedings has been fully demonstrated, and that the advice of his counsel was amply justified. In the frequently quoted language of an American Secretary of State: 'A claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust'.[36]

Freeman concluded that the *Robert E. Brown* award 'assimilated to a denial of justice all the unlawful acts committed to the foreigner's prejudice'. He went on to write:

> It was the 'improper deprivation of rights of a substantial character' which, for the arbitrators, constituted the denial of justice. Exactly how or by what State organs that end was accomplished was apparently immaterial.
>
> An identical position was taken in the *El Triunfo Co* case.[37]

Freeman's failure to see the distinctions between the two cases is a matter of considerable importance. In *Robert E. Brown*, there was massive interference in a pending case, with the executive removal of the chief

[36] *Ibid.* at p. 129; the US Secretary of State in question was Hamilton Fish; his often-cited dictum appears *in* Moore, *Digest*, vol. VI, at p. 677.

[37] Freeman at pp. 100–101.

judge who had been instrumental in acknowledging Brown's rights and with the legislative reversal of a substantive rule which had already become *res judicata* in Brown's specific case. The implication of the two other branches of government in the administration of justice was direct; the difference with *El Triunfo* was manifest and fundamental.[38]

In sum, Fitzmaurice and Freeman's conclusions to the effect that denial of justice involves 'some misconduct either on the part of the judiciary or of organs acting in connection with the administration of justice to aliens'[39] appear irresistible. Indeed, Freeman quotes a Mexican scholar and diplomat, writing at a time when that country's experiences were not such as to make it enthusiastic about any expansion of the delict, that denial of justice may, in extreme cases, involve 'administrative authorities'.[40] Authors or precedents cited to the effect that denial of justice relates only to actions or omissions of courts on closer analysis appear to have been focused primarily on establishing the proposition that Hyde and Nielsen were wrong,[41] and that denial of justice must relate to some dysfunction of the administration of justice as opposed to any and all breaches of international law that might justify diplomatic intervention. In so doing, such authorities may, *obiter dictum*, have used loose expressions. Once it is established that the relevant act or omission is imputable to the state, it simply cannot matter whether the doors to justice were blocked by executive fiat, legislative overreaching, or judicial obstreperousness.

Extension of *locus standi*

The actors on the modern international stage are vastly more numerous than in Freeman's day. At the turn of the century, according to the 2001/2002

[38] See also the five awards (*Ruden*, *R. T. Johnson*, *Neptune*, *Ballistini*, and *Romberg*) cited by Eagleton, *Responsibility of States*, at p. 547, note 2828, involving such executive acts as orders forbidding the trial of suits against the treasury and irresistible interventions by a provincial governor to prevent the hearing of a suit.

[39] Freeman at p. 106, agreeing with Fitzmaurice, who referred, at p. 94, to 'actions *in or concerning the administration of justice*, whether on the part of the courts or of some other organ of the state' (emphasis in the original).

[40] '[A]ctos de autoridades administrativas, cuando éstas ejerzan funciones jurisdiccionales con carácter definitivo y sin ulteriores recursos ante los Tribunales de Justicia', Oscar Rabasa, *Responsabilidad Internacional del Estado con Referencia Especial a la Responsabilidad por Denegación de Justicia* ((Mexico: Imprenta de la Secretaria de Relaciones Exteriores, 1933), at p. 35, quoted in Freeman at p. 106, note 2).

[41] See Note 22 of this chapter above.

A less extreme but in effect equally perverse limitation was the proposition that the expression denial of justice could be used only with respect to the conduct of judicial officers of the state. The support for this proposition is less extensive than some authors have supposed.[1] Some proponents of this theory were interested only in the *a priori* objective of dismantling the international delict of denial of justice. They should be disregarded. As for the others, an examination of their writings suggests that they were primarily concerned with correcting the unacceptable channelling of all international grievances into the delict of denial of justice. In other words, their concern was to achieve agreement to the effect that denial of justice is a meaningful concept only if it is understood as relating to the administration of justice. Once that is established, the issue is simply whether the wrongful acts or omissions are attributable to the state or not. Unless one wishes to open the door to the evisceration of international law by political fiat, it matters not, as argued in greater detail in the section on 'Denial of justice by non-judicial authority' in Chapter 3, whether the internationally wrongful administration of justice is perpetuated by the executive, legislative or judicial branches.

The difficult emergence of a general international standard

International law would not crumble with the disappearance of the expression 'denial of justice'. Yet if it did not exist it would have to be invented in some other guise, and whatever concept were enlisted in its place would share two of its features: (i) it would have to be expressed as an abstraction[2] and (ii) it could not be applied mechanically.

[1] In particular, Cançado Trindade's impressive list of authorities ostensibly favouring the limitation of denial of justice 'to wrong conduct of courts or judges' – including Borchard, Durand, Bevilaqua, Anzilotti, Strisower, Accioly, C. Rousseau, Rolin, 'Oppenheim – Lauterpacht', Brownlie, Kelsen, Castberg, Ago, Brierly – Cançado Trindade, 'Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law', (1978) 53 *Philippine Law Journal* 404, at p. 411, quickly dissolves into a flood of qualifications and exceptions upon examination of the quoted works.

[2] During the 1954 session of the Institut de Droit International, only a small minority of the participants found merit in the prospect of defining denial of justice by enumeration of instances; the majority favoured overarching formulae, (1954) 45 *Annuaire de l'Institut de droit international* 97. Oliver J. Lissitzyn, 'The Meaning of the Term Denial of Justice in International Law', (1936) 30 AJIL 632, at p. 644, on the other hand, favoured avoidance of the term altogether because of its inconclusiveness, given that 'particular acts or omissions meant to be covered by it can be enumerated and defined expressly'.

If these two related propositions were not accepted, formalism would rule; any state could avoid responsibility for the way its system of justice treats foreigners simply by going through expedient motions.

True, by the study of treaties, precedents and doctrine international adjudicators could seek to decide whether there has been an international delict without using the particular abstraction *denial of justice*, but they would still find themselves struggling with the task of finding meaningful applications of other abstractions that seek to encapsulate an evolving consensus as to the minimum international standard required of national legal systems when they deal with the rights of foreigners. This is unavoidable due to the inexorable inclination of perpetrators of unfairness to cloak their actions in the appearance of fairness.

Freeman gives an account of various tentative codifications which in his day had sought to avoid what was viewed, not without reason, as a fuzzy and controversial notion, unlikely in itself to yield predictability. After noting that 'vagueness is characteristic of growing, living branches of legal science, and allows necessary leeway for the law to pass through its formative periods', he concluded:

> the expression should not be tossed aside as incapable of useful service. It is true that considerable controversy rages over its meaning. Yet an imposing body of authority is gradually coming to recognize that its rightful province is synonymous with every failure on the part of the State to provide an adequate judicial protection for the rights of aliens. And as such, 'denial of justice' merits preservation.[3]

International law has already built on this conclusion. It can no longer be seriously maintained that denial of justice means nothing but access to formal adjudication, no matter how iniquitous; nor that state responsibility cannot attach to wrongful acts of the judiciary. And if a foreigner is entitled to the protections of international law, the organs of a state cannot have the last word when such entitlements are invoked. Ignorance, bad faith and the outraged unreasoned rejection of criticism will always be with us, but the controversy of Freeman's day has abated.

The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice. If a foreigner has been convicted of a crime by a jury of five and complains that other courts empanel juries of nine for such cases, there is little prospect of concluding that an international standard has

[3] Freeman at pp. 182–183.

been violated. On the other hand, if jury members had been allowed to hear the prosecution but not the defence, there can be little doubt that a denial of justice has occurred. International adjudicators do not require an explicit rule or an exactly matching precedent to reach a conclusion in either case. The organs of the state do not necessarily defy the fundaments of a fair legal process by the use of a smaller jury (indeed there is no international standard to the effect that facts must be tried by a jury, even in criminal law). But they do so if they silence an accused.

The indispensable line between fundamental violations and others is easy to draw in the instances just imagined, but other cases are less clearcut. What if the defence is given only thirty minutes to answer the prosecution's hour-long summation? How about five minutes? What if the jury includes only members of a particular religion which is alleged to be hostile to the complaining foreigner, or gives greater weight to the testimony of coreligionists, or to men as opposed to women? What if the judgment looks impressively well-reasoned and balanced, but the trial record shows that important elements of the foreigner's evidence were excluded? Most difficult questions are matters of degree. Sometimes they are given weight only when there is an accumulation of disturbing evidence. These concrete questions are at the heart of the matter, and merit reflection.

A less worthwhile inquiry concerns the taxonomy of state organs to be acknowledged as dispensing justice, or the types of interactions with authorities to be acknowledged as part of the processes of justice. For example, it might be argued that a denial of justice can occur only if an alien is thwarted in his attempt to initiate a suit to protect his rights, but that the expression is inapposite if he is the victim of a miscarriage of justice *as a defendant*; since in the latter case he is by definition before the court, there is no *denial* of justice but rather something that must find another name, such as 'manifest or notorious injustice'. Or it may be posited that internationally unacceptable conditions of arrest or detention are international wrongs of a genus different from denial of justice *stricto sensu* because they occur, as it were, in connection with judicial proceedings rather than as a part of them, and involve the conduct of non-judicial officers. Indeed scholars in times past found it necessary to debate such matters.

The phrase 'denial of justice', no matter how elaborately defined, will never yield instant clarity as to how actual cases are to be decided in a complex and untidy world. It seems futile to develop refined theories about what conduct is encompassed by a given expression of such elasticity. To some extent the debate is one of nomenclature; it does not concern the *existence* of an international delict, but what to call it.

The preferred solution is doubtless to adopt a broad definition that encompasses all aspects of the judicial process. Certainly a detainee held for years without a trial would find it difficult to understand why he is not the victim of a denial of justice simply because no judge ordered his incarceration and the opening gavel for his trial has not yet been brought down. This study proceeds on the premise of a definition such as the one proposed in Chapter 1: the delict of denial of justice occurs when the instrumentalities of a state purport to administer justice to aliens in a fundamentally unfair manner. The interesting debate is not whether international delicts are placed in the right category, but whether they are delicts in the first place.

Grotius conceived two types of denial of justice: (i) where 'a judgment cannot be obtained against a criminal or a debtor within a reasonable time' and (ii) where 'in a very clear case judgment has been rendered in a way manifestly contrary to law'.[4] There are two difficulties with this exposition which have created much confusion over the centuries.

The first problem is that Grotius focused on cases where the complainant was frustrated *as a plaintiff*. This conception of the issue has caused some among the successive generations of scholars to view denial of justice exclusively as a matter of *thwarted redress*. Well into the twentieth century, voices were heard to the effect that denial of justice was 'restricted to those cases in which the alien appears as plaintiff'.[5] Some tribunals reasoned that there must have been some 'original' injustice with respect to which a court thereafter denied redress.[6] But of course a foreigner may suffer from a miscarriage of justice as a defendant; the *Loewen* case is an obvious example. To maintain that denial of justice comes into play with respect to only the wrongful treatment of grievances therefore made it necessary to speak of 'manifest injustice' as a category additional to that of denial of justice. Moreover, this approach suggested that the claimant to whom justice was denied must have been right with respect to his grievance, which logically leads to the unacceptable

[4] Hugo Grotius, *De Jure Belli ac Pacis libri tres* (Oxford: Clarendon, 1925), book III, chap. 2.

[5] Clyde Eagleton, 'Denial of Justice in International Law', (1928) 22 AJIL 538, at p. 553. Contra Freeman at p. 151 *et seq.*; de Visscher at p. 393; Fitzmaurice at p. 105.

[6] In the course of colloquy with counsel in the *Cayuga Indians* case, Arbitrator Pound said: 'First there is an injustice antecedent to the denial, and then the denial after it' (*US* v. *Great Britain*; Fred K. Nielsen, *American and British Claims Arbitration under the Special Agreement of August 18, 1910*, at p. 258). This phrase, pithy but misleading (see Freeman's comment at p. 155, n. 1), was cited in the important *Chattin* case in support of the unfortunate conception that the expression 'denial of justice' is inappropriate when 'the courts themselves did injustice', IV RIAA 282, at p. 286.

conclusion that one is entitled to a proper hearing only if one's case is good. Since the substance of the delict of denial of justice is undistinguishable from that of 'manifest injustice' as that phrase was used to cover the special pseudo-category of judicial wrongdoing independent of antecedent injustice, the irresistibly better view is to consider, simply and naturally, that denial of justice covers all situations where a foreigner has been deprived of a proper judicial process, whether he is seeking to establish *or to preserve* legal interests.

Fitzmaurice archly dismissed this as 'a particularly barren distinction of no practical utility', and moreover one of doubtful theoretical validity.[7] The question, he observed, is whether 'a wrong similar in every respect' must be given 'some other name' because it was committed against an alien defendant who is not seeking redress for a prior wrong but is seeking to resist an effort to obtain redress against himself. His analysis in response to this question merits full quotation:

> The point is usually obscured by the fact that in nearly all cases an appeal lies, and owing to the familiar rule that all appeals must be exhausted before formal diplomatic intervention can take place, such intervention can, in fact, when the time comes, usually be based on a failure to redress a previous wrong, i.e. in the case of a defendant, on the improper failure, due e.g. to a lack of impartiality, on the part of a higher court to redress the injury caused by a wrong judgment in a lower one. But it is possible to conceive a case where this would not be so. Imagine that A sues B, a foreigner, for money lent. The court quite properly decides in favour of B, it being clear that he never borrowed the money. A appeals. The court of appeal confirms the judgment. A appeals to the final court of appeal. This court, being clearly prejudiced against B on the ground that he is a foreigner, reverses the previous judgments, and condemns him to pay. Most people would say that this would constitute a denial of justice. Yet it would not consist in a failure to redress a previous injury done to B. On the contrary it would constitute an original wrong done to him.
>
> This instance brings into glaring relief the unreality of the distinction between a denial of justice committed by the courts, and an original wrong or *in*justice committed by them. The distinction may be sound in theory, but it is unreal in practice. In either case there is a failure on the part of the courts to do justice, and in either case there is a failure to render to the injured party the justice which he had the right to expect in a court of law; in other words a denial to him of justice – be he plaintiff or defendant. But the distinction, even if it be valid in pure theory, becomes still more unreal when considered in connexion with the by no means unusual class of case, to which attention has already been drawn, where the

[7] Fitzmaurice at p. 105.

parties before the court are neither plaintiff nor defendant, but as it were both – where each seeks to establish a right and to contest the other's right but without alleging any actual injury. If in such a case a court, e.g. the highest court of appeal, delivers a judgment against one of the parties, a foreigner, which obviously constitutes a flagrant piece of dishonesty, clearly involving the international responsibility of the state, can it be said with any real justification that the party in question has not suffered a denial of justice because there has been no failure by the court to redress a prior wrong (when none was asserted) and that the wrong committed by the court must be called by some other name?

The conclusion to be drawn seems to be that, at any rate for all practical purposes, every injury involving the responsibility of the state committed by a court or judge acting officially, or alternatively every such injury committed by any organ of the government in its official capacity in connexion with the administration of justice, constitutes and can properly be styled a denial of justice, whether it consists in a failure to redress a prior wrong, or in an original wrong committed by the court or other organ itself.[8]

Fiztmaurice found support for this view in the following passage from Borchard:

Whether it is technically possible or desirable to make the distinction where courts are involved between primary and secondary injuries, for example, whether it is practical to say where a mob or the executive controls the courts in a case where the alien is a defendant, that a denial of justice has not occurred, but only an 'unjust judgment', seems rather doubtful. Foreign Offices would probably not make the distinction, nor have international tribunals or writers generally.[9]

The expression 'manifest injustice' of itself is an unhappy one, because it is irremediably ambiguous; it could refer to either an unjust judgment or an unfair trial. This ambiguity is precisely the second difficulty with the Grotian formulation. A judgment 'rendered in a way manifestly contrary to law' could be vitiated either because the court disregarded the procedural code or because it misapplied principles of liability. If anything is clear about the international law of denial of justice, it is that it does not concern itself with bare errors of substance. Fitzmaurice wrote that it 'hardly seems necessary to give authority for the proposition that mere error of fact or mere error in the interpretation of the national law does

[8] *Ibid.* at pp. 107–109.
[9] (1929) I *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 223, quoted in Fitzmaurice, at p. 109.

not *per se* involve responsibility', but went on to quote eloquent and categorical passages to that effect from four awards.[10]

Grotius' discussion of this subject was incidental; he was not proposing a new doctrine to reflect the limits of the territorial prerogatives of emerging nation states, but simply considering all grievances that might be said to legitimise war. The true intellectual father of denial of justice was Vattel, who in 1758 proposed a systematic approach to the illegitimate *refusal* of justice under three heads:

- not admitting foreigners to establish their rights before the ordinary courts,
- delays which are ruinous or otherwise equivalent to refusal,
- judgments 'manifestly unjust and one-sided'.[11]

Two centuries of debate focused on the third category. (No serious international lawyer contests either of the first two.) That phrase – 'manifestly unjust and one-sided' – is the heart of this study. Much may lie in the two adjectives. *Unjust* is not enough, the conjunctive *and* signifies that something more is required. *One-sided* then opens the door to the manner in which the process was conducted; all fundamental rules of procedure are, after all, intended to ensure the absence of partiality. The proper reaction to discrimination, fraud, bias, malice or harassment, abuse of form, or arbitrariness should not engender controversy in principle; they are proscribed. But to anticipate the greatest difficulty of our subject, it should follow that gross or notorious injustice – whatever the words used – is not a denial of justice merely because the conclusion appears to be demonstrably wrong in substance; it must impel the adjudicator to conclude that it could not have been reached by an impartial judicial body worthy of that name. (Thus the unexplained disregard of a century of unbroken jurisprudence might be viewed with suspicion if it happens to benefit powerful local interests arrayed against a politically controversial foreigner.[12])

[10] *Ibid.* at p. 111, note 1. [11] Vattel, Book II, at para. 350.

[12] As Spain's Counter-Memorial in *Barcelona Traction* put it, a state is liable for erroneous judicial decisions, or *mal jugé*, only if it is found that the relevant courts exhibited some degree of 'bad faith or discriminatory intention'. Quoted in Eduardo Jiménez de Aréchaga, 'International Responsibility of States for Acts of the Judiciary', in W. G. Friedmann, L. Henkin and O. J. Lissitzyn (eds.), *Transnational Law in a Changing Society – Essays in Honor of Philip C. Jessup* (New York: Columbia University Press, 1972), 171, at p. 179. An example of a legal basis for a national judgment so outlandish that it is rejected by the international tribunal is the peculiar notion of *res judicata* in the *Idler* case, discussed in the section on 'Gross incompetence' in Chapter 7.

Freeman quoted De Visscher's formulation of denial of justice, namely:

> toute défaillance dans l'organisation ou dans l'exercice de la fonction juridictionnelle qui implique manquement de l'Etat à son devoir international de protection judiciaire des étrangers,[13]

and offered the observation that 'it may well be wondered whether any future jurist will be able to improve upon'[14] that definition. One might object that the word 'definition' does not easily apply to a sentence which includes the unexplained words 'failure', 'duty', and 'judicial protection'.

Certainly Freeman's own attempt, offered almost apologetically in light of the author's admiration for de Visscher's phrase, can be criticised on the same basis. He wrote:

> If there is anything even remotely approaching a tendency toward a uniform definition in recent doctrinal utterances, it is to apply the phrase 'denial of justice' to all unlawful acts or omissions engaging the State's responsibility in connection with the entire process of administering justice to aliens.[15]

This is circular. No insight is required to understand that 'unlawful acts or omissions' give rise to responsibility. What we want to know is precisely *what makes them unlawful.* All we can say, as we try to apprehend the sense of such oft-recurring intensifiers as *shocking*, or *surprising*, is that the issue is one of *fundamental unfairness*. Since the days of de Visscher and Freeman, we have learned to live with inherently elastic concepts relating to the international legitimacy of national judicial processes. The fundamental conventions of human rights which have come into being since then have struggled to do better than to refer to abstractions such as *fair trials.*[16] Yet

[13] In de Visscher at p. 390, quoted in Freeman at p. 162 ('any shortcoming in the organisation or exercise of the jurisdictional function which involves a failure of the state to live up to its international duty of extending judicial protection to foreigners').

[14] Freeman at p. 163. [15] *Ibid.* at p. 161.

[16] Although one must recognise the contribution of the United Nations on the specific issue of the independence of the judiciary and of lawyers: see, e.g., Commission on Human Rights resolution 2003/43 'Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers', UN Doc. E/CN.4/2003/L.11/Add.4, at p. 57; Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF.121/22/Rev.1, at p. 59; Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF.144/28/Rev.1, at p. 118; and General Assembly resolutions A/RES/43/153, adopted 8 December 1988, A/RES/48/137, adopted 20 December 1993, and A/RES/58/183, adopted 18 March 2004, all on 'Human rights in the administration of justice'.

political consensus has been reached as to the articulation of those general principles, and international adjudicators have been able to give them life. An international legal *culture* emerges that enables us to perceive *in concreto* the boundaries of national discretion – with more or less certainty, as always in the life of the law, the closer we find ourselves to the boundary beyond which the international delict arises. The situation is the same with respect to denial of justice. And so perhaps a phrase will do, such as Irizarry y Puente's succinct formulation: 'the international obligation of the state not to administer justice in a notoriously unjust manner'.[17] As seen above, *unfair* might be preferable to *unjust*, because it denotes not just error, but fault. At any rate, and whatever assistance may be provided by precedents and by crystallising general principles relating to due process, the perception of what is fundamentally unfair will, in the difficult cases, ultimately be a matter of subjective discernment.

Before concluding these reflections on the contemporary standard, it seems appropriate to suggest that it is time to put aside the confrontational vocabulary which was perhaps unavoidable in the convulsive period of decolonialisation which gathered momentum in the wake of the Second World War and culminated in the watershed year of 1960. One can understand how Judge Guha Roy could have written in 1961 that the protection of rights obtained in a colonial regime 'cannot for obvious reasons carry with them in the mind of the victims of that abuse anything like the sanctity the holders of those rights and interests may and do attach to them', and that universal adherence cannot be expected to accrue to a law of state responsibility which 'protects an unjustified status quo or, to put it more bluntly, makes itself a handmaid of power in the preservation of its spoils'.[18] But we are no longer talking about the perpetuation of rights originating in King Leopold's shameful private domain, or handed down from colonial concessions. Half a century has gone by, and we are now concerned with the reliability of legal rights and interests defined by autonomous governments who have encouraged foreigners to rely on them. To deny the capacity of sovereign states to generate international acquired rights is to condemn them to suffer a handicap tantamount to perpetual credit-unworthiness. It is to deprive them of the most powerful of tools in the vast process of economic development.

[17] J. Irizarry y Puente, 'The Concept of 'Denial of Justice' in Latin America', (1944) 43 *Michigan Law Review* 383, at p. 406 (emphasis omitted).

[18] S. N. Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 AJIL 866.

Noting that a 'clear and malicious misapplication of the law' is a type of denial of justice – which 'doubtless overlaps with the notion of "pretence of form" to mask a violation of international law' – the arbitral tribunal went on to observe that no such wrongdoing had been alleged, and that the evidence showed that the findings of the Mexican judgments 'cannot possibly be said to have been arbitrary, let alone malicious'. To the contrary the arbitrators found that there was ample evidence of misrepresentations by the Claimants' representatives in the conclusion of the concession.

But how precisely is one to understand the possibility that international responsibility may be extant in the event the judgment on the merits evidences impermissible bias? Although de Visscher, as seen above, clearly spelled out the general rule – *errare humanum est*, with no international responsibility for violations of national law – he then went on to write that complaints against the substance of a national judgment may 'exceptionally' be heard 'if it is shown that under the colour of justice rendered, justice was denied'.[62] Is this to be understood as an exception to the general rule, or something else?

The erroneous application of national law cannot, in itself, be an international denial of justice. Unless somehow qualified by international law, rights created under national law are limited by national law, including the principle that by operation of the fundamental rule of *res judicata* a determination by a court of final appeal is definitive. So even if an instance of municipal *mal jugé* is given weight by international adjudicators when determining that there has been a denial of justice, on the footing that rights created under national law have been so blatantly disregarded as to compel conviction with respect to violation of international standards proscribing discrimination, bias, undue influence, or the like, it remains the case that the international wrong is not the misapplication of national law.

Demise of substantive denial of justice

Three generations ago, conventional doctrine was expressed confidently by Freeman as follows:

> practice, as well as the overwhelming preponderance of legal authority, recognises that not only flagrant procedural irregularities and deficiencies may justify diplomatic complaint, but also gross defects in the substance of the judgment itself.[63]

[62] De Visscher at p. 395. [63] Freeman at p. 309.

The distinction has, it seems, been perpetuated by repetition; writers continue to describe denial of justice as either *procedural* or *substantive*.

Yet in modern international law there is no place for substantive denial of justice. Numerous international awards demonstrate that the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determinations of national judiciaries with respect to their own law. To insist that there is a *substantive* denial of justice reserved for 'grossly' unconvincing determinations is to create an unworkable distinction. If a judgment is *grossly* unjust, it is because the victim has not been afforded fair treatment. That is the basis for responsibility, not the misapplication of national law in itself.

Extreme cases should thus be dealt with on the footing that they are so unjustifiable that they could have been only the product of bias or some other violation of the right of *due process*. Once again, Fitzmaurice merits extensive quotation:

> if all that a judge does is to make a mistake, i.e. to arrive at a wrong conclusion of law or fact, even though it results in serious injustice, the state is not responsible.
>
> There can be no question of the soundness of the above position. Yet, as every one who has had any practical experience of the matter knows, the rule that a state is not responsible for the *bona fide* errors of its courts can be, and all too frequently is, made use of in order to enable responsibility to be evaded in cases where there is a virtual certainty that bad faith has been present, but no conclusive proof of it ...
>
> One of the chief difficulties in applying the rule that the *bona fide* errors of courts do not involve responsibility lies in the fact that the question of whether there has been a 'denial of justice' cannot, strictly speaking, be answered merely by having regard to the degree of injustice involved. The only thing which can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some such question as 'Was the court guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence?' If the answer to this question is in the negative, then, strictly speaking, it is immaterial how unjust the judgment may have been. The relevance of the degree of injustice really lies only in its evidential value. *An unjust judgment may and often does afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence, if the injustice be sufficiently flagrant, so that the judgment is of a kind which no honest and competent court could possibly have given.*[64]

[64] Fitzmaurice at pp. 112–113 (emphasis added).

The most difficult cases in this respect are evidently those where there is strong suspicion, but no proof, of bad faith. Fitzmaurice's solution was as follows:

> In almost all such cases it is probable that the court will have committed some more or less serious error, in the sense of a wrong conclusion of law or of fact. This suggests that the right method is to concentrate on the question whether the court was competent rather than on whether it was honest. The question will then be, was the error of such a character that no competent judge could have made it? If the answer is in the affirmative, it follows that the judge was either dishonest, in which case the state is clearly responsible, or that he was incompetent, in which case the responsibility of the state is also engaged for failing in its duty of providing competent judges.[65]

And we can go further. Pleading for Spain in *Barcelona Traction*, Paul Guggenheim conceded that a presumption of judicial bad faith or *culpa late* could arise, in the case of 'exceptionally outrageous or monstrously grave' *breaches of municipal law*. In such cases, he added, it must be shown that 'one can no longer explain the sentence rendered by any factual consideration or by any valid legal reason'.[66] Three decades earlier, the government of Venezuela, in its memorial in the *Martini* case, had similarly acknowledged that 'not an erroneous judgment, but a gross error, an inexcusable error' could give rise to international responsibility.[67]

This approach may give rise to more controversy and discord than one would wish to see in the international realm where national sensitivities are acute. Pragmatically, it may be wiser to consider that if in such difficult cases the perpetrators of the unfairness are incapable of dissimulating their conduct under the cover of formally irreproachable reasoning, they are equally likely to be guilty of serious procedural missteps and on that account provide better justification for finding denial of justice; to declare that judgments under national law are rationally unsustainable

[65] *Ibid.* at pp. 113–114. De Visscher conceived, at 381, that part of a state's international obligation concerns the 'proper recruitment of judges' (*recrutement convenable des magistrats*); and, at 394, that its duty is to 'place at the disposal of foreigners a judicial organisation capable, by the laws that regulate it *as well as by the men who comprise it*, of achieving the effective protection of their rights' (emphasis added).

[66] CR 69/25, 23 May 1969, quoted in Jiménez de Aréchaga, 'International Responsibility of States', at p. 185.

[67] Quoted in de Visscher at p. 406, note 1. The Venezuelan government's comment was, however, irrelevant. The issue was not whether a Venezuelan judgment repudiating an international award was an error, inexcusable or not, of national law, but whether it violated an international undertaking to respect that award.

may expose the international jurisdiction to the criticism that it does not have an adequate intellectual foundation in the relevant national law.

It may seem that this discussion seriously undercuts the conclusions of the previous section (the general rule of non-revision) as well as the title of the present one. What needs to be understood is that even if in extreme cases the substantive quality of a judgment may lead to a finding of denial of justice, the objective of the international adjudicator is *never* to conduct a substantive view. As Fitzmaurice put it in the lengthier of the two quotations above: 'it is immaterial how unjust the judgment may have been'.[68]

The demonstration of this proposition requires that one consider two questions: does a judicial organ of a state which violates international law thereby automatically commit a denial of justice? Absent a violation of international law, may such an organ commit a denial of justice by erroneously applying its national law? The answer to each question is negative.

Judgments in breach of international law

When a national judiciary renders a decision violative of international law, a tribunal having jurisdiction to apply international law is free, *indeed required*, to substitute its judgment for that of the national court if it disagrees with the way the latter has interpreted or applied international law. Such is the necessary consequence of treating national courts, as one must, as neither more nor less than an instrumentality of the state; and of excluding, as one must, that the state be judge and party in its own case.

It does not follow that the national court's misapplication of international law is a denial of justice. We have already considered this matter in the section of this chapter entitled 'Relationship with specific rights created by international law'. If a court has violated a treaty, the state to which its actions are imputed is internationally responsible in the same way as any other agency of the state. The fact that the culpable agency is charged with the administration of justice does not justify or require a special nomenclature.

So if two countries sign a treaty under which they agree that the citizens of each, when before the other's courts, are entitled to trials in the course of which able-bodied witnesses will not be heard unless they stand on one leg when testifying, a court which neglects that requirement may violate international law by reason of its breach of the treaty, but does not

[68] Fitzmaurice at p. 112.

one of the merits. The local remedies rule is, of course, traditionally considered as a matter of admissibility.[25]

The *Loewen* tribunal's final attempt to explain its conclusion was thus to wax teleological. If the exhaustion requirement were held waived:

> it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law.[26]

But this will be recognised as nothing more than a restatement of the reasons summarised by Freeman, and an incomplete one at that. Once again, the explanation does not point to a distinguishing feature to justify that other claims not be subject to the same threshold.

Ultimately, we are left with this somewhat anticlimactic pronouncement (as though the arbitrators felt that the fact of their having tried so valiantly to come up with a justification entitled them to credit for having achieved it):

> One thing is, however, reasonably clear about Article 1121 and that is that it says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level.[27]

One can only wonder why at this point the arbitrators found the matter only 'reasonably' clear; it is as clear as day that Article 1121 breathes not a word of the specific case of responsibility for judicial acts. They could have said that it was *perfectly* clear; the response would still be: 'so what?'

Exhaustion as a substantive requirement of denial of justice

Yet the *Loewen* tribunal was surely right. Freeman's list of reasons *are* intuitively more compelling with respect to claims of denial of justice than

[25] Indeed Article 44 of the ILC's Articles on State Responsibility, which articulates the local remedies rule, is entitled 'Admissibility of claims': ILC Draft Articles on Responsibility of States for internationally wrongful acts, UN Doc. A/56/10 (2001).

[26] *Loewen*, 26 June 2003, at para. 162. [27] *Ibid.* at para. 161.

in connection with other allegations of international wrongs. We must, it seems, try again to find a rationale for the arbitrators' conclusion. To return to first principles, the question is this: even when exhaustion is otherwise not required, is the international delict of denial of justice, unlike other violations of international law, consummated only after the ordinary and reasonably accessible appeals process has run its course?

To repeat: states may, and do, enter into treaties that provide for direct access by foreigners to international tribunals without first having to exhaust local remedies. Such waivers give foreigners the assurance that internationally wrongful conduct will not be swept under the rug indefinitely.

In the particular case of denial of justice, however, claims will not succeed unless the victim has indeed exhausted municipal remedies, or unless there is an explicit waiver of a type yet to be invented. (An *ad hoc compromis* might do.) This is neither a paradox nor an aberration, for it is in the very nature of the delict that a state is judged by the final product – or at least a *sufficiently* final product – of its administration of justice. A denial of justice is not consummated by the decision of a court of first instance. Having sought to rely on national justice, the foreigner cannot complain that its operations have been delictual until he has given it scope to operate, including by the agency of its ordinary corrective functions.

Perhaps the strongest argument for this special treatment of claims of denial of justice is that it avoids interference with the fundamental principle that states should to the greatest extent possible be free to organise their national legal systems as they see fit. Conscious of the public demand for greater speed, they may wish to provide for a great number of local courts even if they do not have the resources to staff them with the highest-quality jurists. They may institute accelerated procedures on the understanding that most litigants prefer rough justice now to perfect justice in their dotage. They may allow lay volunteers to sit on commercial tribunals of first instance. The state can make such compromises because of its confidence in its appellate mechanisms. If aliens are allowed to bypass those mechanisms and bring international claims for denial of justice on the basis of alleged wrongdoing by the justice of the peace of any neighbourhood, international law would find itself intruding intolerably into internal affairs. For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.

When on the other hand the alleged delict has been committed by officials who are not carrying out a function susceptible to judicial review, the issue is simply whether their acts are imputable to the state or not. If so, responsibility for the delict is in principle extant even in the absence of any attempt to seise a higher authority. Claimants are of course unlikely to pursue international claims against a state for the misdeeds of lower-level officials; overwhelming common sense will command that an attempt be made to go over their heads to administrative superiors before engaging the expense of launching an international claim. (A well-advised potential claimant will also be aware that the quantum of recovery may be compromised in the absence of any attempt to mitigate.)

But a trial judge who misconducts himself simply does not commit a fully constituted international delict imputable to the state. States do not have an international obligation to ensure that no individual judge is ever guilty of a miscarriage of justice. The obligation is to establish and maintain a *system* which does not deny justice; the system is the whole pyramid.[28]

[28] The failure to pursue local remedies may be given weight in assessing the substantive justification for claims other than denial of justice. In contrast to the three cases involving respectively Indonesia (*Amco Asia et al.* v. *Indonesia*, 1 *ICSID Reports* 376), Sri Lanka (*Asian Agricultural Products Ltd* v. *Sri Lanka*, 4 *ICSID Reports* 245), and *Congo* (Brazzaville) (*Benvenuti and Bonfant srl* v. *Congo, 1 ICSID Reports* 330), see *Generation Ukraine Inc.* v. *Ukraine*, award, 16 September 2003, (2005) 44 ILM 404 (Salpius, Voss, Paulsson (presiding)), where the lack of attempts to seek local redress persuaded the arbitrators that there had in fact been no expropriation: '20.30 ... it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction ... 20.33 No act or omission of the Kyiv City State Administration during this period, whether cumulatively or in isolation, transcends the threshold for an indirect expropriation. This Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. That function is within the proper domain of domestic courts and tribunals that are cognisant of the minutiae of the applicable regulatory regime. In the circumstances of this case, the conduct cited by the Claimant was never challenged before the domestic courts of Ukraine. More precisely, the Claimant did not attempt to compel the Kyiv City State Administration to rectify the alleged omissions in its administrative management of the Parkview Project by instituting proceedings in the Ukrainian courts. There is, of course, no formal obligation upon the Claimant to exhaust local remedies before resorting to ICSID arbitration

A tacit recognition of this fundamental element of denial of justice was provided by *Feldman* v. *Mexico*,[29] a case which arose under NAFTA and was decided by an ICSID Additional Facility Tribunal. The arbitrators quoted with approval the reasoning expressed in *Azinian* v. *Mexico* to the effect that 'a governmental authority surely cannot be faulted for acting in a manner validated by its own courts unless the courts themselves are disavowed at the international level'. Faced with a claimant who argued that unfavourable regulatory actions of the Ministry of Finance and Public Credit (in alleged disregard of both a Supreme Court precedent and a specific agreement made with the claimant) constituted denial of justice, the arbitral tribunal had to go further than *Azinian*, where there was no challenge to the relevant Mexican court decisions. In rejecting the claim, the *Feldman* award noted that Mexican judicial and administrative procedures were at all relevant times open to the claimant, that he had indeed won one such court application to the Supreme Court, and that court review of the adverse regulatory decisions was available.[30]

The proposed Article 12 of the Second Report on Diplomatic Protection prepared for the International Law Commission by John Dugard affirms that the local remedies rule is a procedural precondition to the prosecution of an international claim, and not a substantive norm. This proposition seems consistent with the views expressed by Judge Lauterpacht in *Norwegian Loans*,[31] but contrary to those of the first Lauterpacht lecturer, Judge Schwebel, in the *ELSI* case.[32]

For present purposes, it is possible, and indeed right, to sidestep this controversy (which is not a Lauterpacht–Schwebel debate, but a notorious matter of discussion among international legal scholars[33]).

pursuant to the BIT [Ukraine–United States Bilateral Investment Treaty]. Nevertheless, in the absence of any *per se* violation of the BIT discernible from the relevant conduct of the Kyiv City State Administration, the only possibility in this case for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation would have been for the Claimant to be denied justice before the Ukrainian courts in a *bona fide* attempt to resolve these technical matters.' (Emphasis in the original. *Compare Oil Field of Texas, Inc.* v. *Iran*, award, 8 October 1986, 12 Iran–US Claims Tribunal Report 308, where the finding of expropriation depended in significant part on 'the Claimant's impossibility to challenge the Court order in Iran', *ibid.* at para. 43.)

[29] Award, 16 December 2002, 7 *ICSID Reports* 339. [30] *Ibid.* at para. 140.

[31] *France* v. *Norway* 1957 *ICJ Reports* 9, at p. 41.

[32] *US* v. *Italy* 1989 *ICJ Reports* 15, at pp. 115–116.

[33] Judge Roberto Ago once compiled a bibliography of the different schools of thought: *ILC Yearbook* 1977, vol. II, A/CN.4/SER.A/1977/Add.1(78.v.2) at 135–137. De Visscher had no hesitation in declaring the exhaustion requirement to be a *règle de procédure*. He then wrote, at 421: 'It affects less the existence of responsibility than the

The proposition advanced is that the very definition of the delict of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial before exhaustion.[34] (To put it more precisely, the offending state must be given a reasonable opportunity to correct actions which otherwise would ripen into delicts.) The aptness or otherwise of Dugard's proposed Article 12, as it applies to other international delicts, is simply *hors propos*. To take one step further: denial of justice is by definition to be distinguished from situations where international wrongs materialise before exhaustion of local remedies; there is no impediment to perceiving, in accordance with Dugard's report, that exhaustion of local remedies with respect to such wrongs is a waivable procedural precondition.[35]

This analysis impels us to revert to the subject of Calvo Clauses. The fundamental effect of such Clauses, generally accepted as such since the

conditions for initiating the claim.' The word *less* is uncomfortable; if the matter truly was so clear to de Visscher, he might have expressed himself in a more absolute manner, and written *not*. At any rate; the quoted sentence would get a claimant nowhere with respect to a denial of justice; there is no way to 'initiate a claim' which has not matured, i.e. the elements proving 'the existence of responsibility' are not extant before the national system has been given an opportunity for correction.

The exhaustion rule adopted by the ILC Articles on the Responsibility of States for Internationally Wrongful Acts in 2001 appears in Article 44(b), which is entitled 'Admissibility of claims'. (It refers to the non-exhaustion of any *available* and *effective* local remedy.) The commentary does not, however, suggest that exhaustion is purely procedural; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), at pp. 264–265.

[34] The *Mondev* award was therefore in error when it asserted that 'under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule "are interlocking and inseparable"'. *Mondev* at para. 96 (quoting C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), at p. 113).

[35] It is possible that the actions of a lower court may breach international obligations under a treaty. Jiménez de Aréchaga noted in 1968 that 'State responsibility for acts of the Judiciary does not exhaust itself in the concept of denial of justice', in 'International Responsibility', in Max Sørensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968), at p. 555. For example, a treaty may contain promises of 'fair and equitable treatment' which are held not to be confined to matters covered by the customary law of denial of justice; breaches of such promises may not require the exhaustion of local remedies. Or a treaty may be held to contain promises of 'transparency' the breach of which is consummated by a lower court. (The example is suggested by the controversy engendered by the *Metalclad case*; see *Metalclad Corp.* v. *Mexico*, award, 30 August 2000, 5 *ICSID Reports* 209 (Civiletti, Siqueiros, Lauterpacht (presiding)), and its partial annulment in British Columbia, *Mexico* v. *Metalclad Corporation*, 2 May 2001, *ibid.* at 236. Such grievances must find their basis in the *lex specialis* of the treaty; for want of the exhaustion of local remedies, they have not matured as claims of denial of justice.

North American Dredging case,[36] is to deny to international tribunals the power to try (or review) dispositions of national law.[37] Conduct which is alleged to generate immediate international responsibility may of course be brought to such international forums as may have jurisdiction *ratione personae*. But claims that arise because of the manner in which the national system has administered justice do not fall within the scope of authority of international adjudicators until that system has finally disposed of the claim submitted to it, and such an international wrong is not consummated until its remedies have been exhausted. Our conclusion is in harmony with the operation of the Calvo Clause. Put another way, *Loewen* is consistent in principle with *North American Dredging*.

The qualification of reasonableness

In the *Montano* case discussed at greater length in Chapter 6, the Umpire of the US–Peruvian Claims Commission (General Herran) rejected the US Government's objection of non-exhaustion of local remedies and went on to uphold a significant Peruvian claim. He wrote notably:

> The obligation of a stranger to exhaust the remedies which nations have for obtaining justice, before soliciting the protection of his government, ought to be understood in a rational manner, that such obligation does not make delusive the rights of the foreigner.[38]

The Peruvian claimant, Esteban Montano, had obtained a federal judgment in his favour, but it remained unenforced due to the negligence of the marshal charged with its execution in California. The US Government apparently considered that the claimant should now lodge a complaint against the marshal, and thus seemed to be saying, in General Herran's ironic phrase, that 'what Montano gained by the sentence was the right to bring forward another complaint'. The Umpire was satisfied that 'the claimant had exhausted the ordinary means of obtaining justice'.

[36] See the section on 'Modern political realities' in Chapter 2.

[37] The well-informed reader will not miss the broad parallel with the effect of contractual forum clauses analysed in the cases of *SGS Société Générale de Surveillance S.A.* v. *Pakistan*, decision on jurisdiction, 6 August 2003, 8 *ICSID Reports* 406 (Faurès, Thomas, Feliciano (presiding)) and SGS *Société Générale de Surveillance S.A.* v. *Philippines*, decision on jurisdiction, 29 January 2004, 8 *ICSID Reports* 518 (Crawford, Crivellaro, El-Kosheri (presiding)).

[38] *Peru* v. *US*, Moore, *Arbitrations* 1630 at p. 1637.

ANNEX 174

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME IV

Decisions of Claims Commissions
MEXICO—UNITED STATES

Décisions des Commissions des Réclamations
MEXIQUE — ETATS-UNIS

UNITED NATIONS

Annex 174

Fernández MacGregor, Commissioner:

I concur with paragraphs 1 to 6 of the Presiding Commissioner's Opinion. It appears clear to me, notwithstanding the vagueness of the evidence presented by both sides in this case, that Turner was held prisoner without being brought to trial for a period which could be from three to five months more than he should have been, according to Mexican law, and that this fact, which means a violation of human liberty, renders Mexico liable conformably with principles of international law. Therefore, I believe that the claimant must be awarded the sum proposed by the Presiding Commissioner.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of Mary Ann Turner, $4,000.00 (four thousand dollars), without interest.

B. E. CHATTIN (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 422-465.)

EFFECT UPON CLAIM OF ESCAPE OF CLAIMANT FROM PRISON. The fact that claimant escaped from jail and was a fugitive from justice *held* not to bar his Government's right to espouse his claim.

DENIAL OF JUSTICE.—ILLEGAL ARREST. Evidence to support the validity of an arrest need not be of same weight as that to support a conviction.

DIRECT AND INDIRECT RESPONSIBILITY.—MEASURE OF DAMAGES. Direct and indirect responsibility defined and distinguished. Measure of damages in each category considered.

IRREGULARITIES IN JUDICIAL PROCEEDINGS.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.—CONSOLIDATION OF CRIMINAL CASES WITHOUT REASON.—FAILURE TO INFORM ACCUSED OF CHARGE AGAINST HIM.—INSUFFICIENT HEARING OR TRIAL.—FAILURE TO MEET ORDINARY JUDICIAL STANDARDS. Evidence *held* sufficient to establish various irregularities and undue delay in judicial proceedings as well as failure to meet ordinary judicial standards.

INFLUENCING OF TRIAL BY GOVERNOR OF STATE.—EXORBITANT BAIL.—FAILURE TO PROVIDE COUNSEL OR INTERPRETER TO ACCUSED.—FAILURE TO CONFRONT ACCUSED WITH WITNESSES. Evidence *held* not to establish certain irregularities in judicial proceedings.

FAILURE TO SWEAR WITNESSES.—INTERNATIONAL STANDARD. A failure to swear witnesses, when not required by Mexican law, *held* not to involve a failure to meet international standards.

CONVICTION ON INSUFFICIENT EVIDENCE. Claim that claimant was convicted on insufficient evidence *held* not established.

UNDUE SEVERITY OF PENALTY IMPOSED. A court in its discretion may impose a severe penalty for the embezzlement of four pesos, so long as such penalty is permissible under the law.

CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Claim for mistreatment in prison *held* not established. Corroboration of allegations of claimant is required.

MEASURE OF DAMAGES. Measure of damages, in light of evidence, in case involving direct responsibility, considered. Fact that claimant had escaped from prison and was not in jail for entire period involved *held* to lessen damages.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 667; Annual Digest, 1927-1928, p. 248; British Yearbook, Vol. 9, 1928, p. 157.

Van Vollenhoven, Presiding Commissioner :

1. This claim is made by the United States of America against the United Mexican States on behalf of B. E. Chattin, an American national. Chattin, who since 1908 was an employee (at first freight conductor, thereafter passenger conductor) of the Ferrocarril Sud-Pacífico de México (Southern Pacific Railroad Company of Mexico) and who in the Summer of 1910 performed his duties in the State of Sinaloa, was on July 9, 1910, arrested at Mazatlán, Sinaloa, on a charge of embezzlement; was tried there in January, 1911, convicted on February 6, 1911, and sentenced to two years' imprisonment; but was released from the jail at Mazatlán in May or June, 1911, as a consequence of disturbances caused by the Madero revolution. He then returned to the United States. It is alleged that the arrest, the trial and the sentence were illegal, that the treatment in jail was inhuman, and that Chattin was damaged to the extent of $50,000.00, which amount Mexico should pay.

2. Mexico has challenged the claimant's citizenship on account of its being established by testimonial evidence only. Under the principles expounded in paragraph 3 of the Commission's opinion in the case of *William A. Parker* (Docket No. 127)[1] rendered March 31, 1926, the American nationality of Chattin would seem to be proven.

3. The circumstances of Chattin's arrest, trial and sentence were as follows. In the year 1910 there had arisen a serious apprehension on the part of several railroad companies operating in Mexico as to whether the full proceeds of passenger fares were accounted for to these companies. The Southern Pacific Railroad Company of Mexico applied on June 15, 1910, to the Governor of the State of Sinaloa, in his capacity as chief of police of the State, co-operating with the federal police, in order to have investigations made of the existence and extent of said defrauding of their lines within the territory of his State. On or about July 8, 1910, one Cenobio Ramírez, a Mexican employee (brakeman) of the said railroad, was arrested at Mazatlán on a charge of fraudulent sale of railroad tickets of the said company, and in his appearance before the District Court in that town he accused the conductor Chattin—who since May 9, 1910, had charge of trains operating between Mazatlán and Acaponeta, Nayarit—as the principal in the crime with which he, Ramírez, was charged; whereupon Chattin also was arrested by the Mazatlán police, on July 9 (not 10),

[1] See page 35.

1910. On August 3 (not 13), 1910, his case was consolidated not only with that of Ramírez, but also with that of three more American railway conductors (Haley, Englehart and Parrish) and of four more Mexicans. After many months of preparation and a trial at Mazatlán, during both of which Chattin, it is alleged, lacked proper information, legal assistance, assistance of an interpreter and confrontation with the witnesses, he was convicted on February 6, 1911, by the said District Court of Mazatlán as stated above. The case was carried on appeal to the Third Circuit Court at Mexico City, which court on July 3, 1911, affirmed the sentence. In the meantime (May or June, 1911) Chattin had been released by the population of Mazatlán which threw open the doors of the jail in the time elapsing between the departure of the representatives of the Diaz regime and the arrival of the Madero forces.

Forfeiture of the right to national protection

4. Mexico contends that not only has Chattin, as a fugitive from justice, lost his right to invoke as against Mexico protection by the United States, but that even the latter is bound by such forfeiture of protection and may not interpose in his behalf. If this contention be sound, the American Government would have lost the right to espouse Chattin's claim, and the claim lacking an essential element required by Article 1 of the Convention signed September 8, 1923, would not be within the cognizance of this Commission. The motive for the alleged limitation placed on the sovereignty of the claimant's Government would seem to be that a government by espousing such claim makes itself a party to the improper act of its national. International awards, however, establishing either the duty or the right of international tribunals to reject claims of fugitives from justice have not been found; on the contrary, the award in the *Pelletier* case (under the Convention of May 28, 1884, between the United States and Hayti) did not attach any importance to the fact that Pelletier had escaped from an Haytian jail, nor did Secretary Bayard do so in expounding the reasons why the United States Government did not see fit to press the award rendered in its favor (Moore, at 1779, 1794, 1800). In the *Roberts*[1] and *Strother*[2] cases (Docket Nos. 185 and 3088) this Commission virtually held that protection of a fugitive from justice should be left to the discretion of the claimant government, and it did so more explicitly in the *Massey* case (Docket No. 352; paragraph 3 of Commissioner Nielsen's opinion).[3] A similar attitude was taken in cases in which forfeiture of the right to protection was alleged on other grounds. In paragraph 6 of its opinion in the *Macedonio J. García* case (Docket No. 607),[4] the Commission held that the American claimant's participation in Mexican politics was not a point on which the question of the right of the United States to intervene in his behalf, and therefore the question of the Commission's jurisdiction, could properly be raised, but that the pertinency of this point could only be considered in connection with the question of the validity of the claim under international law. In the *Francisco Mallén* case (Docket No. 2935)[5] none of the Commissioners held that misstatements or even misrepresentations by the individual

[1] See page 77.
[2] See page 262.
[3] See page 155.
[4] See page 108.
[5] See page 173.

claimant could furnish a ground for the Commission to reject the claim as an unallowable one. It is true that more than once in international cases statements have been made to the effect that a fugitive from justice loses *his* right to invoke and to expect protection—either by the justice from which he fled, or by his own government—but this would seem not to imply that his government as well loses *its* right to espouse its subject's claim in its discretion. The present claim, therefore, apart from the question whether a man who leaves a jail which is thrown open may be called a fugitive from justice, should be accepted and examined.

Illegal arrest

5. It has been alleged, in the first place, that Chattin, contrary to the Mexican Constitution of 1857, was arrested merely on an oral order. The Court's decision rendered February 6, 1911, stated that the court record contained "the order dated July 9, which is the written order based on the reasons for the detention of Chattin"; and among the court proceedings there are to be found (a) a decree ordering Chattin's arrest, dated July 9, 1910, and (b) a decree for Chattin's "formal imprisonment", dated July 9, 1910, as well. Even if the first decree had been issued some hours after Chattin's arrest, for which there is no proof except the statement by the police prefect that Chattin was placed in a certain jail on the Judge's "oral order", the irregularity would have been inconsequential to Chattin. The Third Circuit Court at Mexico City, when called upon to examine the second decree given on July 9, 1910, held on October 27, 1910, that it had been regular but for the omission of the crime imputed (which was known to Chattin from the examination to which he was previously submitted on July 9, 1910), and therefore the Court affirmed it after having amended it by inserting the name of Chattin's alleged crime. The United States has alleged that, since the sentence rendered on February 6, 1911, held that "the confession of the latter" (Ramírez) "does not constitute in itself a proof against the other" (Chattin), the Court confessed that Chattin's arrest had been illegal. No such inference can be made from the words cited, though the thought might have been expressed more clearly; a statement, insufficient as evidence for a conviction, can under Mexican law (as under the laws of many other countries) furnish a wholly sufficient basis for an arrest and formal imprisonment.

Defective administration of justice

6. Before taking up the allegations relative to irregular court proceedings against Chattin and to his having been convicted on insufficient evidence, it seems proper to establish that the present case is of a type different from most other cases so far examined by this Commission in which defective administration of justice was alleged.

7. In the *Kennedy* case (Docket No. 7)[1] and nineteen more cases before this Commission it was contended that, a citizen of either country having been wrongfully damaged either by a private individual or by an executive official, the judicial authorities had failed to take proper steps against the person or persons who caused the loss or damage. A governmental liability proceeding from such a source is usually called "indirect liability", though,

[1] See page 194.

considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder) for that very act. Such cases of *indirect governmental liability* because of lack of proper action by the judiciary are analogous to cases in which a government might be held responsible for denial of justice in connection with nonexecution of private contracts, or in which it might become liable to victims of private or other delinquencies because of lack of protection by its executive or legislative authorities.

8. Distinct from this so-called indirect government liability is the *direct responsibility* incurred on account of acts of the government itself, or its officials, unconnected with any previous wrongful act of a citizen. If such governmental acts are acts of *executive* authorities, either in the form of breach of government contracts made with private foreigners, or in the form of other delinquencies of public authorities, they are at once recognized as acts involving direct liability; for instance, collisions caused by public vessels, reckless shooting by officials, unwarranted arrest by officials, mis-treatment in jail by officials, deficient custody by officials, etc. As soon, however, as mistreatment of foreigners *by the courts* is alleged to the effect that damage sustained is caused by the *judiciary* itself, a confusion arises from the fact that authors often lend the term "denial of justice" as well to these cases of the second category, which are different in character from a "denial of justice" of the first category. So also did the tribunal in the *Yuille, Shortridge & Company* case (under the British memorandum of March 8, 1861, accepted by Portugal; De Lapradelle et Politis, II, at 103), so Umpire Thornton sometimes did in the 1868 Commission (Moore, 3140, 3141, 3143; *Burn, Pratt* and *Ada* cases). It would seem preferable not to use the expression in this manner. The very name "denial of justice" (*dénégation de justice, déni de justice*) would seem inappropriate here, since the basis of claims in these cases does not lie in the fact that the courts refuse or deny redress for an injustice sustained by a foreigner because of an act of someone else, but lies in the fact that the courts themselves did injustice. In the British and American claims arbitration Arbitrator Pound one day put it tersely in saying that there must be "an injustice antecedent to the denial, and then the denial after it" (Nielsen's *Report*, 258, 261).

9. How confusing it must be to use the term "denial of justice" for both categories of governmental acts, is shown by a simple deduction. If "denial of justice" covers not only governmental acts implying so-called indirect liability, but also acts of direct liability, and if, on the other hand, "denial of justice" is applied to acts of executive and legislative authorities as well as to acts of judicial authorities—as is often being done—there would exist no international wrong which would not be covered by the phrase "denial of justice", and the expression would lose its value as a technical distinction.

10. The practical importance of a consistent cleavage between these two categories of governmental acts lies in the following. In cases of direct responsibility, insufficiency of governmental action entailing liability is not limited to flagrant cases such as cases of bad faith or wilful neglect of duty. So, at least, it is for the non-judicial branches of government. Acts of the *judiciary*, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient

unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this lot only then, when they engender a so-called *indirect* liability in connection with acts of others; and the very reason why this type of acts often is covered by the same term "denial of justice" in its broader sense may be partly in this, that to such acts or inactivities of the executive and legislative branches engendering *indirect* liability, the rule applies that a government cannot be held responsible for them unless the wrong done amounts to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. With reference to *direct* liability for acts of the executive it is different. In the *Mermaid* case (under the Convention of March 4, 1868, between Great Britain and Spain) the Commissioners held that even an act of mere clumsiness on the part of a gunboat—a cannon shot fired at a ship in an awkward way—when resulting in injustice renders the government to whom that public vessel belongs liable (De Lapradelle et Politis, II, 496; compare Moore, 5016). In the *Union Bridge Company* case the British American arbitral tribunal decided that an act of an executive officer may constitute an international tort for which his country is liable, even though he acts under an erroneous impression and without wrongful intentions (Nielsen's *Report*, at 380). This Commission, in paragraph 12 of its opinion in the *Illinois Central Railroad Company* case (Docket No. 432)[1] rendered March 31, 1926, held that liability can be predicated on nonperformance of government contracts even where none of these aggravating circumstances is involved; and a similar view regarding responsibility for other acts of executive officers was held in paragraph 7 of its opinion in the *Okie* case (Docket No. 275),[2] rendered March 31, 1926, and in paragraph 9 of the first opinion in the *Venable* case (Docket No. 603).[3] Typical instances of direct damage caused by the judiciary—"denial of justice" improperly so called—are the *Rozas* and *Driggs* cases (Moore, 3124-3126; not the *Driggs* case in Moore, 3160); before this Commission the *Faulkner*, *Roberts*, *Turner* and *Strother* cases (Docket Nos. 47, 185, 1327 and 3088) presented instances of this type, in so far as the allegation of illegal *judicial* proceedings was involved therein. Neither in the *Rozas* and *Driggs* cases, nor in the *Selkirk* case (Moore, 3130), the *Reed and Fry* case (Moore, 3132), the *Jennings* case (Moore, 3135), the *Pradel* case (Moore, 3141), the *Smith* case (Moore, 3146), the *Baldwin* case (Moore, 3235), the *Jonan* case (Moore, 3251), the *Trumbull* case (Moore, 3255), nor the *Croft* case (under the British memorandum of May 14, 1855, accepted by Portugal; De Lapradelle et Politis, II, at 22; compare Moore, 4979) and the *Costa Rica Packet* case (under the Convention of May 16, 1895, between Great Britain and the Netherlands; La Fontaine, 509, Moore, 4948) was the improper term "denial of justice" used by the tribunal itself. The award in the *Cotesworth & Powell* case made a clear and logical distinction between the two categories mentioned in paragraphs 7 and 8, above; "denials of justice" on the one hand (when tribunals refuse redress), and "acts of notorious injustice" committed by the judiciary on the other hand (Moore, at 2057, 2083).

[1] See page 134.
[2] See page 54.
[3] See page 219.

11. When, therefore, the American Agency in its brief mentions with great emphasis the existence of a "denial of justice" in the *Chattin* case, it should be realized that the term is used in its improper sense which sometimes is confusing. It is true that *both* categories of government responsibility —the direct one and the so-called indirect one—should be brought to the test of international standards in order to determine whether an international wrong exists, and that for *both* categories convincing evidence is necessary to fasten liability. It is moreover true that, as far as acts of the *judiciary* are involved, the view applies to *both* categories that "it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country" (*Garrison's* case; Moore, 3129), and to *both* categories the rule applies that state responsibility is limited to judicial acts showing outrage, bad faith, wilful neglect of duty, or manifestly insufficient governmental action. But the distinction becomes of importance whenever acts of the *other* branches of government are concerned; then the limitation of liability (as it exists for *all* judicial acts) does not apply to the category of direct responsibility, but only to the category of so-called indirect or derivative responsibility for acts of the executive and legislative branches, for instance on the ground of lack of protection against acts of individuals.

Irregularity of court proceedings

12. The next allegation on the American side is that Chattin's trial was held in an illegal manner. The contentions are: (a) that the Governor of the State, for political reasons, used his influence to have this accused and three of his fellow conductors convicted; (b) that the proceedings against the four conductors were consolidated without reason; (c) that the proceedings were unduly delayed; (d) that an exorbitant amount of bail was required; (e) that the accused was not duly informed of the accusations; (f) that the accused lacked the aid of counsel; (g) that the accused lacked the aid of an interpreter; (h) that there were no oaths required of the witnesses: (i) that there was no such a thing as a confrontation between the witnesses and the accused: and (j) that the hearings in open court which led to sentences of from two years' to two years and eight months' imprisonment lasted only some five minutes. It was also contended that the claimant had been forced to march under guard through the streets of Mazatlán; but the Commission in paragraph 3 of its opinion in the *Faulkner* case (Docket No. 47)[1] rendered November 2, 1926, has already held that such treatment is incidental to the treatment of detention and suspicion, and cannot in itself furnish a separate basis for a complaint.

13. As to illegal efforts made by the Governor of Sinaloa to influence the trial and the sentence (allegation a), the only evidence consists in hearsay or suppositions about such things as what the Governor had in mind, or what the Judge has said in private conversation; hearsay and suppositions which often come from persons connected with those colleagues of Chattin's who shared his fate. To uncorroborated talk of this kind the Commission should not pay any attention. The record contains several allegations about lawyers being unwilling to give or to continue their services because of fear of the Governor of Sinaloa; but the only statement of this kind proceeding from a lawyer himself relates to an undisclosed behavior on

[1] See page 67.

his part which displeased quite as much the college where he was teaching as a professor, as it displeased the Governor of the State. Among these lawyers who presented bills for large fees, but, according to the record, did not take any interest at all in their clients, and did not avail themselves of the rights accorded by Mexican law in favor of accused persons, there was one who seems to have been willing, only if he were appointed official consulting attorney for the American consulate, not merely to become quite active but also to drop at once his fear of the Governor. It took another lawyer thirty eight days to decline a request to act as counsel on appeal. If really these lawyers have behaved as it would seem from the record, their boastful pretenses and feeble activities were not a credit to the Mexican nation. The Government of Mexico evidently cannot be held liable for that; but if conditions sometimes are in parts of Mexico as they were then in Sinaloa, it might be well to explicitly obligate the Judge by law to inform the accused ones of their several rights, both during the investigations and the trial.

14. For the advisability or necessity of consolidating the proceedings in the four cases (allegations b), here is only slight evidence. Yet there is; and it would seem remarkable that, if the court record can be relied upon in this respect, this point was not given any attention during the investigations and the trial. Among the scanty pieces of evidence against Chattin there exists on the one hand a stub (No. 21), on which Chattin, by a statement made on October 28, 1910, admitted having written on April 24, 1910 (that is, before he came in charge of the track Mazatlán—Acaponeta, and was still on the track Culiacán-Mazatlán) the words "This man is O. K.—Chattin" (there is no addressee's name on the original), and of which he could give no other explanation than that it was issued to "recommend a friend who travelled on the line"; and on the other hand there was produced a stub (No. 23) reading "5/24/10.—Chattin—The two parties are O. K.—Haley", regarding which Haley stated on October 29, 1910, "that he wrote it on May 24th last for the purpose of recommending some intimate friends". These recommendations of travelling friends not only might raise suspicions in connection with the allegation ascribed to Camou and made in court by Batriz (both of them accused Mexican brakemen) that there was one general system of understandings between the several railway conductors, but it also shows that there might have been good reasons to connect the cases of at least Chattin and Haley; and as the cases of Haley and Englehart had been already naturally connected from the beginning, it would seem reasonable that at least the cases of these three men had been linked up. However, the Court which had taken these stubs from secret documents presented to it on August 3, 1910, by the railroad company, instead of making them an object of a most careful inquiry, neither informed Chattin and his colleagues about their origin, nor examined Haley and Chattin as to the relation existing between them. More than two months after the consolidation, to-wit on October 12, 1910, testimony was given that Ramírez, in the south of Sinaloa, had delivered passes to Guaymas, Sonora; but neither is there any trace of an investigation as to this connecting link between the acts of several conductors. Since no grounds were given for the consolidation of the cases, and not a single effort was made to throw any more light on the occurrences from this consolidation, all disadvantages resulting therefrom for those whose cases might have been heard at much earlier dates (Haley, Englehart and Parrish) must be imputed to the Judge. The present claimant, however, Chattin,

is the one who has not suffered from the consolidation, since his case was slowest in maturing for trial and since the others were waiting for him.

15. For undue delay of the proceedings (allegation c), there is convincing evidence in more than one respect. The formal proceedings began on July 9, 1910. Chattin was not heard in court until more than one hundred days thereafter. The stubs and perhaps other pieces of evidence against Chattin were presented to the Court on August 3, 1910; Chattin, however, was not allowed to testify regarding them until October 28, 1910. Between the end of July, and October 8, 1910, the Judge merely waited. The date of an alleged railroad ticket delinquency of Chattin's (June 29, 1910) was given by a witness on October 21, 1910; but investigation of Chattin's collection report of that day was not ordered until November 11, 1910, and he was not heard regarding it until November 16, nor confronted with the only two witnesses (Delgado and Sarabia) until November 17, 1910. The witnesses named by Ramírez in July were not summoned until after November 22, 1910, at the request of the Prosecuting Attorney, with the result that, on the one hand, several of them—including the important witness Manuel Virgen—had gone, and that, on the other hand, the proceedings had to be extended from November 18, to December 13. On September 3, 1910, trial had been denied Parrish, and on November 5, it was denied Chattin, Haley and Englehart; though no testimony against them was ever taken after October 21 (Chattin), and though the absence of the evidence ordered on November 11 and after November 22 was due exclusively to the Judge's laches. Unreliability of Ramírez's confession had been suggested by Chattin's lawyer on August 16, 1910; but it apparently was only after a similar suggestion of Camou on October 6, 1910, that the Judge discovered that the confession of Ramírez did not "constitute in itself a proof against" Chattin. New evidence against Chattin was sought for. It is worthy of note that one of the two new witnesses, Estebán Delgado, who was summoned on October 12, 1910, had already been before the police prefect on July 8, 1910, in connection with Ramírez's alleged crime. If the necessity of new evidence was not seriously felt before October, 1910, this means that the Judge either has not in time considered the sufficiency of Ramírez's confession as proof against Chattin, or has allowed himself an unreasonable length of time to gather new evidence. The explanation cannot be found in the consolidation of Chattin's case with those of his three fellow conductors, as there is no trace of any judicial effort to gather new testimony against these men after July, 1910. Another remarkable proof of the measure of speed which the Judge deemed due to a man deprived of his liberty, is in that, whereas Chattin appealed from the decree of his formal imprisonment on July 11, 1910—an appeal which would seem to be of rather an urgent character—"the corresponding copy for the appeal" was not remitted to the appellate Court until September 12, 1910; this Court did not render judgment until October 27, 1910; and though its decision was forwarded to Mazatlán on October 31, 1910, its receipt was not established until November 12, 1910.

16. The allegation (d) that on July 25, 1910, an exorbitant amount of bail, to-wit a cash bond in the sum of 15,000.00 pesos, was required for the accused is true; but it is difficult to see how in the present case this can be held an illegal act on the part of the Judge.

17. The allegation (e) that the accused has not been duly informed regarding the charge brought against him is proven by the record, and to

a painful extent. The real complainant in this case was the railroad company, acting through its general manager; this manager, an American, not only was allowed to make full statements to the Court on August 2, 3, and 26, 1910, without ever being confronted with the accused and his colleagues, but he was even allowed to submit to the Court a series of anonymous written accusations, the anonymity of which reports could not be removed (for reasons which he explained); these documents created the real atmosphere of the trial. Were they made known to the conductors? Were the accused given an opportunity to controvert them? There is no trace of it in the record, nor was it ever alleged by Mexico. It is true that, on August 3, 1910, they were ordered added to the court record; but that same day they were delivered to a translator, and they did not reappear on the court record until *after* January 16, 1911, when the investigations were over and Chattin's lawyer had filed his briefs. The court record only shows that on January 13, and 16, 1911, the conductors and one of their lawyers were aware of the existence, not that they knew the contents, of these documents. Therefore, and because of the complete silence of both the conductors and their lawyers on the contents of these railroad reports, it must be assumed that on September 3, 1910, when Chattin's lawyer was given permission to obtain a certified copy of the proceedings, the reports were not included. Nor is there evidence that, when two annexes of the reports (the stubs mentioned in paragraph 14 above) were presented to the conductors as pieces of evidence, their origin was disclosed. It is not shown that the confrontation between Chattin and his accusers amounted to anything like an effort on the Judge's part to find out the truth. Only after November 22, 1910, and only at the request of the Prosecuting Attorney, was Chattin confronted with some of the persons who, between July 13 and 21, inclusive, had testified of his being well acquainted with Ramírez. It is regrettable, on the other hand, that the accused misrepresents the wrong done him in this respect. He had not been left altogether in the dark. According to a letter signed by himself and two other conductors dated August 31, 1910, he was perfectly aware even of the details of the investigations made against him; so was the American vice-consul on July 26, 1910, and so was one H. M. Boyd, a dismissed employee of the same railroad company and friend of the conductors, as appears from his letter of October 4, 1910. Owing to the strict seclusion to which the conductors contend to have been submitted, it is impossible they could be so well-informed if the charges and the investigations were kept hidden from them.

18. The allegations (f) and (g) that the accused lacked counsel and interpreter are disproven by the record of the court proceedings. The telegraphic statement made on behalf of the conductors on September 2, 1910, to the American Embassy to the effect that they "have no money for lawyers" deserves no confidence; on the one hand, two of them were able to pay very considerable sums to lawyers, and on the other hand, two of the Mexicans, who really had no money, were immediately after their request provided with legal assistance.

19. The allegation (h) that the witnesses were not sworn is irrelevant, as Mexican law does not require an "oath" (it is satisfied with a solemn promise, *protesta*, to tell the truth), nor do international standards of civilization.

20. The allegation (i) that the accused has not been confronted with the witnesses—Delgado and Sarabia—is disproven both by the record of

the court proceedings and by the decision of the appellate tribunal. However, as stated in paragraph 17 above, this confrontation did not in any way have the appearance of an effort to discover what really had occurred. The Judge considered Ramírez's accusation of Chattin corroborated by the fact that the porter of the hotel annex where Chattin lived (Rojas) and an unmarried woman who sometimes worked there (Viera) testified about regular visits of Ramírez to Chattin's room; but there never was any confrontation between these four persons.

21. The allegation (j) that the hearings in open court lasted only some five minutes is proven by the record. This trial in open court was held on January 27, 1911. It was a pure formality, in which only confirmations were made of written documents, and in which not even the lawyer of the accused conductors took the trouble to say more than a word or two.

22. The whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court. There is no trace of an effort to have the two foremost pieces of evidence explained (paragraphs 14 and 17 above). There is no trace of an effort to find one Manuel Virgen, who, according to the investigations of July 21, 1910, might have been mixed in Chattin's dealings, nor to examine one Carl or Carrol Collins, a dismissed clerk of the railroad company concerned, who was repeatedly mentioned as forging tickets and passes and as having been discharged for that very reason. One of the Mexican brakemen, Batriz, stated on August 8, 1910, in court that "it is true that the American conductors have among themselves schemes to defraud in that manner the company, the deponent not knowing it for sure"; but again no steps were taken to have this statement verified or this brakeman confronted with the accused Americans. No disclosures were made as to one pass, one "half-pass" and eight perforated tickets shown to Chattin on October 28, 1910, as pieces of evidence; the record states that they were the same documents as presented to Ramírez on July 9, 1910, but does not attempt to explain why their number in July was eight (seven tickets and one pass) and in October was ten. No investigation was made as to why Delgado and Sarabia felt quite certain that June 29 was the date of their trip, a date upon the correctness of which the weight of their testimony wholly depended. No search of the houses of these conductors is mentioned. Nothing is revealed as to a search of their persons on the days of their arrest; when the lawyer of the other conductors, Haley and Englehart, insisted upon such an inquiry, a letter was sent to the Judge at Culiacán, but was allowed to remain unanswered. Neither during the investigations nor during the hearings in open court was any such thing as an oral examination or cross-examination of any importance attempted. It seems highly improbable that the accused have been given a real opportunity during the hearings in open court, freely to speak for themselves. It is not for the Commission to endeavor to reach from the record any conviction as to the innocence or guilt of Chattin and his colleagues; but even in case they were guilty, the Commission would render a bad service to the Government of Mexico if it failed to place the stamp of its disapproval and even indignation on a criminal procedure so far below international standards of civilization as the present one. If the wholesome rule of international law as to respect for the judiciary of another country —referred to in paragraph 11 above—shall stand, it would seem of the utmost necessity that appellate tribunals when, in exceptional cases, discover-

ing proceedings of this type should take against them the strongest measures possible under constitution and laws, in order to safeguard their country's reputation.

23. The record seems to disclose that an action in *amparo* has been filed by Chattin and his colleagues against the District Judge at Mazatlán and the Magistrate of the Third Circuit Court at Mexico City, but was disallowed by the Supreme Court of the Nation on December 2, 1912.

Conviction on insufficient evidence

24. In Mexican law, as in that of other countries, an accused can not be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal never can replace the important first element, that of the Judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, the legality and sufficiency of the evidence.

25. It has been alleged that among the grounds for Chattin's punishment was the fact that he had had conversations with Ramírez who had confessed his own guilt. This allegation is erroneous; the conversations between the two men only were cited to deny Chattin's contention made on July 13, 1910, that he had only seen Ramírez around the city at some time, without knowing where or when, and his contention made on July 9, 1910, to the effect that he did not remember Ramírez's name. It has been alleged that the testimony of Delgado and Sarabia merely applied to the anonymous passenger conductor on a certain train; but the record clearly states that the description given by these witnesses of the conductor's features coincided with Chattin's appearance, and that both formally recognized Chattin at their confrontation on November 17, 1910. Mention has been made, on the other hand, of a docket of evidence gathered by the railway company itself against some of its conductors; though it is not certain that the Court has been influenced by this evidence in considering the felony proven, it can scarcely have failed to work its influence on the penalty imposed.

26. From the record there is not convincing evidence that the proo against Chattin, scanty and weak though it may have been, was not such as to warrant a conviction. Under the article deemed applicable the medium penalty fixed by law was imposed, and deduction made of the seven months Chattin had passed in detention from July, 1910, till February, 1911. It is difficult to understand the sentence unless it be assumed that the Court, for some reason or other, wished to punish him severely. The most acceptable explanation of this supposed desire would seem to be the urgent appeals made by the American chief manager of the railroad company concerned, the views expressed by him and contained in the record, and the dangerous collection of anonymous accusations which were not only inserted in the court record at the very last moment, but which were even quoted in the decision of February 6, 1911, as evidence to prove "illegal acts of the nature which forms the basis of this investigation". The allegation that the Court in this matter was biased against American citizens would seem to be contradicted by the fact that, together with the four Americans, five Mexicans were indicted as well, four of whom had been caught and have subsequently been convicted—that one of these Mexicans was punished as severely as the Americans were—and that the lower penalties imposed on the three others are explained by motives which, even if not shared,

would seem reasonable. The fact that the Prosecuting Attorney who did not share the Judge's views applied merely for "insignificant penalties"—as the first decision establishes—shows, on the one hand, that he disagreed with the Court's wish to punish severely and with its interpretation of the Penal Code, but shows on the other hand that he also considered the evidence against Chattin a sufficient basis for his conviction. If Chattin's guilt was sufficiently proven, the small amount of the embezzlement (four pesos) need not in itself have prevented the Court from imposing a severe penalty.

27. It has been suggested as most probable that after Chattin's escape and return to the United States no demand for his extradition has been made by the Mexican Government, and that this might imply a recognition on the side of Mexico that the sentence had been unjust. Both the disturbed conditions in Mexico since 1911, and the little chance of finding the United States disposed to extradite one of its citizens by way of exception, might easily explain the absence of such a demand, without raising so extravagant a supposition as Mexico's own recognition of the injustice of Chattin's conviction.

Mistreatment in prison

28. The allegation of the claimant regarding mistreatment in the jail at Mazatlán refers to filthy and unsanitary conditions, bad food, and frequent compulsion to witness the shooting of prisoners. It is well known, and has been expressly stated in the *White* case (under the verbal note of July, 1863, between Great Britain and Peru; De Lapradelle et Politis, II, at 322; Moore, at 4971), how dangerous it would be to place too great a confidence in uncorroborated statements of claimants regarding their previous treatment in jail. Differently from what happened in the *Faulkner* case (Docket No. 47),[1] there is no evidence of any complaint of this kind made either by Chattin and his fellow conductors, or by the American vice-consul, while the four men were in prison; and different from what was before this Commission in the *Roberts* case (Docket No. 185),[2] there has not been presented by either Government a contemporary statement by a reliable authority who visited the jail at that time. The only contemporary complaint in the record is the complaint made by one H. M. Boyd, an ex-employee of the railroad company and friend of the conductors, and by the American vice-consul (both on September 3, 1910), that these prisoners were "held to a strict compliance with the rules of the jail while others are allowed liberties and privileges", apparently meaning the liberty of walking in the patio. The vice-consul in his said letter of September 3, 1910, moreover mentioned that one of the conductors regarding whom his colleagues wired "one prisoner sick, his life depends on his release", when allowed by the Judge to go to the local hospital, did not wish to do this; and in summing up he confined himself to merely saying "that there is some cause for complaint against the treatment they are receiving". All of this sounds somewhat different from the violent complaints raised in the affidavits. The hot climate of Mazatlán would explain in a natural way many of the discomforts experienced by the prisoners; the fact that Chattin's three colleagues were taken to a hospital or allowed to go there

[1] See page 67.
[2] See page 77.

when they were ill and that one of them had the services of an American physician in jail might prove that consideration was shown for the prisoner's conditions. Nevertheless, if a small town as Mazatlán could not afford—as Mexico seems to contend—a jail satisfactory to lodge prisoners for some considerable length of time, this could never apply to the food furnished, and it would only mean that it is Mexico's duty to see to it that prisoners who have to stay in such a jail for longer than a few weeks or months be transported to a neighboring jail of better conditions. The statement made in the Mexican reply brief that "a jail is a place of punishment, and not a place of pleasure" can have no bearing on the cases of Chattin and his colleagues, who were not convicts in prison, but persons in detention and presumed to be innocent until the Court held the contrary. On the record as it stands, however, inhuman treatment in jail is not proven.

Conclusion

29. Bringing the proceedings of Mexican authorities against Chattin to the test of international standards (paragraph 11), there can be no doubt of their being highly insufficient. Inquiring whether there is convincing evidence of these unjust proceedings (paragraph 11), the answer must be in the affirmative. Since this is a case of alleged responsibility of Mexico for injustice committed by its judiciary, it is necessary to inquire whether the treatment of Chattin amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man (paragraph 11); and the answer here again can only be in the affirmative.

30. An illegal arrest of Chattin is not proven. Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court. Insufficiency of the evidence against Chattin is not convincingly proven; intentional severity of the punishment is proven, without its being shown that the explanation is to be found in unfairmindedness of the Judge. Mistreatment in prison is not proven. Taking into consideration, on the one hand, that this is a case of direct governmental responsibility, and, on the other hand, that Chattin, because of his escape, has stayed in jail for eleven months instead of for two years, it would seem proper to allow in behalf of this claimant damages in the sum of $5,000.00, without interest.

Nielsen, Commissioner:

I agree with the conclusions of the Presiding Commissioner that there is legal liability on the part of Mexico in this case. While not concurring entirely in the reasoning of certain portions of the Presiding Commissioner's opinion, including those found in paragraphs 6 to 11 inclusive, I am in substantial agreement with his conclusions on important points in the record of the proceedings instituted against Chattin and the other Americans with whose cases his case was consolidated. Irrespective of the question of the innocence or guilt of the claimant of the charge against him—whatever its precise nature was—I think it is clear that he was the victim of mistreatment.

Contention is made in behalf of the United States that the Governor of the state of Sinaloa, prompted by strong influence brought to bear upon him by the Southern Pacific Railroad Company, improperly undertook to influence the judge of the District Court at Mazatlán to convict the claimant and the other accused men in order that an example might be made of them. I do not think that this charge is substantiated by evidence in the record. A lawyer retained to act in this case withdrew and explained that by the action taken by him in the case he incurred the ill will of the Governor. The offenses for which the claimant and the other defendants in the case were charged was a crime under the federal law, but we find that the Governor appointed a commission to gather evidence against the accused. However it is explained that such action could properly under Mexican law be taken by him with regard to a federal offense, and it seems to me that this explanation cannot in the light of the information before the Commission be rejected. Other charges made by the United States with respect to the proceedings against the prisoners are enumerated in the Presiding Commissioner's opinion, and in a mass of vague evidence, and of technical questions of law concerning which there is considerable uncertainty, there are two outstanding points with respect to which the Commission may in my opinion reach a definite conclusion, namely, first, the delay in the proceedings that took place during the so-called period of investigation (*sumario*); and second, the character of the hearing that took place when the so-called period of proof (*plenario*) was reached. After a very careful consideration of the pleadings, the evidence and the oral and the written arguments, I think it is impossible not to say that the record reveals in some respects obviously improper action resulting in grave injury to the claimant and his fellow prisoners. Counsel for Mexico himself admitted and pointed out irregularities in the proceedings, while contending that they were not of a character upon which an international tribunal could predicate a pecuniary award.

So far as concerns methods of procedure prescribed by Mexican law, conclusions with respect to their propriety or impropriety may be reached in the light of comparisons with legal systems of other countries. And comparisons pertinent and useful in the instant case must be made with the systems obtaining in countries which like Mexico are governed by the principles of the civil law, since the administration of criminal jurisprudence in those countries differs so very radically from the procedure in criminal cases in countries in which the principles of Anglo-Saxon law obtain. This point is important in considering the arguments of counsel for the United States regarding irrelevant evidence and hearsay evidence appearing in the record of proceedings against the accused. From the standpoint of the rules governing Mexican criminal procedure conclusions respecting objections relative to these matters must be grounded not on the fact that a judge received evidence of this kind but on the use he made of it.

Counsel for Mexico discussed in some detail two periods of the proceedings under Mexican law in a criminal case. The procedure under the Mexican code of criminal procedure apparently is somewhat similar to that employed in the early stages of the Roman law and similar in some respects to the procedure generally obtaining in European countries at the present time. Counsel for Mexico pointed out that during the period of investigation a Mexican judge is at liberty to receive and take cognizance of anything placed before him, even matters that have no relation to the offense with which the accused is tried. The nature of some of the things

incorporated into the record, including anonymous accusations against the character of the accused, is shown in the Presiding Commissioner's opinion. Undoubtedly in European countries a similar measure of latitude is permitted to a judge, but there seems to be an essential difference between procedure in those countries and that obtaining in the Mexican courts, in that after a preliminary examination before a judge of investigation, a case passes on to a judge who conducts a trial. The French system, which was described by counsel for Mexico as being more severe toward the accused than is Mexican procedure, may be mentioned for purposes of comparison. Apparently under French law the preliminary examination does not serve as a foundation for the verdict of the judge who decides as to the guilt of the accused. The examination allows the examining judge to determine whether there is ground for formal charge, and in case there is, to decide upon the jurisdiction. The accused is not immediately brought before the court which is to pass upon his guilt or innocence. His appearance in court is deferred until the accusation rests upon substantial grounds. His trial is before a judge whose functions are of a more judicial character than those of a judge of investigation employing inquisitorial methods in the nature of those used by a prosecutor. When the period of investigation was completed in the cases of Chattin and the others with whom his case was consolidated, the entire proceedings so far as the Government was concerned were substantially finished, and after a hearing lasting perhaps five minutes, the same judge who collected evidence against the accused sentenced them.

Articles 86 and 87 of the Mexican federal code of criminal procedure read as follows:

"Art. 86. El procedimiento del orden penal tiene dos períodos; el de instrucción que comprende la serie de diligencias que se practican con el fin de averiguar la existencia del delito, y determinar las personas que en cualquier grado aparezcan responsables; y el del juicio propiamente tal, que tiene por objeto definir la responsabilidad del inculpado o inculpados, y aplicar la pena correspondiente.

"ART. 87. La instrucción deberá terminarse en el menor tiempo posible, que no podrá exceder de ocho meses cuando el término medio de la pena señalada al delito no baje de cinco años, y de cinco meses en todos los demás casos.

"Cuando por motivos excepcionales el juez necesitare mayor término, lo pedirá al superior immediato indicando la prórroga que necesite. La falta de esta petición no anula las diligencias que se practiquen; pero amerita una corrección disciplinaria y el pago de daños y perjuicios a los interesados." [1]

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[1] *Translation.*—86. The criminal process has two periods; that of investigation (instrucción) which embraces the series of steps taken to the end of ascertaining the existence of the crime and determining the persons who in any degree whatsoever may appear responsible; and the trial proper which shall have as its object the defining of responsibility of the accused and the application of the corresponding penalty.

87. The investigation should be terminated in the shortest possible time, not to exceed eight months when the average penalty assigned for the crime is not less than five years and should not exceed five months in all other cases.

When, on account of exceptional reasons the judge may need a greater length of time, he shall ask his immediate superior, indicating the extension which is needed. The failure to so ask shall not annul the steps which already have been taken; but it shall place the judge liable to disciplinary corrective measures and the payment of damages to the parties interested.

In the proceedings in the trial of Chattin the period of investigation lasted approximately five months, and it may be that, considering the nature of the offense with which he was charged the maximum period prescribed by the code was not exceeded. But I think it is proper to note that although maximum periods are prescribed the code also properly requires that the period of investigation shall terminate in the least time possible. Moreover, the hearing after the period of investigation consumed practically no time, and without a determination of the question of guilt the accused Chattin was held for about seven months.

Although delays in criminal proceedings undoubtedly frequently occur throughout the world, I am of the opinion that it can properly be said that in the light of the record revealing the nature of the proceedings in Chattin's case, it was obviously improper to keep him in jail for either five or seven months during which he appealed without success to the judge for a proper disposition of his case. With respect to this period of imprisonment it should be noted that the amount of bail fixed by the judge, the sum of 15,000 pesos —a very large amount considering the nature of the offense charged—was for practical purposes the equivalent of imprisonment without bail.

The purpose of the investigation during which Chattin was held was to ascertain as prescribed in Article 86 of the criminal code, whether an offense had been committed and, to determine upon the persons who appeared to be guilty of such offense. The period of investigation in Mexican law may perhaps in a sense be regarded as a stage of a trial. And it may also be considered that in a measure the Mexican judge during the period of investigation performs functions similar to those carried on by police or prosecuting authorities in other countries, or similar to those of a common law grand jury. The distinguished Mexican diplomat and scholar, Matias Romero, makes the following comparison:

> "So far, therefore, as a proceeding under one system may be said to correspond to a proceeding under the other, it may be said that the *sumario*, in countries where the Roman law prevails, corresponds practically to a grand jury indictment in Anglo-Saxon nations." *Mexico and the United States*, Vol. I, p. 413.

The character of the proceedings in Chattin's case are described in some detail in the Presiding Commissioner's opinion. Chattin was arrested because a brakeman named Ramírez stated before the judge that these two men had been engaged in defrauding the railroad. It appears that after this statement, denied by Chattin, had been made the judge determined that it was not sufficient proof upon which to continue to detain him. He was finally convicted on the statement of two persons who stated that they paid to a person on the train whom the judge evidently considered to be identified as Chattin, 4 pesos on the 29th of June. The judge evidently was satisfied from the testimony of these two persons, and from records produced by the manager of the Southern Pacific Railroad that these witnesses rode on the train on the 29th of June, and that Chattin did not deliver the pesos to the railroad company on that same day. These things may be true, but considering the vague charge on which Chattin was originally held and the long period during which he was detained in prison, it seems to me that such a period of detention could not be justified, unless time and effort had been used to obtain more conclusive proof of guilt. In view of the fact that Chattin's case was consolidated with those of the three other conductors, it is proper in considering the propriety of the delays in Chattin's case to

take account of the character of proceedings in the other cases. All cases were terminated by the same decree of the court. The cases of the accused were consolidated. One of the men was brought from the state of Sonora to the state of Sinaloa after a series of loose proceedings. From the arguments advanced by counsel I am unable to perceive the propriety of this action in view of the general principle incorporated into Mexican law that crimes must be tried within the jurisdiction where they are committed. It seems to me to be clear that the case of each defendant was delayed by this process of consolidation, each case being affected by delays incident to other cases. However, while no court seems to have made any pronouncement with regard to a specific issue as to the propriety of such consolidation, inasmuch as a Mexican court was responsible for it, I do not feel that the Commission, in the light of the record before it can properly pronounce the action wrongful. The conductors accused together with Chattin so far as is revealed by the judicial decision rendered in their cases, were convicted on the testimony of certain persons that they had bought from brakeman tickets which were different from those in use on the day they were purchased from the brakeman and had been permitted by the conductors to use such tickets. If conductors knowingly received spurious tickets and profited from the sale of such tickets, they were evidently guilty of defrauding the railroad. However, it is not disclosed by the record of proceedings before the Commission that throughout the long period of retention any time was consumed in ascertaining whether or how the witnesses who testified against the accused knew that the tickets they bought were not of the kind in use on the day of purchase. There is no record that it was attempted to prove that the tickets bought from the brakeman could not be legally accepted by the conductors. There is no definite proof that the brakeman sold spurious tickets or that the conductors knowingly accepted spurious tickets. The brakeman might have fraudulently obtained possession of good tickets. Time was not consumed obtaining possibly important witnesses such as those mentioned in the Presiding Commissioner's opinion. Time was not taken to confront the accused with some important witnesses. Chattin, by taking an appeal against the decree of formal imprisonment did not delay the proceedings, since the investigation was carried on while the appeal was pending. Moreover, it appears that there was a delay of two months in remitting the appeal to a higher court, which required something more than another month to pass upon it, and its decision apparently was not received by the lower court until two weeks later.

When the preliminary investigation was ended the proceedings, so far as the Government was concerned, were virtually terminated. The law apparently permitted either the Government or the defendants to produce further evidence. The defendants submitted nothing, but their counsel rested the cases by presenting written statements in which the position was taken that no case had been made out against the accused in the light of the evidence before the court. I sympathize with that view, but do not consider that it is necessary nor proper for the Commission for the purpose of a determination of this case to reach a conclusion on that point. However, it seems to me that the record upon which the innocence or guilt of the accused was to be determined was of such a character that it was highly essential that the Government, in order to make a case against the accused, should have produced further evidence. And the fact that this was not done furnishes an additional, strong reason why the long period of deten-

tion of seven months cannot be justified by any necessity for such time in making the record upon which the accused men were convicted.

There are many things in the record apart from the records of judicial proceedings to which I think the Commission can give little or no weight. However, as bearing on the question of delay, I think it is proper to take note of a despatch dated July 29, 1910, addressed by Mr. Charles B. Parker, American consular representative at Mazatlán, to the Secretary of State at Washington. In that communication Mr. Parker reported that on July 25th the judge decided to grant bail to Chattin in the amount of 15,000 pesos. Mr. Parker further reports that he was informed by the district judge that there was "a clear case against two of the defendants, Haley and Englehart". It therefore appears that approximately four months before the termination of the period of investigation, and more than six months prior to the date of sentence, the judge expressed himself convinced of the guilt of two of the four accused men whose cases it seems to me were certainly not more susceptible of proof than those of the other defendants. Under date of September 3, 1910, Mr. Parker reported that he had been advised by the American Ambassador at Mexico City to insist on bail for one of the conductors who was sick, and that the judge had stated that the accused men could not be admitted to bail yet "because the case had not progressed far enough".

International law requires that in the administration of penal laws an alien must be accorded certain rights. There must be some grounds for his arrest; he is entitled to be informed of the charge against him; and he must be given opportunity to defend himself.

It appears to me from an examination of the record that the defendant Chattin first learned of the charge against him when he was called into court. It is not disclosed that a specific charge was made against him, but it is recorded that he stated "with regard to the facts under investigation" that he knew nothing about certain things which had been testified against him. In the decision rendered by a higher court on October 27th, sustaining the decree of formal imprisonment, it is said that it was not material that the crime charged was not specifically stated, and the crime is described "as it appears so far, embezzlement". The record does not show that any notice of the charge so stated was served on the defendant, although his lawyer probably could take notice from the record.

On December 17, 1910, a higher court sustained the decree of formal imprisonment against two of the conductors, and directed that the decree of imprisonment for the crime of embezzlement should be amended and that imprisonment should be decreed "for the crime of fraud with breach of trust". In a brief dated December 26, 1910, which was filed by the prosecuting attorney, the conclusion is expressed that offenses charged against the four conductors did not constitute the crime of embezzlement. It seems to me that there is an unfortunate degree of uncertainty on the point whether the defendants were ever properly notified of the offenses with which they were charged. However, I do not think that the Commission is in a position, in the light of the record, to formulate a conclusion that there was impropriety on this point. The subject is one with respect to which an international tribunal should attach more importance to matters of substance than to forms.

Much was said during the course of argument with regard to improper evidence in the record, particularly the anonymous accusations filed with

the judge by Brown, the superintendent of the Southern Pacific Railroad Company. The report seems to have been prepared by persons evidently resident in the state of California who were employed by Brown to make an investigation of rumors that conductors were defrauding the railroad company. In view of the nature of this report, it seems to be clear that the authors might well deem it proper and advisable not to sign it. Brown appeared in court on August 2nd and made sweeping charges against the four conductors. He stated that he had commissioned private detectives to make an investigation and as a result they succeeded in *proving* in the month of June, 1910, that the conductors and others, whom he did not remember, were appropriating money due the company, and that they had a well-organized "stealing scheme". This he could prove, he said, by delivering to the court notes which the detectives had made. He expressed a supposition that irregularities such as had caused the court's investigation had been occurring since the guilty employees entered the service of the company, and he stated that sometime ago many employees were discharged for irregularities. While Brown was submitting to the judge his conclusions, suppositions and offers of anonymous reports, the defendants were in jail. It seems to me that if Brown deemed it proper to exert himself as he did to bring about the conviction of the accused, he could have employed less crude and more efficient methods. I have already indicated the view that, having in mind the system of criminal jurisprudence in Mexico, any conclusions concerning objections to evidence of this character must be grounded not on the fact that the judge received it, but upon the nature of the use which he made of it. I do not question his motives nor competency, nor undertake to reach conclusions regarding his mental operations. But it is pertinent to note that the record of evidence collected during the period of investigation was the record on which the defendants were convicted. In view of the use made of the anonymous reports, as shown by the sentence given by the judge at Mazatlán on February 6, 1911, I cannot but conclude that these reports in some measure influenced the sentence.

The Commission has repeatedly expressed its views with regard to the reserve with which it should approach the consideration of judicial proceedings. Generally speaking, we must, of course, look to matters of substance rather than of form. Positive conclusions as to the existence of some irregularities in a trial of a case obviously do not necessarily justify a pronouncement of a denial of justice. I do not find myself able fully to concur in the general trend of the argument of counsel for the United States that the record of the trial abounds in irregularities which reveal a purpose on the part of the judge at Mazatlán to convict the accused even in the absence of convincing proof of guilt. A considerable quantity of correspondence and affidavits included in the record give color to a complaint of that nature against the judge. Whatever may be the basis for the charges found in evidence of this kind, I am of the opinion that the conclusions of the Commission must be grounded upon the record of the proceedings instituted against the accused. Having in mind the principles asserted by the Commission from time to time as to the necessity for basing pecuniary awards on convincing evidence of a pronounced degree of improper governmental administration, and having further in mind the peculiarly delicate character of an examination of judicial proceedings by an international tribunal, as well as the practical difficulties inherent in such examination, I limit myself to a rigid application of those principles in the instant case by concluding that the Commission should render an award, small in

comparison to that claimed, which should be grounded on the mistreatment of the claimant during the period of investigation of his case. While deeply impressed with the importance of a strict application of the principles applicable to a case of this character, such application does not, in my opinion, preclude a full appreciation of human rights which it was contended in argument were grossly violated, and which it is clearly shown were in a measure disregarded with resultant injury to a man who languished in prison for seven months and was severely sentenced on scanty evidence for the alleged embezzlement of four pesos. I do not think it can properly be said that he made an *escape* from jail at the end of eleven months of his sentence, when in a document produced by Mexico it is stated that the accused "were freed at the time the Madero forces entered" the place where they were imprisoned.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of B. E. Chattin, $5,000.00 (five thousand dollars), without interest.

Dissenting opinion

Fernández MacGregor, Commissioner:

1. This is a case in which the United States of America charges a court of the United Mexican States with maladministration of justice to the prejudice of four citizens of the United States who were prosecuted before said court for the crime of embezzlement. Two decisions appear in the record: One in first instance, dictated by the District Judge of Mazatlán, and another on appeal, dictated by the Justice of the Third Circuit Court of the Federation.

2. This Commission has expressed, in general, its idea of what constitutes a denial of justice, where this expression is confined to acts of judicial authorities only. In the decision rendered in the case of *L. F. H. Neer and Pauline E. Neer*, Docket No. 136,[1] is held that, without attempting to announce a precise formula, its opinion was:

"(1) That the propriety of governmental acts should be put to the test of international standards, and (2) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

In the case of *Ida Robinson Smith Putnam*, Docket No. 354,[2] I held, with the assent of the Presiding Commissioner, in referring to the respect that is due to the decisions rendered by high courts of a state:

"The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country (case of *Margaret Roper*, Docket No. 183, paragraph 8)[3]. A question which has been passed on in courts of different jurisdiction by the

[1] See page 60.
[2] See page 151.
[3] See page 145.

local judges, subject to protective proceedings, must be presumed to have been lairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law."

The charges made against the procedure followed by the District Judge of Mazatlán must be judged in the light of these standards, which I believe justified and prudent. Such charges are, in short, the following: (1) That there was unlawful arrest or detention; (2) influence exercised by the Governor of the State of Sinaloa to have the accused convicted; (3) improper consolidation of the proceedings against the four conductors; (4) undue delay in the proceedings; (5) requirement of exorbitant bail for the provisional release of the accused; (6) lack of knowledge on the part of the accused as to the charges filed against them; (7) lack of counsel and interpreter on the part of the accused; (8) lack of oath by the witnesses who testified; (9) lack of confrontations between the witnesses and the accused; (10) lack of insufficiency of hearings in open court; (11) imposition of penalties out of proportion to the offenses committed; (12) lack of evidence of guilt of the accused and (13) bad treatment of the accused during their confinement in jail.

3. The unlawful arrest of the accused is not proven; neither is the undue influence of the Governor of the State of Sinaloa; nor the lack of counsel or interpreters; nor that the bail required may have been exorbitant; nor the absolute lack of evidence against the accused, nor that there may have been intentional severity in the sentence imposed; nor is it proven, finally, that the accused may have suffered bad treatment in prison. (See the opinion of the Presiding Commissioner.) On the other hand, the following charges are proven: *(a)* Lack of adequate investigation; *(b)* insufficiency of confrontation; *(c)* that the accused was not given the opportunity to know all the charges made against him; *(d)* delay in the proceedings; *(e)* lack of hearings in open court; and *(f)* continued absence of seriousness on the part of the Court.

4. The study which I have made confirms the Presiding Commissioner's conclusions with respect to the charges which he finds unfounded, so that it is necessary for me to examine only the remaining charges to compare them, if I find them sustained, with the standards of international law.

5. It has been alleged that the proceedings instituted against the four conductors should not have been consolidated, because there was no evidence to justify this step. The records show that the consolidation was decreed by the Judge on August 3, 1910; previous to this date the investigation made regarding Chattin had already advanced; on July 19th the Judge received the police reports from Barraza and his associates, which the latter ratified in his presence, and it was only then that sufficient grounds were judged to exist to decree the consolidation. The latter is decreed when there are plausible reasons; complete evidence is not necessarily required. The consolidation means only a saving of time in the proceedings and unity in the judicial action; hence the consolidation always appears as necessary or proper at the beginning of the action, when all the evidence establishing a case has not yet been gathered. It is, therefore, sufficient that there may be a strong presumption, to order this purely economical proceeding, and in the instant case the mere statements of the first witnesses indicated that there might be some probable connection between the delinquent acts

that were imputed to the four conductors. In fact, Ramírez had testified that he sold tickets illegally in combination with Chattin, who was, in turn, in connivance with the other conductors; Barraza and his police associates testified that they had traveled on the railroad lines using false tickets which were always accepted by the corresponding conductors, asserting, further, that those who sold the tickets to them had claimed to be in connivance with the conductors, which could be corroborated to a certain extent by the fact that the unlawful ticket-sellers on one line of the railroad recommended Barraza and his associates to the unlawful sellers in another line of the railroad. The possible connection becomes the more probable when there are taken into account not only the cases of the conductors but those of the Mexican brakemen and other employees of the railroad who were involved in the affair. The Judge gave the reasons for his decree of consolidation, referring only to the applicable articles of the Federal Code of Criminal Procedure, and it suffices to see that Article 329 of said Code provides for this consolidation of actions brought for connected crimes; that Article 330 defines as connected crimes those committed by several persons, even if at diverse times and places, but through agreement among them; and, finally, that consolidation should be decreed ex officio; that is, by a voluntary act of the Judge (Art. 333) to justify such step. Moreover, the accused protested against the consolidation and the Judge limited himself to answering them; that if they filed their complaint in due form he would consider it. A consolidation can not, in general, cause irreparable damage to the defendants; although the most advanced action has to wait for the more backward actions to mature, nevertheless the legal provisions which oblige the Judge to terminate the preliminary investigation *(instrucción)* of the cases within a definite period of time (five months in this case) remain in force; so that it is not evident that the consolidation could have prejudiced (in the international sense of this term) any of the defendants in this case. The Presiding Commissioner is of the opinion that Chattin was, in this case, the one who could suffer the least by the consolidation. I consider that legally Chattin was the one who could suffer the most by the consolidation, for the reason that the proceedings against him were the most advanced and had to wait for the proceedings against the other conductors, or other persons involved in this case, to mature. But aside from all this reasoning which only serves to explain a question of domestic law. I am of the opinion that a judicial decision of a sovereign state can not be attacked by another state before an arbitral tribunal, because domestic precepts regarding consolidation may have been violated, as such internal violations can not constitute a violation of international law or result in damage clearly shown to have been suffered by citizens of the claimant government.

6. With regard to the undue delay in the proceedings, the record shows at once that certain proceedings could have been carried out with more diligence. The tickets and other documents contained in the record could have been exhibited to Chattin before it was actually done; the Judge did nothing in the case, between the end of July and the beginning of October, 1910; the witnesses who claimed to have handed four pesos to Chattin, testified on October 21st, and the report from the conductor on the money delivered to the company was not asked until November 11th; certain witnesses to whom Ramírez alluded in July were not summoned until November 22nd, which made it impossible for some of them, as Virgen, to be found, etc. But it must be noted that all these delays do not violate,

of course, any local law, since they refer only to the instruction period of the prosecution, which the Judge was carrying out, and the law allows him, at this stage, to use his discretion without any limits except that of terminating the preliminary investigation within a certain period, which was five months in the present case. (Art. 87 of the Federal Code of Criminal Procedure.) Now, Chattin's case was started on July 9, 1910, and on November 18th the Judge considered the investigation as completed, which means that he did it within the term of five months, to which I have referred above. In the *Roberts* case, Docket No. 185,[1] the Commission, referring to the time that an alien charged with crime may be held in custody pending the investigation of the charges against him, stated:

"Clearly there is no definite standard prescribed by international law by which such limits may be fixed. Doubtless an examination of local laws fixing a maximum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case."

The present case had been brought to trial on January 27, 1911, and it was decided in first instance on February 6th of the same year; that is to say, before the lapse of seven months after the initiation of the first proceeding instituted against Chattin. I believe that, from an international point of view, all incidental delays in general procedure disappear before an international tribunal, which can not call the Judge to account for each one of his acts, as if it were his hierarchical superior. This same criterion necessarily has to be applied to other defects which may be certainly found in the Judge's acts.

7. I do not believe that the accused was ignorant of a single one of the charges made against him, for the simple reason that the records formed in a criminal process are not secret, according to Mexican law, and are, from the time of their commencement, at the disposal of the defendants or their counsel, who have the right to attend all the proceedings for filing of evidence and other proceedings held in Court (Art. 20, section IV, of the Federal Constitution of 1857 and Art. 39 of the Federal Code of Criminal Procedure). There is no trace in the record in question of the fact that the accused, Chattin, was at any time deprived of these rights, and, on the contrary, it is established that on many occasions notice was served on him and his counsel of the different steps that were being taken in the process. It has been said in this connection that the accused had no knowledge of a document which contains a record of the investigations made by certain detectives from the United States at the request of the Southern Pacific Railroad of Mexico to ascertain whether the conductors of the trains of such railroad were defrauding the company by accepting tickets issued illegally. The record shows, under date of August 2nd, less than a month after the proceedings had been initiated, the statement of Elbert N. Brown, superintendent of the railroad in question, who referred to the private investigation made by the detectives from Los Angeles, California, U.S.A.; said superintendent made a further statement on August 3rd, and at the latter proceeding he exhibited a set of papers of 35 sheets containing the information that has been called secret. By decree of August 3rd, the judge ordered that the exhibited documents be annexed to the record and their corresponding translations be made, in view of the fact that they were in

[1] See page 77.

English, one Arturo E. Félix having been appointed translator for such purpose, and the latter accepted the commission and asked for the documents in question, which were delivered to him immediately. Later, on December 18th, the entire record was ordered to be placed in the hands of the defendant for three days so that he might take notes. Since the aforementioned documents were annexed to the record, and since the record could be consulted by the defendant and by his counsel, according to the legal provisions above cited, theoretically and legally Chattin could take notice of the charges placed against him as a result of the private investigation made by the detectives from Los Angeles, and, if neither he nor his counsel made use of their rights, such a circumstance can not furnish grounds for the responsibility of the District Judge of Mazatlán. It can not be argued that this disputed document was in the possession of the translator, for, even in such case, it was legally within the reach of the defendant and his counsel. It is an established fact that the counsel had knowledge of this information. Counsel Adolfo Arias, in the motion dated January 31, 1911, signed by Parrish, Englehart, and Haley, makes reference to the proceeding in which Brown delivered said documents (folio 192 of the record); counsel Fortino Gómez makes reference to the same secret testimony of the same detectives from Los Angeles, in his motion dated January 16, 1911, folio 209; and it is to be taken into account that all the counsel of the defendants in this case were wholly in agreement and communicated with one another in regard to the circumstances of the proceedings, as established in the record of this claim. It must be noted, also, that if the information adduced by Brown created an unfavorable impression which, it is said, was had by the Court towards the accused, the latter and his counsel could have eliminated such impression by presenting proper evidence which the Judge could not legally ignore. There is no proof of the defendant's having made use of this right, either. Finally, it must be also remembered that the Judge did not base himself in his decision on the results of this so-called secret information, for he limited himself to considering the real evidence of guilt which existed against the accused. In view of the above consideration, I believe that the charge under discussion can not be maintained.

8. It has been alleged that the trial proper (meaning by trial that part of the proceedings in which the defendants and witnesses as well as the Prosecuting Attorney and counsel appear personally before the Judge for the purpose of discussing the circumstances of the case) lasted five minutes at the most, for which reason it was a mere formality, implying thereby that there was really no trial and that Chattin was convicted without being heard. I believe that this is an erroneous criticism which arises from the difference between Anglo-Saxon procedure and that of other countries. Counsel for Mexico explained during the hearing of this case that Mexican criminal procedure is composed of two parts: Preliminary proceedings *(sumario)* and plenary proceedings *(plenario)*. In the former all the information and evidence on the case are adduced; the *corpus delicti* is established; visits are made to the residences of persons concerned; commissions are performed by experts appointed by the Court; testimony is received and the Judge can cross-examine the culprits, counsel for the defense having also the right of cross-examination; public or private documents are received, etc. When the Judge considers that he has sufficient facts on which to establish a case, he declares the instruction closed and places the record in the hands of the parties (the defendant and his counsel on the one side and the Prose-

cuting Attorney on the other), in order that they may state whether they desire any new evidence filed, and only when such evidence has been received are the parties in the cause requested to file their respective final pleas. This being done, the public hearing is held, in which the parties very often do not have anything further to allege, because everything concerning their interests has already been done and stated. In such a case, the hearing is limited to the Prosecuting Attorney's ratification of his accusation, previously filed, and the defendants and their counsel also rely on the allegations previously made by them, these two facts being entered in the record, whereupon the Judge declares the case closed and it becomes ready to be decided. This is what happened in the criminal proceedings which have given rise to this claim, and they show, further, that the defendants, including Chattin, refused to speak at the hearing in question or to adduce any kind of argument or evidence. In view of the foregoing explanation, I believe that it becomes evident that the charge, that there was no trial proper, can not subsist, for, in Mexican procedure, it is not a question of a trial in the sense of Anglo-Saxon law, which requires that the case be always heard in plenary proceedings, before a jury, adducing all the circumstances and evidence of the cause, examining and cross-examining all the witnesses, and allowing the prosecuting attorney and counsel for the defense to make their respective allegations. International law insures that a defendant be judged openly and that he be permitted to defend himself, but in no manner does it oblige these things to be done in any fixed way, as they are matters of internal regulation and belong to the sovereignty of States.

9. I have already expressed my opinion with regard to the general imputation that the accused were not informed of the charges that had been filed against them. But particular reference has been made, for instance, to the fact that the general manager of the railroad company was never confronted with the accused; that the confrontations between the accused and the witnesses who testified against them do not reveal effort on the part of the judge to find the truth; that no efforts were made to find witness Manuel Virgen, nor one Collins; that it was not attempted to establish whether it was eight or seven passes or tickets which were shown to Chattin on October 28, 1910, nor to ascertain the reason why the two witnesses on whose testimony the Judge based himself in convicting Chattin, said that the trip to which they were referring had been made on July 29th, and other charges of this nature. The Agent of Mexico averred that the general manager of the railroad was not the complainant, and that therefore it was not necessary to confront him with the prisoners. He argued that Brown had only advised the authorities that he suspected that the employees of the railroad were defrauding the company, but he made no specific charges against any individual employee. Under such circumstances he was neither a complainant nor a witness for the prosecution, because he did not refer to specific and certain facts imputable on any conductor. He added that, according to Mexican law in 1910, it was not constitutionally obligatory even to confront the accused with his accuser, specially in view of the fact that the real accuser in criminal causes is the State. Article 20 of the Constitution of 1857, in force in 1910, provides that it is the right of the accused to be informed as to the name of the accuser, if there be such, but not to be confronted with such accuser on motion of the Judge. The accused has, of course, the right to demand such confrontation and the Judge can not refuse to grant it.

10. I admit that the other deficiencies pointed out in the preceding paragraph exist and that they show that the Judge could have carried out the investigation in a more efficient manner, but the fact that it was not done does not mean any violation of international law. The Commission stated in its decision in the case of *L. F. H. Neer and Pauline E. Neer*, Docket No. 136:[1]

"It is not for an international tribunal such as this Commission to decide whether another course of procedure taken by the local authorities at Guanacevi could be more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in willful neglect of their duties, or in a pronounced degree to improper action, or (2) that Mexican law rendered it impossible for them properly to fulfill their task."

I believe that this rule is perfectly applicable to this case; an ideal Judge or a more experienced Judge would have carried out the proceedings in a better way, but the Commission is not competent to judge such a question.

11. The negligence of the Judge in holding certain proceedings is alleged specially with respect to the evidence against the accused. The essential point is that the Judge may have had sufficient evidence to convict them and not that he may not have accumulated more evidence when he was able to do so. The first statement against Chattin was rendered by Cenobio Ramírez; the latter stated that various persons had seen him deal with Chattin; such persons having been summoned, Ramírez's allegations could not be corroborated in an evident manner and, perhaps, for this reason the Judge abandoned this clue by not summoning all the persons named by Ramírez, etc. But it is doubtless that two witnesses free from all impediment testified that Chattin had collected in the train four pesos for a passage without giving a receipt, which fact was thereafter verified by the report rendered by Chattin that day to the company, that the four pesos had not been accounted for by him. The Federal Code of Criminal Procedure provides, in its Article 264, that testimony rendered in the manner in which it was rendered against Chattin, constitutes full evidence. The crime of embezzlement is defined by Article 407 of the Penal Code, as follows:

"He who, fraudulently and to the prejudice of another, disposes wholly or in part of an amount of money in coin, in bank bills, or in paper currency; of a document entailing an obligation, release, or transfer of rights, or of any personal property belonging to another, which he may have received in virtue of any of the contracts of pledge, agency, deposit, lease, *commodatum*, or any other contract which does not transfer title, will suffer the same penalty that, taking into account the circumstances of the case and the delinquent, would be imposed on him, had he committed larceny of such things."

Taking advantage of his position Chattin had appropriated to himself the four pesos that had been delivered to him, which is sufficient to justify the penalty of two years that was imposed on him, conformably with Article 384 of the Criminal Code. Such penalty does not reveal severity on the part of the Judge, for it is the pure and simple application of Mexican law. The latter provides that the medium penalty be imposed whenever there are no extenuating or aggravating circumstances, and such penalty is, in this case, two years.

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[1] See page 60.

12. In the procedure under examination, the requisites established by international law in matters of this kind were observed in the principal features; the accused were arrested for probable cause; they had the opportunity to know all the charges pressed against them; they were permitted to defend themselves, there being no indication of the defense having been hampered; all the defenses which they pleaded were considered; they were confronted with the witnesses who testified against them; they were given the opportunity to be heard in open trial; they were convicted on evidence which, although not abundant, nevertheless met the requisites of Mexican law necessary to convict them; finally, the penalty fixed also by Mexican law was imposed on them. Hence, if the essential rights granted by the law of nations were respected, it matters not that certain precepts of the domestic adjective law may have been violated or that the Judge may have shown a certain degree of negligence and carelessness. This opinion is supported by the decision rendered in the *Cotesworth and Powell* case, which is celebrated in this matter and which summarizes what is established in international law on the question of denial of justice and on maladministration of justice. I quote the following passages:

"The judiciary of a nation should be respected as well by other nations as by foreigners resident or doing business in the country. Therefore, every definite sentence of a tribunal, regularly pronounced, should be esteemed just and executed as such. As a rule, when a cause in which foreigners are interested has been decided in due form, the nation of the defendants can not hear their complaints. It is only in cases where justice is refused, or palpable or evident injustice is committed, or when rules and forms have been openly violated, or when odious distinctions have been made against its subjects that the government of the foreigner can interfere * * *."

"No demand can be founded, as a rule, upon more objectionable *forms* of procedure or the *mode* of administering justice in the courts of a country; because strangers are presumed to consider these before entering into transactions therein. Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice * * *."

"Nations are responsible to those of strangers, under the conditions above enumerated, *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 the 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." (Cotesworth & Powell; Moore's *International Abritrations*, pages 2050, *et seq.*)

13. To appraise the defective administration of justice which the United States alleges in this case (the American Agent calls it denial of justice in his Memorial and Brief), the Presiding Commissioner has entered into a study of the differences which exist between wrongful acts when the latter are caused by the judicial department of a nation, on one hand, and the same acts when caused by either the executive or the legislative department. I believe that the grouping of things in categories is very beneficial, provided these arise from or show essential differences. Establishing purely formal categories, if useful for certain determined purposes of economy of thought, carry the danger of inducing one to commit transcendental errors. There is no doubt but that there is a slight difference between a judicial act which involves refusal to repair a previous wrongful act and a judicial act which, without a previous injury, causes the damage of itself.

But this is not important in fixing the liability of the State. The latter exists only when the judicial act causes damage in violation of a principle of international law, and as much in the case of a previous wrongful act as in the case where the latter is lacking the State is only liable for its own act; in the first case, for the damage which is caused by its failure to repair a previous injury, and in the second, for the damage caused by its act violating the substantive or adjective law. In both cases the liability is direct, in international questions, as recognized by the Presiding Commissioner himself, when he says, in referring to so-called indirect liability: "*Though, considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder)* * * *." And I believe that the liability of this person, if a private person, is not an international question.

14. If this is so, if the liability arising out of judicial acts of any kind is direct, then it is the same as the liability arising out of wrongful acts of the executive and legislative departments, it resulting therefrom that the three classes must be governed by identical principles, inasmuch as they do not differ essentially. The liability for executive or legislative acts of a government is not, then, stricter or greater than the liability arising out of judicial acts. It does not matter that some decisions may have established that acts of the executive or legislative departments give rise to liability even when they may not contain the element of bad intention. The intention has nothing to do in international law. What is to be determined, as already stated (and this agrees with the definitions which have been given as to what is an international claim), *is whether there exists an injury*, and whether the act which causes it violates *any rule of international law*, regardless of whether the act is intentional or not.

15. However, it seems that Anglo-Saxon practice has tried to establish this difference between judicial and executive acts; with regard to the latter, it has been said that once there exist the two elements, damage to a citizen of another country and violation of international law, the indemnization accrues at once, without any further steps, whereas such is not the case when dealing with judicial acts, for it is then necessary that the remedies furnished by the local law be exhausted, and, further, that the act involved bad faith, willful neglect of duty, or very defective administration of justice.

16. In my opinion, different things are confused and tests are applied which should serve for widely different classes of ideas. With respect to exhausting local remedies, I maintain, together with many publicists, that it should always be required with regard to any class of acts. An international claim should not accrue except as a last resort and not immediately as desired by the practice of Anglo-Saxon countries, which establish such principle because in them the State can not be sued. I consider that it is more dangerous to admit the right to an immediate claim when referring to wrongful acts of the executive or legislative, as a nation will resent more this procedure if it is a question of acts of the organs in which apparently sovereignty rests conspicuously, than if it is a question of violations made by its tribunals. The most important thing in the world is the preservation of peace among nations, and this is attained only through the most constant respect for sovereignty. If a nation inflicts damage on a citizen of another,

the one who causes the injury should be given the opportunity to repair it *through her own means*, and these are generally represented by judicial remedies. In this sense, it can be said that all claims accrue from a denial of justice. Hence, in this respect there is no difference between claims arising out of acts of the different agencies of a State.

17. With respect to the test that is applied to judicial acts, to wit, that in order to give rise to an international claim they must show bad faith, willful neglect of duty, or such a deviation from the practices of civilized nations as to be recognized at first sight by any honest man, it only serves to determine when judicial acts violate a principle of international law, it being unnecessary to apply this test to executive and judicial acts, as they, due to being more direct and simple, are more easily discerned when they deviate from a certain international rule. The important thing, it is insisted, is that the act which gives rise to the claim *causes damage in violation of a rule of international law*, and this is very difficult to determine when it is a question of judicial acts. There are many acts of this nature which, although involving a violation of domestic law, either do not cause measurable damages or do not violate any specific international principle, and, in both cases, lacking one of the elements of the claim, the latter does not accrue. I believe, in view of the foregoing, that to admit the classification of liability arising out of judicial acts into direct and indirect results in the confusion of the first class with the liability arising out of acts of the executive and the legislative; and as it is attempted to apply to the latter a stricter test (the Presiding Commissioner holds that the liability for these acts is unlimited and immediate), this test would seem applicable also, by analogy, to the so-called direct liability for judicial acts, to the detriment of the respectability of decisions, so much proclaimed by publicists and by arbitral tribunals.

18. Returning to the particular case on which I am commenting, I must say that, although the Presiding Commissioner makes clear the exception that, when dealing with decisions of courts, in regard to direct as well as indirect liability, the principle of respect for the judiciary prevails, nevertheless it appears to me that his clear and righteous spirit could not remove itself from the influence of the idea that, as the acts of the District Judge of Mazatlán do not amount to a denial of justice, but to a defective administration of it, or in other words, inasmuch as they involve *direct liability*, such acts must be judged with a severity which, although it does honor to his sense of abstract justice, is not based on international law.

19. I consider that this is one of the most delicate cases that has come before the Commission and that its nature is such that it puts to a test the application of principles of international law. It is hardly of any use to proclaim in theory respect for the judiciary of a nation, if, in practice, it is attempted to call the judiciary to account for its minor acts. It is true that sometimes it is difficult to determine when a judicial act is internationally improper and when it is so from a domestic standpoint only. In my opinion the test which consists in ascertaining if the act implies damage, wilful neglect, or palpable deviation from the established customs becomes clearer by having in mind the damage which the claimant could have suffered. There are certain defects in procedure that can never cause damage which may be estimated separately, and that are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not

engender international liability; the latter do so, since such liability arises from the decision which is iniquitous because of such defects. To prevent an accused from defending himself, either by refusing to inform him as to the facts imputed to him or by denying him a hearing and the use of remedies; to sentence him without evidence, or to impose on him disproportionate or unusual penalties, to treat him with cruelty and discrimination; are all acts which *per se* cause damage due to their rendering a just decision impossible. But to delay the proceedings somewhat, to lay aside some evidence, there existing other clear proofs, to fail to comply with the adjective law in its secondary provisions and other deficiencies of this kind, do not cause damage nor violate international law. Counsel for Mexico justly stated that to submit the decisions of a nation to revision in this respect was tantamount to submitting her to a régime of capitulations. All the criticism which has been made of these proceedings, I regret to say, appears to arise from lack of knowledge of the judicial system and practice of Mexico, and, what is more dangerous, from the application thereto of tests belonging to foreign systems of law. For example, in some of the latter the investigation of a crime is made only by the police magistrates and the trial proper is conducted by the Judge. Hence the reluctance in accepting that one same judge may have the two functions and that, therefore, he may have to receive in the preliminary investigation *(instrucción)* of the case all kinds of data, with the obligation, of course, of not taking them into account at the time of judgment, if they have no probative weight. It is certain that the secret report, so much discussed in this case, would have been received by the police of the countries which place the investigation exclusively in the hands of such branch. This same police would have been free to follow all the clues or to abandon them at its discretion; but the Judge is criticized here because he did not follow up completely the clue given by Ramírez with respect to Chattin. The same domestic test—to call it such—is used to understand what is a trial or open trial imagining at the same time that it must have the sacred forms of common-law and without remembering that the same goal is reached by many roads. And the same can be said when speaking of the manner of taking testimony of witnesses, of cross-examination, of holding confrontations, etc.

20. In view of the above considerations, I am of the opinion that this claim should be disallowed.

ANNEX 175

Date of dispatch to the Parties: June 26, 2003

International Centre for Settlement of Investment Disputes
Washington, D.C.

In the proceeding between

The Loewen Group, Inc. and Raymond L. Loewen
(Claimants)

and

United States of America
(Respondent)

Case No. ARB(AF)/98/3

Award

Members of the Tribunal
Sir Anthony Mason
Judge Abner J. Mikva
Lord Mustill

Secretary of the Tribunal
Mrs Margrete Stevens

Representing the First Claimant

Mr Christopher F. Dugan (until March 10, 2003)
Mr James A. Wilderotter
Mr Gregory A. Castanias
Jones, Day, Reavis & Pogue

Representing the Second Claimant

Mr John H. Lewis, Jr.
Montgomery, McCracken, Walker & Rhoads
D. Geoffrey Cowper, QC
Fasken Martineau DuMoulin (from October 11, 2001)

Representing the Respondent

Mr Kenneth L. Doroshow (until July 8, 2002)
Mr Jonathan B. New (from July 8, 2002)
United States Department of Justice

Mr Mark A. Clodfelter
Mr Barton Legum
United States Department of State

I. INTRODUCTION

1. This is an important and extremely difficult case. Ultimately it turns on a question of jurisdiction arising from (a) the NAFTA requirement of diversity of nationality as between a claimant and the respondent government, and (b) the assignment by the Loewen Group, Inc. of its NAFTA claims to a Canadian corporation owned and controlled by a United States corporation. This question was raised by Respondent's motion to dismiss for lack of jurisdiction filed after the oral hearing on the merits. In this Award we uphold the motion and dismiss Claimants' NAFTA claims.

2. As our consideration of the merits of the case was well advanced when Respondent filed this motion to dismiss and as we reached the conclusion that Claimants' NAFTA claims should be dismissed on the merits, we include in this Award our reasons for this conclusion. As will appear, the conclusion rests on the Claimants' failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA.

3. This dispute arises out of litigation brought against first Claimant, the Loewen Group, Inc ("TLGI") and the Loewen Group International, Inc ("LGII") (collectively called "Loewen"), its principal United States subsidiary, in Mississippi State Court by Jeremiah O'Keefe Sr. (Jerry O'Keefe), his son and various companies owned by the O'Keefe family (collectively called "O'Keefe"). The litigation arose out of a commercial dispute between O'Keefe and Loewen which were competitors in the funeral home and funeral insurance business in Mississippi. The dispute concerned three contracts between O'Keefe and Loewen said to be valued by O'Keefe at $980,000 and an exchange of two O'Keefe funeral homes said to be worth $2.5 million for a Loewen insurance company worth $4 million approximately. The action was heard by Judge Graves (an African-American judge) and a jury. Of the twelve jurors, eight were African-American.

4. The Mississippi jury awarded O'Keefe $500 million damages, including $75 million damages for emotional distress and $400 million punitive damages. The verdict was the outcome of a seven-week trial in which, according to Claimants, the trial judge

repeatedly allowed O'Keefe's attorneys to make extensive irrelevant and highly prejudicial references (i) to Claimants' foreign nationality (which was contrasted to O'Keefe's Mississippi roots); (ii) race-based distinctions between O'Keefe and Loewen; and (iii) class-based distinctions between Loewen (which O'Keefe counsel portrayed as large wealthy corporations) and O'Keefe (who was portrayed as running family-owned businesses). Further, according to Claimants, after permitting those references, the trial judge refused to give an instruction to the jury stating clearly that nationality-based, racial and class-based discrimination was impermissible.

5. Loewen sought to appeal the $500 million verdict and judgment but were confronted with the application of an appellate bond requirement. Mississippi law requires an appeal bond for 125% of the judgment as a condition of staying execution on the judgment, but allows the bond to be reduced or dispensed with for "good cause".

6. Despite Claimants' claim that there was good cause to reduce the appeal bond, both the trial court and the Mississippi Supreme Court refused to reduce the appeal bond at all and required Loewen to post a $625 million bond within seven days in order to pursue its appeal without facing immediate execution of the judgment. According to Claimants, that decision effectively foreclosed Loewen's appeal rights.

7. Claimants allege that Loewen was then forced to settle the case "under extreme duress". Other alternatives to settlement were said to be catastrophic and/or unavailable. On January 29, 1996, with execution against their Mississippi assets scheduled to start the next day, Loewen entered into a settlement with O'Keefe under which they agreed to pay $175 million.

8. In this claim Claimants seek compensation for damage inflicted upon TLGI and LGII and for damage to second Claimant's interests as a direct result of alleged violations of Chapter Eleven of the North American Free Trade Agreement ("NAFTA") committed primarily by the State of Mississippi in the course of the litigation.

II. THE PARTIES

9. First Claimant TLGI is a Canadian corporation which carries on business in Canada and the United States. Second Claimant is Raymond Loewen, a Canadian citizen who was the founder of TLGI and its principal shareholder and chief executive officer. TLGI submits claims as "investor of a Party" on its own behalf under NAFTA, Article 1116 and on behalf of LGII under Article 1117. Likewise, Raymond Loewen submits claims as “the investor of a party” on behalf of TLGI under NAFTA, Article 1117.

10. The Respondent is the Federal Government of the United States of America.

III. HISTORY OF PROCEEDINGS IN THIS ARBITRATION

11. There is no occasion to set out the procedural history of this arbitration before the Tribunal delivered its Decision dated January 5, 2001, on Respondent’s objection to competence and jurisdiction. The Decision fully recites that history. It will, however, be necessary to refer later to the grounds of that objection because they were not fully determined by the Decision. The Decision is attached to this Award.

12. By that Decision dated January 5, 2001, the Tribunal dismissed Respondent’s objection to competence and jurisdiction so far as it related to the first ground of objection[1] and adjourned the further hearing of Respondent’s other grounds of objection and joined that further hearing to the hearing on the merits which was fixed for October 15, 2001. The Tribunal made orders –

    1. Respondent to file its counter-memorial on the merits within 60 days of the date of this Decision.
    2. Claimants to file their replies within 60 days of the time limited for the filing of Respondent’s counter-memorial on the merits.
    3. Respondent to file its rejoinder within 60 days of the time limited for the filing of Claimants’ replies.

[1] Sir Robert Jennings in his Third Opinion misstates the Tribunal’s Decision when he says that the Tribunal rejected Respondent’s argument that the decisions of the Mississippi courts were not “measures’ because they were not “final’ acts of the United States court system.

IV. REPRESENTATION

13. First Claimant has been represented by –

Mr Christopher F. Dugan	Jones, Day, Reavis & Pogue (until March 10, 2003)
Mr James A. Wilderotter	Jones, Day, Reavis & Pogue
Mr Gregory A. Castanias	Jones, Day, Reavis & Pogue

Second Claimant has been represented by –

Mr John H. Lewis, Jr.	Montgomery, McCracken, Walker & Rhoads
D. Geoffrey Cowper, QC	Fasken Martineau DuMoulin (from October 11, 2001)

14. Respondent has been represented by –

Mr Kenneth L. Doroshow	United States Department of Justice (until July 8, 2002)
Mr Jonathan B. New	United States Department of Justice (from July 8, 2002)
Mr Mark A. Clodfelter	United States Department of State
Mr Barton Legum	United States Department of State

15. On October 10, 2001, the Government of Canada and the Government of Mexico gave written notice of their intention to attend the hearing on the merits.

16. Canada has been represented by –

Mr Fulvio Fracassi	Department of Foreign Affairs and International Trade Ottawa, Canada
Ms Sheila Mann	Department of Foreign Affairs and International Trade Ottawa, Canada

17. Mexico has been represented by –

Mr Hugo Perezcano Díaz	Secretaría de Comercio y Fomento Industrial (SECOFI), Mexico City, Mexico

V. HISTORY OF THE PROCEEDINGS SINCE THE DECISION ON COMPETENCE AND JURISDICTION

18. Respondent's Counter-Memorial was filed on March 30, 2001, pursuant to an extension of time granted on January 31, 2001.

19. Claimants' Joint Reply was filed on June 8, 2001, pursuant to an extension of time granted on May 15, 2001.

20. Respondent's Rejoinder was filed on August 27, 2001, pursuant to an extension of time granted on August 17, 2001.

21. On August 9, 2001, Respondent filed a motion for the disqualification of Yves Fortier, QC as a member of the Tribunal in circumstances arising out of the proposed merger of Mr Fortier's firm with a firm which had previously acted for Claimants in connection with their bankruptcy reorganisation under Chapter Eleven of the United States Bankruptcy Code.

22. On September 10, 2001, Mr Fortier resigned from his office as a member of the Tribunal.

23. On September 13, 2001, Sir Anthony Mason and Judge Mikva, pursuant to Article 15(3) of the ICSID Arbitration (Additional Facility) Rules consented to Mr Fortier's resignation.

24. On September 14, 2001, Lord Mustill was duly appointed by Claimants as a member of the Tribunal in place of Mr Fortier.

25. The oral hearing on the merits, incorporating the joined unresolved objections to competence and jurisdiction, took place in Washington DC on October 15, 16, 17, 18 and 19, 2001.

26. At the conclusion of the oral hearing, the Tribunal made orders granting leave to Canada and Mexico to file written submissions pursuant to NAFTA Article 1128 and to the Parties to file written submissions in reply.

27. On November 9, 2001, Canada and Mexico filed written submissions.

28. On December 7, 2001, Claimants filed a joint reply and Respondent filed a response to the written submissions of Canada and Mexico.

29. Subsequently, on January 25, 2002 Respondent filed the motion to dismiss Claimants' NAFTA claims for lack of jurisdiction, based on the reorganization of TLGI under Chapter Eleven of the United States Bankruptcy Code. An element in that reorganization was the assignment by TLGI of its NAFTA claims to a newly created Canadian corporation, Nafcanco, which was owned and controlled by LGII (re-named "Alderwoods, Inc", a United States corporation).

VI. THE CIRCUMSTANCES GIVING RISE TO CLAIMANTS' CLAIM

30. The dispute which gave rise to the litigation in Mississippi State Court related to three contracts between O'Keefe and the Loewen companies and a settlement agreement made on August 19, 1991 whereby Loewen agreed to sell an insurance company and a related trust fund to O'Keefe and to provide O'Keefe with the exclusive right to provide certain insurance policies sold through Loewen funeral homes. By the settlement agreement, for its part O'Keefe agreed to dismiss an action it had brought against Loewen relating to the three contracts, to sell to Loewen two O'Keefe funeral homes, and to assign to Loewen an option which O'Keefe held on a cemetery tract north of Jackson, Mississippi.

31. The origin of the dispute lay in competition between two funeral companies in the Gulf Coast region of Mississippi. In the Gulfport area, the Riemann brothers owned and operated funeral homes and funeral insurance companies. In the Biloxi area, O'Keefe owned and operated funeral homes and funeral insurance companies. Gulf National Life Insurance Company ("Gulf") was one such funeral insurance company owned and operated by O'Keefe.

32. Loewen, which had embarked on a grand strategy of acquiring funeral homes across North America, purchased the Riemann businesses in January, 1990. The Riemann businesses were restructured into a holding company known as "Riemann Holdings, Inc.", of which LGII became owner as to 90%, the Riemann interests holding the remaining 10%. Loewen retained the previous owners and managers as salaried

employees of Loewen. Despite the change in ownership, Riemann continued to advertise itself as locally owned – "we haven't sold out: we just have a new partner, The Loewen Group International". O'Keefe challenged Riemann's claim that it was locally owned. O'Keefe published advertisements in the Gulf Coast community, asserting that Riemann was really owned by Loewen which was a Canadian company financed by an Asian Bank. This was part of an advertising campaign designed to encourage support for the O'Keefe local business as against foreign-owned and foreign financed competition.

33. Loewen extended its Mississippi interests to Jackson, the largest metropolitan area in the State, by purchasing the Wright & Ferguson Funeral Home, the largest funeral home in Jackson. Wright & Ferguson had an association with O'Keefe dating back to 1974, when O'Keefe purchased the exclusive right to sell Gulf funeral insurance through the Wright & Ferguson Funeral Home.

34. Loewen began to sell insurance through Wright & Ferguson Funeral Homes, despite Gulf's exclusive right under the 1974 contract. O'Keefe's complaints about this breach of the contract, along with financial difficulties that O'Keefe was experiencing, led to negotiations between O'Keefe and Loewen which failed to result in any agreement. Subsequently O'Keefe began a lawsuit in connection with the breach of contract.

35. It was then that the settlement agreement of August 19, 1991 was reached. The agreement provided for completion within 120 days, time being of the essence. Prompt completion was important to O'Keefe because O'Keefe was under review by the state regulatory authority. There was evidence that Loewen was aware of O'Keefe's difficulties with the regulatory authority and of the adverse consequences for O'Keefe if the agreement were not completed in the 120 days. Moreover, the Riemanns objected strongly to the agreement, so much so that Loewen told them that the deal would not close without their approval.

36. There was a dispute over the 1991 agreement and its legal effect. While the parties were negotiating about that agreement the US Federal Bureau of Investigation seized

the Mississippi Insurance Commissioner's records relating to the O'Keefe insurance companies.

37. After the negotiations broke down, O'Keefe filed an amended complaint alleging breach of the 1991 agreement and fresh claims of common law fraud and violations of Mississippi anti-trust law. That complaint sought actual damages of $5 million.

38. In May 1992, the Mississippi Insurance Commissioner placed Gulf under administrative supervision. O'Keefe's complaint was further amended to include claims for consequential damages allegedly suffered as a result of administrative supervision.

VII. THE NATURE OF CLAIMANT'S CLAIM

39. Claimants' case is that the verdict for $500,000,000 and the decisions refusing to relax the bonding requirements are "measures adopted or maintained by a Party" relating to:

    (a) investors of another Party;

    (b) within the meaning of NAFTA, Article 1101.1.

Claimants argue that

(1) the trial court, by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment, violated Article 1102 of NAFTA which bars discrimination against foreign investors and their investments;

(2) the discrimination tainted the inexplicably large verdict;

(3) the trial court, by the way in which it conducted the trial, in particular by its conduct of the *voir dire* and its irregular reformation of the initial jury verdict for $260,000,000, by permitting extensive nationality-based, racial and class-based testimony and counsel comments, violated Article 1105 of NAFTA which imposes a minimum standard of treatment for investments of foreign investors, including a duty of "full protection and security" and a right to "fair and equitable treatment" of foreign investors;

(4) the excessive verdict and judgment (even apart from the discrimination) violated Article 1105;

(5) the Mississippi courts' arbitrary application of the bonding requirement violated Article 1105; and

(6) the discriminatory conduct, the excessive verdict, the denial of Loewen's right to appeal and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated appropriation of investments of foreign investors.

40. Claimants allege that Respondent is liable for Mississippi's NAFTA breaches under Article 105, which requires that the Parties to NAFTA shall ensure that all necessary measures are taken to give effect to the provisions of the Agreement, including their observance by State and provincial governments. Claimants also allege that, by tolerating the misconduct which occurred during the O'Keefe litigation, Respondent directly breached Article 1105, which imposes affirmative duties on Respondent to provide "full protection and security" to investments of foreign investors, including "full protection and security" against third-party misconduct.

VIII. THE GROUNDS OF RESPONDENT'S OBJECTION TO COMPETENCE AND JURISDICTION

41. By its Memorial on Competence and Jurisdiction, Respondent objected to the competence and jurisdiction of this Tribunal on the following grounds:

(1) the claim is not arbitrable because the judgments of domestic courts in purely private disputes are not "measures adopted or maintained by a Party" within the scope of NAFTA Chapter Eleven;

(2) the Mississippi court judgments complained of are not "measures adopted or maintained by a Party" and cannot give rise to a breach of Chapter Eleven as a matter of law because they were not final acts of the United States judicial system;

(3) a private agreement to settle a litigation matter out of court is not a government "measure" within the scope of NAFTA Chapter Eleven;

(4) the Mississippi trial court's alleged failure to protect against the alien-based, racial and class-based references cannot be a "measure" because Loewen never objected to such references during the trial; and

(5) Raymond Loewen's Article 1117 claims should be dismissed because he does not "own or control" the enterprise at issue.

IX. THE ISSUES

42. In stating the issues and in dealing with them, we have addressed the sectional and particular arguments presented by counsel. Without in any way criticizing the presentation of the arguments in that form, we emphasise that those particular arguments are designed to elucidate the one substantial question, namely whether the judgment and orders made by the Mississippi Courts against Loewen amounted to violations of NAFTA for which Respondent is liable.

43. Respondent maintains grounds (2) to (4) inclusive of its grounds of objection to competence and jurisdiction. As Respondent's substantive submissions on the merits cover much of the subject matter dealt with by the unresolved grounds of objection, we shall direct our attention in the first instance to the substantive issues.

(a) Issues concerning the Trial

44. Issues of fact and issues of law arise in connection with the trial of the action in Mississippi State Court before Judge Graves and a jury. According to Claimants, the trial resulted in a grossly excessive verdict, brought about by conduct of O'Keefe's counsel, notably Mr Gary, which was allowed by the trial judge. Claimants contend that the conduct of the trial, for which Respondent is responsible under NAFTA, involved violations of NAFTA Articles 1102, 1105 and 1110. Respondent, on the other hand, contends that Claimants' complaints about the trial are grossly exaggerated and that they do not constitute NAFTA violations. Respondent relies upon grounds (2), (3) and (4) of its objection to competence and jurisdiction as substantive defences to the claim. Respondent argues also that Claimants are not entitled to rely on the conduct constituting the alleged NAFTA violations because they did not object to that conduct at the trial. Respondent further contends that flawed decisions taken at trial by Loewen, not NAFTA violations, were the cause of the verdict.

45. The issues of fact which arise for determination, in the light of the cases presented by the Parties, may be expressed as follows:

(1) Did the trial court allow O'Keefe to engage in a strategy of exciting anti-Canadian, pro-Mississippi animus?

(2) Did the trial court allow O'Keefe to engage in a strategy of racial antagonism?

(3) Did the trial court allow O'Keefe to engage in class-based animus?

(4) Does the conduct of the trial court give rise to an inference of bias against Loewen?

(5) Was the trial flawed by other major irregularities of a kind that could result in manifest injustice?

(6) What steps, if any, did Loewen take at the trial to object to conduct of the kind described in (1), (2) and (3) above, or to protect themselves from it?

46. (1) The next question is whether the conduct of which Claimants, if established, complain tainted the verdict and whether that conduct contributed to an excessive verdict. These questions calls for consideration of the decisions taken at the trial by Loewen and for an examination of the amounts awarded for

(a) punitive damages;

(b) economic damages;

(c) emotional damages.

(2) A separate question is whether there was any legal or evidentiary basis for O'Keefe's antitrust and oppression claims.

47. Ultimately, so far as the conduct of the trial is concerned, the following questions of law arise for determination:

(1) Was the conduct of the trial so flawed as to violate NAFTA Articles 1102, 1105 and 1110 or any of them, assuming the verdict and judgment of Mississippi State Court to be a "measure adopted or maintained by a Party within the scope of NAFTA Chapter Eleven"?

(2) Did Claimants' failure to object at the trial to conduct constituting NAFTA violations disentitle Claimants from relying upon them?

(b) Issues concerning the supersedeas bonding requirement

48. Other issues concern the supersedeas bonding requirement and the refusal of the Mississippi courts to relax the requirement. Claimants make no challenge to the bonding requirement itself. Claimants argue that the refusals to relax the bonding requirement constituted independent violations of NAFTA provisions. Claimants also argue that the refusal to relax the bonding requirement effectively deprived Loewen of the prospect of appealing the verdict entered by the trial court. In this respect Claimants assert that the deprivation of the prospect of appeal satisfied the principle of finality, if such a principle is applicable to a claim under NAFTA based on the decision of a trial court. Claimants also contend that the decisions not to relax the bonding requirement in a situation in which Loewen was exposed to immediate execution on its assets subjected Loewen to economic duress. The claim of economic duress, if soundly based, would lead to a challenge to set aside the settlement agreement under which Loewen agreed to pay to O'Keefe $175 million. Yet there is no suggestion that Loewen seeks to rescind or set aside that agreement. The claim of economic duress may, however, be relevant in establishing that entry into the agreement was consequential upon violation of one or more of the NAFTA articles.

49. The issues of fact in relation to the decisions of the Mississippi courts refusing relaxation of the bonding requirement and Loewen's entry into the settlement agreement are:

(1) Were the refusals to relax the bonding requirement the result of an institutional or other bias on the part of the Mississippi judiciary against Loewen by virtue of Loewen's nationality?
(2) Did the refusals to relax the bonding requirement effectively foreclose the options otherwise available to Loewen to challenge by way of appeal or otherwise the verdict entered by the trial court?
(3) Was Loewen's decision to enter into the settlement agreement a business judgment or decision on the part of Loewen?

50. The principal questions of law which arise in consequence of the refusals to relax the bonding requirement and the entry into the settlement agreement are:

(1) Did the refusals constitute a violation of the NAFTA articles on its own or in combination with the jury's verdict?
(2) Did the refusals satisfy the principle of finality, thereby enabling Claimants to hold Respondent responsible for NAFTA violations at the trial?
(3) If entry into the settlement agreement was the result of a business decision by Loewen, does that preclude Claimants from relying on NAFTA violations?

51. The claim before the Tribunal is a claim under international law for violations of NAFTA. It is for the Tribunal to decide the issues in dispute in accordance with NAFTA and applicable rules of international law. NAFTA Article 1131.1. The Tribunal is concerned with domestic law only to the extent that it throws light on the issues in dispute and provides domestic avenues of redress for matters of which Claimants complain. The Tribunal cannot under the guise of a NAFTA claim entertain what is in substance an appeal from a domestic judgment.

52. The claim before the Tribunal relates to the conduct of the Mississippi trial court and the Mississippi Supreme Court for whose acts, if they constitute a violation of NAFTA, Respondent is responsible (NAFTA Article 105). Respondent is not responsible under NAFTA for the conduct of O'Keefe and its counsel in the Mississippi litigation, unless responsibility for that conduct can be attributed to the Mississippi courts.

53. As will appear hereafter, Judge Graves failed in his duty to take control of the trial by permitting the jury to be exposed to persistent and flagrant appeals to prejudice on the part of O'Keefe's counsel and witnesses. Respondent is responsible for any failure on the part of the trial judge in failing to take control of the trial so as to ensure that it was fairly conducted in this respect.

X. THE TRIAL

54. Having read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law. Whether this conclusion results in a violation of Article 1105 depends upon the resolution of Respondent's submissions still to be considered, in particular the submission that State responsibility arises only when final action is taken by the State's judicial system as a whole.

55. In the succeeding paragraphs we set out the reasons for the conclusion stated in para. 54 above as well as the reasons why we conclude that, in other respects, Claimants' case must be rejected.

(a) O'Keefe's nationality strategy

56. O'Keefe's case at trial was conducted from beginning to end on the basis that Jerry O'Keefe, a war hero and "fighter for his country", who epitomised local business interests, was the victim of a ruthless foreign (Canadian) corporate predator. There were many references on the part of O'Keefe's counsel and witnesses to the Canadian nationality of Loewen ("Ray Loewen and his group from Canada"). Likewise, O'Keefe witnesses said that Loewen was financed by Asian money, these statements being based on the fact that Loewen was partly financed by the Hong Kong and Shanghai Bank, an English and Hong Kong bank which was erroneously described by Jerry O'Keefe in evidence as the "Shanghai Bank". Indeed, Jerry O'Keefe, endeavouring to justify an earlier advertising campaign in which O'Keefe had depicted its business under American and Mississippi flags and Loewen under Canadian and Japanese flags, stated that the Japanese may well control both the "Shanghai Bank" and Loewen but he did not know that. O'Keefe's strategy of presenting the case in this way was linked to Jerry O'Keefe's fighting for his country against the Japanese and the exhortation in the closing address of Mr Gary (lead counsel for O'Keefe) to the jury to do their duty as Americans and Mississippians.

This strategy was calculated to appeal to the jury's sympathy for local home-town interests as against the wealthy and powerful foreign competitor.

57. Several additional examples will serve to illustrate this strategy. In the *voir dire* and opening statements, Mr Gary stated that he had "teamed up" with Mississippi lawyers "to represent one of your own, Jerry O'Keefe and his family". Mr Gary also stated "The Loewen Group, Ray Loewen, Ray Loewen is not here to-day. The Loewen Group is from Canada. He's not here to-day. Do you think that every person should be responsible and should step up to the plate and face their own actions? Let me see a show of hands if you feel that everybody in America should have the responsibility to do that". Whilst the conduct of the *voir dire* may not in itself have been conspicuously out of line with practice in Mississippi State courts, the skilful use by counsel for Claimants of the opportunity to implant inflammatory and prejudicial materials in the minds of the jury set the tone for the trial when it actually began.

58. In the *voir dire* O'Keefe's counsel sought an assurance from potential jurors that they would be willing to award heavy damages. Once again, in their opening statements, O'Keefe's counsel urged the jury to exercise "the power of the people of Mississippi" to award massive damages. O'Keefe's counsel drew a contrast between O'Keefe's Mississippi antecedents and Loewen's "descent on the State of Mississippi".

59. Emphasis was constantly given to the Mississippi antecedents and connections of O'Keefe's witnesses. By way of contrast Mr Gary, in cross-examination of Raymond Loewen, repeatedly referred to his Canadian nationality, noted that he had not "spent time" in Mississippi and questioned him about foreign and local funeral home ownership. Jerry O'Keefe, in his evidence, pointed out that Loewen was a foreign corporation, its "payroll checks come out of Canada" and "their invoices are printed in Canada".

60. An extreme example of appeals to anti-Canadian prejudice was evidence given by Mr Espy, former United States Secretary of State for Agriculture who, called to give evidence of the good character of Jerry O'Keefe, spoke of his (Espy's) experience in protecting "the American market" from Canadian wheat farmers who exported low priced wheat into the American market with which American producers could not

compete and later, having secured a market, then jacked up the price. The tactic of thrusting prejudicial comment on to the cross-examiner was not confined to Mr Espy. It was a feature of Jerry O'Keefe's answers in cross-examination.

61. The strategy of emphasizing O'Keefe's American nationality as against Loewen's Canadian origins reached a peak in Mr Gary's closing address. He likened Jerry O'Keefe's struggle against Loewen with his war-time exploits against the Japanese, asserting that he was motivated by "pride in America" and "love for your country". By way of contrast, Mr Gary characterized Loewen's case as "Excuse me, I'm from Canada". Indeed, Mr Gary commenced his closing address by emphasizing nationalism:

> "[Y]our service on this case is higher than any honor that a citizen of this country can have, short of going to war and dying for your country." (Transcript at 5539).

He described the American jury system as one that O'Keefe

> "fought for and some died for" (Transcript at 5540-41).

Mr Gary said

> "they [Loewen] didn't know that this man didn't come home just as an ace who fought for his country – he's a fighter … He'll stand up for America and he has" (Transcript at 5544).

62. Mr Gary returned to the same theme at the end of his closing address:

> " [O'Keefe] fought and some died for the laws of this nation, and they're [Loewen] going to put him down for being American" (Transcript at 5588).

Mr Gary reminded the jury that many of O'Keefe's witnesses were Mississippians (Transcript at 5576,5578, 5589, 5591). On the other hand, Mr Gary characterized Loewen as a foreign invader who "came to town like gang busters. Ray came sweeping through …" (Transcript at 5548). Mr Gary even repeated the prejudicial evidence given by Mr Espy about the Canadian wheat farmers. Mr Gary likened Loewen to the Canadian wheat farmers. Loewen would "come in" and purchase a funeral home and "no sooner than they got it, they jacked up the prices down here in Mississippi" (Transcript at 5588). Mr Gary continued on a similar theme when he

urged the jury to award substantial damages in doing their duty as Americans and Mississippians.

63. Respondent argues that the vast majority of references to nationality during the trial were made in a context in which O'Keefe was seeking to identify the location of disputed events. This argument is without substance. The references to nationality were an element in a strategy calculated to appeal to the jury's sentiment in favour of local interests. In conformity with this strategy, O'Keefe's counsel went out of their way to make it clear that they had no quarrel with Mr John Wright and David Riemann who were Mississippians, notwithstanding that Wright and Ferguson was a defendant in the action, Mr Wright was a director of LGII and the Riemanns held 10% of the share capital of the Riemann companies.

64. Respondent also argues that the introduction of evidence with an anti-Canadian basis was caused by Loewen's plan to portray O'Keefe as "a biased and unfair competitor who had engaged in an anti-foreigner advertising campaign" with a view to taking business away from Riemann Holdings. Respondent is correct in saying that Loewen pursued that plan. It misfired. The jury appears not to have been concerned by O'Keefe's advertising campaign. But the answer to Respondent's argument is that O'Keefe's counsel in the *voir dire* and in their opening statement had already embarked on their nationality strategy before Loewen's counsel made any reference to the advertising campaign in their opening statements. In any event, the persistent pursuit by O'Keefe of the nationality strategy went far beyond a response to Loewen's plan based on the advertising campaign.

(b) O'Keefe's racial politics strategy

65. Claimants' case that O'Keefe engaged in a strategy of racial politics is largely based on the efforts of O'Keefe to suggest that O'Keefe did business with black and white people alike whereas Loewen did business with white people. This aspect of Claimants' case must be seen in a context in which both parties were endeavoring to ingratiate themselves with the African-American jurors. Both parties added to their legal teams prominent African-American lawyers. The lead counsel on each side was a prominent African-American lawyer, Mr Gary for O'Keefe, Mr Sinkfield for

Loewen. Two of the remaining four Loewen lawyers were well-known African-American members of the Mississippi state legislature. Two other O'Keefe lawyers were African-American lawyers. After the midway point of the trial had been reached, Judge Graves observed that "the race card has already been played". Significantly, Judge Graves remarked "and I know that the jury knows what's going on". In allowing an O'Keefe witness to give racially based evidence, Judge Graves acknowledged that Loewen did not start this strategy and "was going to bring up the rear" in that contest.

66. Loewen sought to counter this strategy by showing that it also did business with the black community. Loewen called evidence of its contract with the National Baptist Convention in order to show that Loewen was contributing to the economic development of the black community. O'Keefe countered by claiming that Loewen was racially exploiting the National Baptist Convention and the many black people who were members of the Convention.

67. Respondent seeks to justify O'Keefe's racial politics strategy by arguing that it was relevant to the O'Keefe anti-trust case. Respondent argues that, in order to define Loewen's market power, it was necessary to establish that the relevant markets for comparison included white funeral homes owed by Loewen and excluded African-American funeral homes with which they did not compete. Yet O'Keefe's anti-trust case was that O'Keefe and Loewen competed only in predominantly white markets. In any event, the O'Keefe racial politics strategy went well beyond defining relevant markets.

(c) O'Keefe's appeal to class-based prejudice

68. Claimants further complain that Mr Gary repeatedly portrayed Loewen as a large, wealthy foreign corporation and contrasted Jerry O'Keefe as a small, local, family businessman. There were a number of references by O'Keefe's counsel emphasizing this contrast. These references culminated in Mr Gary's closing address in which he incited the jury to put a stop to Loewen's activities. Speaking of Jerry O'Keefe, Mr Gary said:

> "He doesn't have the money that they have nor the power, but he has heart and character, and he refused to let them shoot him down."
> "You know your job as jurors gives you a lot of power … You have the power to bring major corporations to their knees when they are wrong. You can see wrong, make it right. Suffering and stop it."
> "Ray comes down here, he's got his yacht up there, he can go to cocktail parties and all that, but do you know how he's financing that? By 80 and 90 year old people who go to get to a funeral, who go to pay their life savings, goes into this here, and it doesn't mean anything to him. Now, they've got to be stopped … Do it, stop them so in years to come anybody should mention your service for some 50 odd days on this trial, you can say 'Yes, I was there', and you can talk proud about it."
> "1 billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may never get this chance again. And you're not just helping the people of Mississippi but you're helping poor people, grieving families everywhere. I urge you to put your foot down. Don't let them get away with it. Thank you, and may God bless you all."

69. Respondent seeks to justify these tactics on the basis that O'Keefe complained that Loewen exploited "its unequal financial means to oppress the Plaintiffs". The rhetoric of O'Keefe's counsel went well beyond any legitimate exercise in ventilating O'Keefe's oppression claim which, as will appear, was not submitted by Judge Graves to the jury.

70. It is artificial to split the O'Keefe strategy into three segments of nationality-based, race and class-based strategies. When the trial is viewed as a whole right through from the *voir dire* to counsel's closing address, it can be seen that the O'Keefe case was presented by counsel against an appeal to home-town sentiment, favouring the local party against an outsider. To that appeal was added the element of the powerful foreign multi-national corporation seeking to crush the small independent competitor who had fought for his country in World War II. Describing 'Loewen' as a Canadian was simply to identify Loewen as an outsider. The fact that an investor from another state, say New York, would or might receive the same treatment in a Mississippi court as Loewen received is no answer to a claim that the O'Keefe case as presented invited the jury to discriminate against Loewen as an outsider.

XI. LOEWEN'S FAILURE TO OBJECT TO O'KEEFE'S PREJUDICIAL CONDUCT AT THE TRIAL AND ITS CONSEQUENCES

71. Respondent also argues that Loewen's counsel were at fault in failing to object to O'Keefe's nationality and racial politics strategy and appeals to class prejudice. The point of this argument is to avoid attributing to the trial judge any part of the responsibility for allowing O'Keefe to engage in these strategies and appeals. If Loewen's counsel did not object, then, so the argument runs, there was no error on the part of the trial judge in failing to intervene of his own motion. For Claimants to succeed in their claim, they must establish that the trial judge permitted or failed to take steps (which he should have taken) to prevent the alleged conduct of O'Keefe's counsel and witnesses. Respondent is only responsible in international law for the conduct of the Mississippi courts.

72. The transcript discloses many occasions when Loewen's counsel did not object to comments or evidence on these matters when they could have done so. Likewise, there were occasions when they might have moved to have witness' comments deleted from the record on the ground that they were non-responsive. Mr Espy's reference to Canadian wheat farmers was an example.

73. In a jury trial, however, counsel are naturally reluctant to create the impression, by continuously objecting, that they are seeking to suppress relevant evidence or that they are relying on technicalities. So it is not to be expected that Loewen's counsel would object on every occasion when objectionable comment was made or inadmissible evidence was given. The question is whether Loewen's counsel sufficiently brought their objections to the attention of the trial judge and whether the trial judge was aware of the problem and should have taken action himself.

74. A reading of the transcript reveals that Loewen's counsel at the trial did not make any objections to evidence or comments on the ground that they were calculated to foment prejudice on the grounds of nationality, race or class. Claimants have been unable to point to any such objection. The silence of Loewen's counsel on these matters is a matter that calls for consideration in the light of the claims now pursued by Claimants.

75. With respect to O'Keefe's nationality strategy, the explanation for the absence of objection is obscure. Loewen's counsel may have considered that the risk of a verdict reflecting local favouritism was inherent in the litigation and that the best way of handling the problem was to nail O'Keefe with his unfair and misleading advertising campaign and rely on an instruction to the jury eliminating local favouritism. As it happened, Judge Graves did not give the jury the instruction sought by Loewen, a matter to which we shall come shortly. Loewen's counsel were certainly aware of the risk of local favouritism. They explored that risk with potential jurors in the *voir dire*. It may well be that the trial judge's unfavourable, dismissive, abrupt responses to their objections during the *voir dire*, reinforced by similar responses during the trial, led them to make the judgment that objections would be rejected and would result in prejudice to Loewen in the eyes of the jury.

76. With respect to the issue of race, the explanation for the absence of any objection may well be that Loewen's counsel, conscious of their own efforts to ingratiate themselves with the predominantly African-American jury, considered that the making of objections to O'Keefe's conduct would appear inconsistent and hypocritical.

77. The probable explanation for the absence of objection to class-based appeals to the jury is that Loewen's counsel regarded the problem as inherent in the litigation. Further, the making of an objection would only serve to highlight the advantage which Loewen enjoyed over O'Keefe in both wealth and power. So the giving of an appropriate jury instruction would be the best answer to the difficulty.

XII. STEPS TAKEN BY LOEWEN TO PROTECT ITS POSITION

78. In pre-trial proceedings, Loewen moved to dismiss the anti-trust, unfair competition and oppression claims on the ground that they were frivolous. These claims generated at the trial many of the appeals to prejudice. Judge Graves peremptorily dismissed this motion. Loewen also moved pre-trial to exclude evidence of special damages, including the emotional distress claim. This motion was also dismissed by Judge Graves.

79. Claimants now submit that the denial of the two motions effectively preserved the issues that prejudicial error was committed at trial by allowing evidence and arguments of counsel based on these claims. It does not follow, however, that the filing of these motions preserved Loewen's position in so far as their claim is based on prejudicial conduct and evidence.

80. In the *voir dire*, Loewen's counsel objected to Mr Gary seeking commitments from the jury panel in relation to their treatment of Loewen which he had described as "Ray Loewen and his group from Canada". The objection was overruled. Mr Gary then asked whether potential jurors would be willing "to render a verdict against Ray Loewen and his group and render a verdict for over $600 million?" An objection to that question was overruled.

81. On the first day of the trial, Judge Graves ruled in response to two objections by Loewen's counsel that character evidence would be admitted generally. Loewen counsel stated that the purpose of such evidence was to attract "sympathy and favor" from the jury. At the end of the trial, Judge Graves dismissed two motions for mistrial based on the character evidence. And, prior to the opening statements, the trial judge overruled objections to the placing before the jury panel an enlarged picture of all the members of the O'Keefe family and pictures of Jerry O'Keefe's military service.

82. Judge Graves, at the conclusion of the trial, rejected a jury instruction proposed by Loewen's counsel. The proposed instruction told the jury that they were not to be swayed by bias, prejudice, favour or other improper motive. This instruction was refused on the basis that it duplicated standard instruction "C-1". Judge Graves began his instructions to the jury with instruction "C-1", which is given in every case and addresses such general topics as the role of the jury, the court, the evidence and counsel's argument. Included in "C-1" was a short one-sentence warning against bias in general, which made no reference to nationality-based or racial bias in particular. The warning was in these terms:

> "You should not be influenced by bias, sympathy or prejudice."

83. When Judge Graves asked if there were any objections to the instructions (including C-1) which he had prepared, Loewen counsel sought a more elaborate direction on the topic. Although Judge Graves summarily rejected this objection when counsel acknowledged that there was nothing wrong with the Judge's proposed direction, it was clear that Claimant's counsel was seeking an expanded direction to fit the particular circumstances of the case.

84. Later Loewen's counsel submitted a specific instruction to address the risk of nationality-based, racial and class bias. The proposed instruction provided (App. at A2231-32):

> "The law is a respecter of no persons. All are equal in the eyes of the law without regard to race, ethnicity, national origin, wealth or social status.
>
> In deciding the issues presented in this case, you must not be swayed by bias or prejudice or favor or any other improper motive. The parties, the court and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict based on these two things alone, regardless of the consequences.
>
> This case should be considered and decided by you as a matter between parties of equal standing in the community, between persons or businesses of equal standing and holding the same or similar stations in life. A corporation or other business entity is entitled to the same fair trial at your hands as a private individual.
>
> The Loewen Group, Inc. is a corporation organized and having its principal place of business in Vancouver, British Columbia, Canada. Loewen Group International, Inc. is a corporation having its principal place of business in Covington, Kentucky, just across the Ohio River from Cincinnati. These parties are entitled to the same fair trial at your hands as are other parties who are residents of Mississippi such as the O'Keefes and the eight separate O'Keefe corporations that are Plaintiffs in this case. All persons and parties stand equal before the law and are to be dealt with as equals in this court of justice."

85. O'Keefe's counsel objected to this instruction as "cumulative" of the one-sentence warning. This objection was summarily upheld by Judge Graves, notwithstanding that the proposed instruction went far beyond the one-sentence warning in C-1 which was, in the light of the circumstances of this case, inadequate to counter the prejudice created by the way in which O'Keefe's case had been presented.

86. Loewen's counsel did not object to the prejudicial and extravagant appeals in Mr Gary's closing address to the jury. In the light of the trial judge's refusal of the jury instruction that had been sought, they may well have concluded that no purpose would be served by objecting.

87. Having regard to the history of the trial, and the way in which it was conducted by Judge Graves, we do not consider that failures to object on the part of Loewen's counsel amounted to a waiver of the grounds on which Claimants now contend that the conduct of the trial constituted a violation of NAFTA. There was a gross failure on the part of the trial judge to afford the due process due to Loewen in protecting it from the tactics employed by O'Keefe and its counsel. It defies common sense to suggest that Loewen's counsel by their conduct made an election not to pursue their objections to those tactics and that Loewen waived its objections to the lack of due process and to the grounds on which it now complains. Although "a State cannot base the charges made before an international court or tribunal … on objections or grounds, which were not previously raised before the municipal courts" (Judge Jiménez de Aréchaga, "International Law in the Past Third of a Century"159 "Recueil des Cours" (1978) at p 282), Claimants' grounds were sufficiently raised at trial.

XIII. THE REFORM OF THE INITIAL JURY VERDICT

88. In punitive damages cases, Mississippi law requires a bifurcated trial procedure. At the first stage, the jury determines liability and compensatory damages; at the second stage, the jury considers whether to award punitive damages. The jury cannot consider liability and punitive damages at the same time. Miss. Code Ann. §11-1-65(b-c).

89. In conformity with this provision, Judge Graves instructed the jury only on liability and compensatory damages issues. The parties did not adduce evidence or present argument on punitive damages in the first stage of the trial. Nor did Judge Graves give the jury any instructions about punitive damages.

90. In the jury *voir dire*, however, O'Keefe's counsel informed the panel of potential jurors that there was a claim for punitive damages. O'Keefe's counsel asked the

panel whether they would have any hesitation in awarding a verdict for over $600 million damages if the plaintiffs' case was proved according to law. Loewen's counsel's objection that this question amounted to seeking a commitment from the jury was overruled. In the early stages of the trial, O'Keefe's counsel made reference to the claim for punitive damages. Loewen's counsel objected but the trial judge gave no instruction to the jury in response to the objection.

91. The matters mentioned in paras. 89 and 90 may well have induced the jury to understand that they were to award both compensatory and punitive damages together if they found for O'Keefe on liability.

92. On November 1, 1995, the jury returned a verdict for O'Keefe of $260,000,000. This amount was said to be made up as follows (App. at A651-658):

(Wright and Ferguson contracts)	
Breach of three of the Wright and Ferguson contracts	31,200,000
Tortious interference with one or more of the three Wright and Ferguson contracts	7,800,000
Tortious (wilful, intentional) breach of a Wright and Ferguson contract	23,400,000
Breach of implied covenants of good faith and Fair dealing in a Wright and Ferguson contract	15,600,000
(1991 Agreement)	
Wilful and malicious breach of the 1991 Agreement	54,600,000
Tortious (wilful and intentional) breach of the 1991 Agreement	54,600,000
Breach of an implied covenant of good faith and Fair dealing in the 1991 Agreement	36,400,000
State anti-monopoly law breaches	18,200,000
Common law fraud	18,200,000
	$ 300,000,000

93. The individual amounts listed in the previous paragraph total $260,000,000 (the verdict brought in by the jury) not $300,000,000. There was no allocation in the individual amounts or in the total amount of the verdict as between compensatory and punitive damages.

94. A note written by the jury foreman to Judge Graves, after the verdict was announced, stated that the $260 million covered both compensatory damages of $100 million and punitive damages of $160 million, and that the $260,000,000 was a "negotiated compromise" between a low of $100,000,000 and a high of $300,000,000 (App. at A659).

95. How, in the light of the way the amount of $260,000,000 was calculated, the verdict was divided into $100,000,000 compensatory damages and $160,000,000 punitive damages remains a complete mystery. The way in which the verdict was constructed, including, as it did, compensatory and punitive damages, demonstrates that there was a failure adequately to instruct the jury to limit their initial award to compensatory damages.

96. Immediately after announcement of the verdict, Loewen moved for a mistrial, contending that the verdict was biased, excessive and procedurally defective because it covered punitive damages. Judge Graves denied the motion without discussion (Transcript at 5739). Judge Graves purported to reform the verdict. He informed the jury that he accepted the verdict of $100,000,000 compensatory damages but did not accept the award of $160,000,000 punitive damages. The jury may well have interpreted the rejection of this award as an indication that it was inadequate.

XIV. THE PUNITIVE DAMAGES HEARING AND VERDICT

97. Judge Graves then directed that the trial enter the punitive damages stage. It took place on November 2, 1995. Bernard Pettingill, an O'Keefe witness, testified that the net worth of Loewen was almost $3.2 billion, though he conceded that its market capitalization, based on the current value of its shares, was less than $1.8 billion. He explained the difference by saying that the market had failed to take into account the "future value" of Loewen's contract with the National Baptist Convention (Transcript at 5762).

98. On the other hand Loewen presented expert evidence that its entire net worth, as reflected in filings with the US Securities and Exchange Commission was between

$600 and $700 million (Transcript at 5771-5772) and that its market value was approximately $1.7 billion (Transcript at 5777).

99. In his closing address, Mr Gary returned to his earlier themes: "Ray Loewen is not here to-day. He's not here and I think that's the ultimate arrogance … That's the ultimate arrogance for him to think that he can do what he's doing to people like Jerry O'Keefe … and to the consumers of this stage, and he can deal with it in this fashion" (Transcript at 5794-5795). Mr Gary claimed that Loewen officials were "smiling when they charge grieving families in Corinth, Mississippi"(Transcript at 5796).

100. As he had done in his earlier closing address, Mr Gary asserted that Loewen would make "over $7.9 billion" off the National Baptist Convention Contract, an assertion unsupported by evidence. He further asserted that this profit would be made from "just selling vaults" because Loewen would not admit black people to Loewen funeral homes for burial. Again this assertion was unsupported by evidence. The closing address concluded with the exhortation:

> "1 billion dollars, 1 billion dollars … You've got to put your foot down, and you may not ever get this chance again. And you're not just helping people of Mississippi, but you're helping … families everywhere."(Transcript at 5809).

101. The jury returned a verdict for $400,000,000 punitive damages. On November 6, 1995, judgment for a total verdict of $500,000,000 was entered.

102. On that day Loewen filed a motion to reduce the punitive damages on the grounds of bias and excessiveness (App. at A1196). On November 15, 1995, Loewen filed another motion for judgment notwithstanding the verdict, or for a new trial, or for remittitur (App. at A660) on the ground that the jury's verdict exhibited bias, passion and prejudice against Loewen and on the ground that each element in the damage's award was excessive.

103. On November 20, 1995, Judge Graves denied Loewen's post trial motions.

XV. THE CLAIM THAT THE $500 MILLION VERDICT WAS EXCESSIVE

104. The total damages award of $500 million was by far the largest ever awarded in Mississippi.

105. Claimants had a very strong case for arguing that the damages awarded, both compensatory and punitive, were excessive, and that the amounts were so inflated as to invite the inference that the jury was swayed by prejudice, passion or sympathy. The initial award of punitive damages, despite the trial judge's instruction that the jury was then to confine itself to issues of liability and compensatory damages, indicates that the jury was minded to award punitive damages against Loewen without instructions from the trial judge and without evidence to support the amount of an award. Further, the initial award of damages included amounts for anti-trust oppression breaches and the fraud claim, although Mr Gary, in his closing address, had not asked for damages on those claims. The award of $100,000,000 compensatory damages was very close to the total amount of $105,852,000 which was the amount sought by Mr Gary from the jury for all claims, though it was calculated by reference to the contract and tort claims.

106. The award on the breach of the Wright and Ferguson contracts greatly exceeds the value placed on those contracts in evidence by the O'Keefe witness, $980,000 (Transcript at 2367), which was the amount sought from the jury by Mr Gary (Transcript at 5711-5712). The total amount initially awarded in respect of the various claims made in relation to these contracts, $78,000,000, allowing for what was at that stage of the case an impermissible punitive component, bore no relationship to the apparent value of the contracts. It is difficult to avoid the conclusion that there was a multiplication of damages on claims which overlapped.

107. Likewise, the damages awarded in relation to the 1991 settlement agreement appear to be grossly excessive. In his closing address, Mr Gary sought a total of $104,852,000 for the claims based on the 1991 agreement, made up of $74,500,000 for emotional distress and the remainder in economic damages, yet in the O'Keefe "Amended and Supplemental Complaint" sought $625,000 only in emotional damages for Jerry O'Keefe and his son (App. at A202). This amount was mentioned by O'Keefe's

counsel in the opening statement. The only evidence of emotional distress was given by Jerry O'Keefe and his daughter Susan. They spoke of his sleepless nights, worry and stress. There was no expert evidence, no evidence of medical or psychiatric treatment, medication, physical manifestation of distress and no evidence whatsoever relating to the son.

108. Mr Gary sought from the jury, at least by implication, an amount of $30 to $35 million in economic damages (Transcript at 5713-5715), resulting from breach of the 1991 agreement. Yet, allowing for an impermissible element of punitive damages, the jury initially awarded $145,600,000 damages for the claims on the 1991 agreement. The amount of $30 to $35 million sought by Mr Gary included $20 million in lost "future revenue" from the Family Care Company (Transcript at 4848-4864), $6 million in lost "future revenue" from Riemann Trust Funds (Transcript at 1400-1401) and $4.5 million in lost "future revenue" from the Family Care Trust Rollover (Transcript at 2366, 5566-5568). Under Mississippi law, lost future profits are recoverable as damages but lost future revenue is not recoverable (*Fred's Stores of Mississippi v M & H Drugs Inc.* 725 So. 2d 902, 914-915 (1998)).

109. The duplication of awards on the Wright and Ferguson contracts and the 1991 agreement is an obvious problem. That agreement extinguished all claims arising out of the then existing litigation between O'Keefe and Loewen. The pending lawsuit included claims for breach of the Wright and Ferguson contracts. If the 1991 agreement was enforceable, claims for breaches of the Wright and Ferguson contracts could not be maintained.

110. Again, Claimants had a strong ground for claiming that the fraud damages were excessive. As already noted, Mr Gary did not ask for these damages. The only fraud claim involved alleged misstatements about the 1991 agreement and its performance. Why the fraud claim would result in damages additional to the damages awarded on the other claims made in respect of the 1991 agreement is by no means apparent.

111. Claimants' challenge to the award on the anti-trust claims appears to misconceive the nature of the claim. It was not, as Claimants seem to suggest, confined to a claim based on loss sustained as a result of impermissible pricing below cost. The O'Keefe

case was mainly based on the unfair means by which Loewen attempted to attain its monopoly power. It was O'Keefe's case that Loewen violated the anti-monopoly laws by manipulating the 1991 agreement in bad faith in order to drive O'Keefe out of funeral home markets, thereby enabling Loewen to raise prices without fear of competition. It was also O'Keefe's case that Loewen's treatment of O'Keefe was part of a broader practice of destroying or excluding smaller competitors by unfair means. There is expert evidence before us in the form of a declaration by Mr Jack Dunbar that O'Keefe's allegations were more than sufficient to state a claim for a violation of Mississippi anti-monopoly laws. And evidence was presented at the trial to substantiate the monopolization claims. That evidence included the testimony of a credible expert Mr Dale Espich whose testimony dealt in detail with Loewen's monopolistic practices. He described Loewen's domination of various Mississippi markets, its persistent practice in raising prices, particularly in dominated markets (Transcript at 1837-1840), its tendency to cluster its purchases of funeral homes to dominate markets (Transcript at 1845-1846) and Loewen's success in excluding O'Keefe from the largest Mississippi market – Jackson. (Transcript at 1867). This testimony was not challenged in cross-examination. So Claimants' argument that there was no legal basis for the anti-trust claim appears to be without substance.

112. There is no occasion to deal with the so-called "oppression" claim. No such claim was submitted by Judge Graves to the jury and no verdict was rendered on such a claim. That O'Keefe pleaded "oppression" as a separate count is therefore immaterial.

113. The total award (even the award of compensatory damages) appears to be grossly disproportionate to the damage suffered by O'Keefe. The dispute involved three contracts valued at $980,000 and an exchange of two funeral homes worth approximately $2.5 million for a Loewen funeral insurance company valued at approximately $4 million. The jury foreman said "May be O'Keefe lost $1 million dollars. $6 million to $8 million I'd say was right …" (App. at A3079). Respondent seeks to justify the award of $500 million not by reference to the substance of the dispute but by reference to Loewen's "monopolization of funeral home markets and overcharging of grief-stricken consumers of funeral services". Granted that a

substantial award of damages on this claim might well be justified, Claimants had very strong grounds for arguing that verdict of $500,000,000 was excessive.

114. Notwithstanding the viability of the anti-trust claim, Claimants had very strong prospects of successfully appealing the damages awarded on the ground that they were excessive.

XVI. RESPONDENT'S CASE THAT EXCESSIVE VERDICT WAS CAUSED BY LOEWEN'S FLAWED TRIAL STRATEGY

115. Respondent argues that the excessive verdict was not caused by inadmissible appeals to prejudice and local favouritism but by Loewen's flawed trial strategy. First, it is said that because the foreman of the jury was formerly a Canadian, it would be wrong to impute anti-Canadian bias to the jury. This argument is based very largely on post-trial interviews with the jurors, including the foreman. We do not regard these interviews as establishing that the verdict was uninfluenced by appeals to local sentiment, racial or class-based prejudice. These influences may well have played a part in the verdict, even if there was an absence of actual bias on the part of the jurors themselves. The magnitude of the verdict suggests that the verdict was influenced by bias, prejudice, passion or sympathy.

116. Respondent's argument on this point is based on the Opinion of Professor Stephan Landsmann who has pointed to a number of strategical or tactical decisions taken by Loewen's counsel during the course of the trial, particularly in relation to the punitive damages stage of the trial. There is much to be said for the view that a number of decisions taken by Loewen's counsel, viewed with the advantage of hindsight, were unwise. Further, four individuals who had been employed by Loewen gave evidence which was very critical of Loewen's business practices. One of them testified to a policy of constant and aggressive price increases for funeral services (Transcript at 1228,1240). The same witness described communications in which O'Keefe was given misleading information or in which material information was withheld in evident breach of contract (Transcript at 1217-1223). The Riemann brothers wrote letters to Loewen complaining about the business methods of Loewen.

117. Professor Landsmann points also to four matters which would have strengthened the O'Keefe charges against Loewen. They were:

(1) the belated disclosure and production of the Riemann letters (already mentioned) which appear to support a number of significant O'Keefe allegations;

(2) the striking by the Court of the testimony of a Loewen witness, Ellis, after it was revealed that Loewen's counsel had not complied with the court's sequestration order with respect to his pre-trial preparation;

(3) frequent claims of memory failure by Raymond Loewen in direct and cross-examination, a matter commented upon by Judge Graves; and

(4) the contradiction by Loewen witnesses and by documents of Loewen's counsel's statements about the net worth of Loewen during the punitive damages stage of the trial.

118. The matters referred to in the two preceding paragraphs unquestionably strengthened the O'Keefe case against Loewen and highlighted Loewen's predatory and aggressive conduct. But these matters do not erase the prejudicial conduct at trial on O'Keefe's part or eliminate the influence it was calculated to have on the jury.

XVII. EVALUATION OF THE TRIAL

119. By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.

120. The trial before Judge Graves lasted some 50 days. During such a protracted period of adversarial behavior, mistakes and errors will occur; even the most even-handed judge will not be able to entirely preclude appeals to the jury's passions. Appellate courts in the United States, and indeed, in most countries in the world, have recognized that "perfect trials" are not to be expected. Doctrines of harmless error, invited error, and waiver of the right to object to prejudicial conduct are commonly invoked to sustain the results of less than perfect trials. Clearly, an arbitral tribunal applying the provisions of a treaty and of international law is even more constrained

to avoid nitpicking a trial record and the rulings of a trial judge. Even when all of those limitations are applied most rigorously, the trial and its $500,000,000 verdict cannot be countenanced.

121. Respondent obviously could not defend some of the lawyer conduct and trial judge inadequacy previously referred to. Instead it argued that some of the appellate doctrines mentioned above precluded the tribunal from relying on specific flaws that were the most egregious. We need not resolve the domestic procedural disputes which arose at the trial such as the question whether Loewen was entitled to the particular instruction which it sought as to bias. The question is whether the whole trial, and its resultant verdict, satisfied minimum standards of international law, or the "fair and equitable treatment and full protection and security" that the Contracting States pledged in Article 1105 of NAFTA. This question is addressed in paras. 124-137.

122. If a single instance of the unfair treatment that was accorded Loewen at the trial level need be cited, it would be the manner in which the large and excessive verdict was constructed by the judge and the jury. As has previously been detailed, the jury originally came in with a verdict of $260,000,000, which the foreman indicated included compensatory damages of $100,000,000 and punitive damages of $160,000,000. Since Mississippi law required a separate prove up of punitive damages (which had not occurred), the judge accepted the $100,000,000 compensatory damages portion of the verdict, but conducted a further, and minimal, hearing of evidence on the punitive damages question. The jury subsequently came back with the much enhanced punitive damages award of $400,000,000, making the total verdict of $500,000,000 the largest in Mississippi history. Whether the jury interpreted Judge Graves' procedure as an invitation to increase the verdict or not, the results compounded the excessiveness of the original verdict. The methods employed by the jury and countenanced by the judge were the antithesis of due process. But we repeat this is only one instance of many.

123. In reaching the conclusion stated in the previous paragraph, we take it to be the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. It is the

responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice. In the United States and in other jurisdictions, advocacy which tends to create an atmosphere of hostility to a party because it appeals to sectional or local prejudice, has been consistently condemned and is a ground for holding that there has been a mistrial, at least where the conduct amounts to an irreparable injustice (*New York Central R.R. Co. v Johnson* 279 US 310, 319 (1929); *Le Blanc v American Honda Motor Co. Inc.* 688 A 2d 556, 559). In *Walt Disney World Co. v Blalock* 640So 2d 1156,1158, a new trial was ordered where closing argument was pervaded with inflammatory comment and personal opinion of counsel, although the offensive comments were not objected to. See also *Whitehead v Food Max of Mississippi Inc.* 163 F 3d 265, 276-278 (where a new trial was ordered on the ground that plaintiffs' counsel repeatedly "reminded the jury that [defendant] Kmart is a national … corporation … [and] contrasted that with" his and his client's status as a Mississippi resident, despite the fact that most of the objectionable comments were not objected to); *Norma v Gloria Farms Inc.* 668 So 2d 1016,1021,1023 (new trial ordered where defense counsel in closing remarks appealed to jurors' self-interest, despite plaintiff's counsel's failure to object). In such circumstances the trial judge comes under an affirmative duty to prevent improper tactics which will result in an unfair trial (*Pappas v Middle Earth Condominium Association* 963 F 2d 534 539, 540; *Koufakis v Carvel* 425 F 2d 892, 900).

XVIII. NAFTA ARTICLE 1105

124. Article 1105 which is headed "Minimum Standard of Treatment" provides:

> "1. Each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

The precise content of this provision, particularly the meaning of the reference to "international law" and the effect of the inclusory clause has been the subject of controversy.

125. On July 31, 2001, the Free Trade Commission adopted an interpretation of Article 1105(1). The Commission's interpretation is in these terms:

"Minimum Standard of Treatment in Accordance with International Law

(1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

(2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

(3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

126. An interpretation issued by the Commission is binding on the Tribunal by virtue of Article 1131(2).

127. Although Claimants, in their written materials, submitted that the Commission's interpretation adopted on July 31, 2001 went beyond interpretation and amounted to an unauthorized amendment to NAFTA, Claimants did not maintain that submission at the oral hearing. The oral argument presented by Mr Cowper QC on behalf of Claimants was consistent with the Commission's interpretation of Article 1105(1). Mr Cowper QC submitted that, accepting that Article 1105(1) prescribes the customary international law standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of an investor of another Party, the treatment of Loewen by the Mississippi courts violated that minimum standard.

128. The effect of the Commission's interpretation is that "fair and equitable treatment" and "full protection and security" are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA Tribunals in *Metalclad Corp v United Mexican States* ICSID Case No. ARB(AF)/97/1 (Aug 30, 2000), *S.D. Myers, Inc. v Government of Canada* (Nov 13, 2000) and *Pope & Talbot, Inc. v*

Canada, Award on the Merits, Phase 2, (Apr 10, 2001) may have expressed contrary views, those views must be disregarded.

129. It is not in dispute between the parties that customary international law is concerned with denials of justice in litigation between private parties. Indeed, Respondent's expert, Professor Greenwood QC, acknowledges that customary international law imposes on States an obligation "to maintain and make available to aliens, a fair and effective system of justice" (Second Opinion, para. 79).

130. Respondent submits that, in conformity with the accepted standards of customary international law, it is for Loewen to establish that the decisions of the Mississippi courts constituted a manifest injustice. Professor Greenwood states in his Second Opinion:

> "the awards and texts make clear that error on the part of the national court is not enough, what is required is "manifest injustice" or "gross unfairness" (Garner, "International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice", 10 BYIL (1929), p 181 at p 183), "flagrant and inexcusable violation" (Arechaga, ["International Law in the Past Third of a Century", 159 "Recueil des Cours" (1978) at p 282]) or "palpable violation" in which "bad faith not judicial error seems to be the heart of the matter" (O'Connell, International Law, 2nd ed, 1970) p 498). As Baxter and Sohn put it (in the Commentary to their Draft Convention on the Responsibility of States for Injuries to Aliens) "the alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice".

131. In *Pope & Talbot Inc. v Canada*, Award in respect of damages, May 31, 2002 a NAFTA Tribunal considered the effect of the Interpretation of July 31, 2001. The Tribunal concluded (para. 62 of its Award) that the content of custom in international law is now represented by more than 1800 bilateral investment treaties which have been negotiated. Nevertheless the Tribunal did not find it necessary to go beyond the formulation by the International Court of Justice in *Elettronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at 76:

> "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law … It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety."

132. Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.

133. In the words of the NAFTA Tribunal in *Mondev International Ltd v United States of America* ICSID Case No. ARB (AF)/99/2 , Award dated October 11, 2002,

> "the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment'."

134. If that question be answered in the affirmative, then a breach of Article 1105 is established. Whether the conduct of the trial amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.

135. International law does, however, attach special importance to discriminatory violations of municipal law (Harvard Law School, Research in International Law, Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners ("1929 Draft Convention") 23 American Journal of International Law 133, 174 (Special Supp. 1929) ("a judgment [which] is manifestly unjust, especially if it has been inspired by ill-will towards foreigners as such or as citizens of a particular states"); Adede, A Fresh Look at the Meaning of Denial of Justice under International Law, XIV Can YB International Law 91 ("a … decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant"). A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.

136. In the present case, the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.

137. In the light of the conclusions reached in paras. 119-123 (inclusive) and 136, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment. However, because the trial court proceedings are only part of the judicial process that is available to the parties, the rest of the process, and its availability to Loewen, must be examined before a violation of Article 1105 is established. We address this question in paras. 142-157 (inclusive), 165-171 (inclusive) and 207-217 (inclusive).

XIX. THE CLAIM OF BIAS

138. Claimants' argument that Judge Graves and the jury were actually biased against Loewen is not made out. There is no direct evidence of bias on the part of Judge Graves or the jury. Nor do the jury interviews demonstrate that the jury was biased. The interviews reveal that the jury took an adverse view of Loewen's conduct based on evidence which included testimony of Loewen employees and former employees. Nor does the evidence warrant the drawing of an inference of bias against the jury, though there is strong reason for thinking that the jury were affected by the persistent and extravagant O'Keefe appeals to prejudice. Although the trial judge's conduct of the trial is explicable by reference to bias, the evidence does not support a finding that he was biased against Loewen. We take the view that the judge, for reasons which do not clearly appear, failed to discharge his paramount duty to ensure that Loewen received a fair trial.

XX. NAFTA ARTICLE 1102

139. Article 1102 bars discrimination against foreign investors and their investments. Article 1102(1) and (2) requires each Party to accord investors and investments of another Party "treatment no less favorable than it accords in like circumstances to its own investors" or their investments. With respect to a state or province Article 1102(3) requires

> "treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms part."

The effect of these provisions, as Respondent's expert Professor Bilder states, is that a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself. We agree also with Professor Bilder when he says that Article 1102 is direct only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial.

140. A critical problem in the application of Article 1102 to the facts of this case is that we do not have an example of "the most favorable treatment accorded, in like circumstances" by a Mississippi court to investors and investments of the United States. Claimants submit that the treatment accorded O'Keefe is an appropriate comparator, that Loewen and O'Keefe were "in like circumstances" because they were litigants in the same case. But their circumstances as litigants were very different and it is not possible to apply Article 1102(3) by reference to the treatment accorded to O'Keefe. What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant. There are no materials before us which enable such a comparison to be made.

XXI. NAFTA ARTICLE 1110

141. Claimants' reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.

XXII. THE NECESSITY FOR FINALITY OF ACTION ON THE PART OF THE STATE'S LEGAL SYSTEM

142. Having reached the conclusion that the trial and the verdict were improper and cannot be squared with minimum standards of fair international law and fair and equitable treatment, we must now consider the question whether, in the light of subsequent proceedings, the trial and the verdict alone or in combination with the subsequent proceedings amounted to an international wrong. We take up at this point the Respondent's second ground of objection to competence and jurisdiction which covers much of the same ground and was not resolved in the Tribunal's Decision of January 5, 2001.

143. Respondent argues that the expression "measures adopted or maintained by a Party" must be understood in the light of the principle of customary international law that, when a claim of injury is based upon judicial action in a particular case, State responsibility only arises when there is final action by the State's judicial system as a whole. This proposition is based on the notion that judicial action is a single action from beginning to end so that the State has not spoken until all appeals have been exhausted. In other words, the State is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort. Respondent distinguishes this substantive requirement of customary international law for a final non-appealable judicial action, when an international claim is brought to challenge judicial action as a breach of international law, from international law's procedural requirement of exhaustion of local remedies ("the local remedies rule").

144. Respondent submits that there is nothing to show that in Chapter Eleven the Parties intended to derogate from this substantive rule of international law when judicial action is the basis of the claim for violation of NAFTA. Respondent argues that the terms of Article 1101, "adopted or maintained by a Party", incorporate the substantive rule of international law and require finality of action. Only those judicial decisions that have been accepted or upheld by the judicial system as a whole, after all available appeals have been exhausted, so the argument runs, can be said to possess that degree of finality that justifies the description "adopted or maintained".

145. Claimants' response to this argument is that Article 1121(1)(b) of NAFTA requires an arbitral claimant to waive its local remedies, not exhaust them. This Article authorizes the filing of a Chapter Eleven claim only if

> "the investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 …".

Claimants submit, first, that "the Article eliminates the necessity to exhaust local remedies provided by the host country's administrative or judicial courts". (B. Sepulveda Amor, *International Law and International Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 Houston Journal of International Law 565 at 574 (1997)). Claimants submit, secondly, that the so-called substantive principle of finality is no different from the local remedies rule and that international tribunals have reviewed the decisions of inferior municipal courts where the exhaustion requirement has been waived or is otherwise inapplicable.

146. Respondent argues that Article 1121(2)(b) is not a waiver provision and that it does not waive the local remedies rule or for that matter the requirement that the judicial process be pursued to the highest court where a judicial act constitutes the breach of international law. Respondent appears to acknowledge, however, that the Article relaxes the local remedies rule to a partial but limited extent, without defining or otherwise indicating what that extent is or may be.

147. As Professor Greenwood points out in his First Opinion, usually there are three separate issues to be considered:

(a) whether there is an act which is imputable to the respondent State;
(b) whether that act is contrary to international law; and
(c) whether the respondent State can be held responsible for that act in international proceedings until local remedies have been exhausted.

148. In this case, we are not concerned with the question whether there is an act which is imputable to Respondent. A decision of a court of a State is imputable to the State because the court is an organ of the State. This proposition was acknowledged in the

Tribunal's Decision of January 5, 2001. We are, of course, concerned with the question whether the relevant decisions of the Mississippi courts constitute violations of international law because this is not a case where the alleged violation of international law is constituted by a non-judicial act or decision.

149. The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission (ILC) Draft Articles on State Responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law (Text provisionally adopted on 31 May, 2001, UN Doc. A/CN 4/L 602. Article 44 is identical to Article 45 of the 2000 draft referred to in the Decision of January 5, 2001, para. 67). Article 22 of the earlier draft, which had been prepared in 1975, embodied a substantive approach which was strongly criticized by governments (most notably the United Kingdom) and was not followed in *Elettronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at para. 50. See Second Opinion of Professor Greenwood, paras 52-54).

150. Although Loewen submits, in accordance with an Opinion of Sir Robert Jennings, that the local remedies rule is essentially confined to cases of diplomatic protection, that view does not coincide with that of other commentators. See García-Amador, Sohn and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974) pp 143, 129-132; see also García-Amador's Draft Articles on State Responsibility prepared in 1960 for the International Law Commission, noting his comment at p. 79:

> "Article 21 of the draft sets forth the basis of a procedure which would enable the alien himself, once local remedies have been exhausted, to submit an international claim to obtain reparation for injury suffered by him."

See also OECD Draft Convention on the Protection of Foreign Property, 1967, Article 7(b) and Commentary (OECD Publication No. 23081 (1967) pp 36-41. Professor James Crawford SC, rapporteur on State Responsibility of the ILC has stated "the

exhaustion of local remedies rule is not limited to diplomatic protection" (UN Doc. A/CN 4/517, p 33).

151. Professor Greenwood in his First Opinion refers to "the principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice". The principle is supported by a number of decisions of the United States-Mexican Claims Tribunal (*Jennings, Laughland & Co v Mexico* (Case No. 374, 3 Moore, *International Arbitrations* (1898) p 3135); *Green v Mexico* (ibid, at p 3139); *Burn v Mexico* (ibid at 3140); *The Ada* (ibid at 3143); *Smith v Mexico* (ibid at 3146); *Blumhardt v Mexico* (ibid at 3146); *The Mechanic (Corwin v Venezuela)* (ibid 3210 at 3218). In the first of these decisions, Umpire Thornton observed (at p 3136):

> "The Umpire does not conceive that any government can thus be made responsible for the conduct of a judicial officer when no attempt has been made to obtain justice from a higher court."

152. Text writers also give support to the principle (Oppenheim's International Law, 9th ed, 1992, vol I, pp 543-545; Freeman, *International Responsibility of States for Denial of Justice*, (1938) pp 291-292, 311-312), although Freeman regards the rule as linked to the local remedies rule (at p 415).

153. The principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice at the international level has been linked to the duty imposed upon a State by international law to provide a fair and efficient system of justice. Professor James Crawford SC, rapporteur to the ILC, has stated:

> "There are also cases where the obligation is to have a system of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There systematic considerations enter into the question of breach, and 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".

(UN Doc. A/CN 4/498, para. 75). Judge Jiménez de Aréchaga took the same view of the State's responsibility, stating that it was an essential condition of a State being held responsible for a judicial decision in breach of municipal law that the decision must be a decision of a court of last resort, all remedies having been exhausted ("International Law in the Past Third of a Century", 159 Recueil des Cours (1978) at

p 282, where the judge expressed the reason for the requirement as being that States provide remedies to correct the natural fallibility of their judges). He considered that a corollary of the requirement is that "a State cannot base the charges made before an international court or tribunal … on objections or grounds which were not previously raised before the municipal courts"

154. 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.

155. That there is a difference in the purposes served by this principle was recognized by the Iran-United States Claims Tribunal in *Oil Fields of Texas* 12 Iran-US CTR 308 at 318-319. The question there was whether a judicial decision could amount to a measure of appropriation. The decision was that of the Islamic Court of Ahwaz, which appears to have been a lower court. The Tribunal held that the order of the Court amounted to a permanent deprivation of use. The Tribunal said (at p 319):

> "In these circumstances, and taking into account the Claimant's impossibility to challenge the Court order in Iran, there was a taking of the three blowout preventers for which the Government is responsible" (p 319).

156. The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision. The requirement has application to breaches of Articles 1102 and 1110 as well as Article 1105.

157. The questions whether there was an adequate and effective municipal remedy available to Loewen and whether Loewen took sufficient steps to pursue such a remedy are questions which remain to be considered. It is convenient, first, however, to deal with Article 1121 and the problem of waiver.

XXIII. ARTICLE 1121 AND WAIVER

158. In para. 71 of the Decision of January 5, 2001, the Tribunal expressed the view that "the rule of judicial finality is no different from the local remedies rule. Its purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own judicial system".

159. This statement requires qualification in light of the preceding discussion of Article 1105, denial of justice and the local remedies rule. The requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision means that this requirement and the local remedies rule, though they may be similar in content, serve two different purposes.

160. An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so (*Elettronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at 42). Such an intention may be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.

161. Although the precise purpose of NAFTA Article 1121 is not altogether clear, it requires a waiver of domestic proceedings as a condition of making a claim to a NAFTA tribunal. Professor Greenwood and Sir Robert Jennings agree that Article 1121 "is not about the local remedies rule". One thing is, however, reasonably clear about Article 1121 and that is that it says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level.

162. Nor is there any basis for implying any dispensation of that requirement. It would be strange indeed if sub silentio the international rule were to be swept away. And it would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to

the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law.

163. Article 1121 may have consequences where a claimant complains of a violation of international law not constituted by a judicial act. That is not a matter which arises here.

164. For the reasons given, Article 1121 involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act.

XXIV. THE SCOPE AND CONTENT OF THE OBLIGATION TO PURSUE LOCAL REMEDIES

165. The question then is as to the scope and content of the obligation to pursue local remedies in a case in which the alleged violation of international law is founded upon a judicial act. In such a case the pursuit of local remedies plays a part in creating the ground of complaint that there has been a breach of international law. There is a body of opinion which supports the view that the complainant is bound to exhaust any remedy which is adequate and effective (*The Finnish Ships Arbitration Award*, May 9, 1934, 3 RIAA, 1480 at 1495; *Nielsen v Denmark* [1958-1959] Yearbook of the European Commission on Human Rights, 412 at 436, 438, 440, 444) so long as the remedy is not "obviously futile" (*The Finnish Ships Arbitration Award* at 1503-1505).

166. On the other hand, the requirement has been described as one "which is not a purely technical or rigid rule" and one "which international tribunals have applied with a considerable degree of elasticity" (*Norwegian Loans Case* (1957) ICJR 9 at 39 per

Lauterpacht J). In conformity with this approach, one commentator has suggested that the result in any particular case will depend upon a balancing of factors. So in a case where it is highly unlikely that resort to further remedies will be favourable to a claimant, the correct conclusion may be that local remedies have been exhausted "if the cost involved in the proceeding further considerably outweighs the possibility of any satisfaction resulting"' (Mummery, "The Content of the Duty to Exhaust Local Remedies" (1964) 58 Am. Jo. Intl. Law 389 at 401). The same commentator favours formulation of the issue in terms of whether the local remedy "may reasonably be regarded as incapable of producing satisfactory reparation" (ibid). Although this formulation appears to be directed to a case in which the claim is based on an antecedent breach of international law, the formulation is equally appropriate to obtaining redress as to producing reparation.

167. Here, however, the question concerns the availability of the remedy rather than its adequacy or even its effectiveness. At least that is true of the appeal to the Mississippi Supreme Court. It was an adequate and fully effective appeal. The obligation of the claimant, who complains that a judicial act is a violation of international law, to afford the host State the opportunity of remedying the default in the court below, by taking the matter to a higher court, is subject to reasonable practical limitations. Thus, Sohn and Baxter, "Convention on the International Responsibility of States for Injuries to Aliens", 12th Draft (1961) 168 in their commentary on Article 19, sub-paragraph 2(b), state:

> "The subparagraph is intended to preclude a respondent State from maintaining that a local remedy exists when in fact resort to that remedy is a practical impossibility and to permit a claimant to introduce evidence of the practical workings of justice, as distinct from the theoretical state of the law as reflected in code, statute, decision and learned writing. (…) It may be that an alien in fact finds it difficult to employ an existing local remedy by reason of the existence of some other procedural barrier in the law, such as a requirement of posting excessive security for costs, or where the law leaves to the discretion of a court official the amount of security for costs to be posted, an order for the posting of a prohibitive amount (…). Since the purpose of the Article as a whole is to require exhaustion of a remedy only if it is reasonably available, it is important to provide not only for the case where a remedy is unavailable as a matter of law, but also for the case where a theoretically available remedy cannot in fact be utilized."

168. This passage, in our view, correctly expresses the scope and content of the principle relating to exhaustion of local remedies. It is an obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated.

169. Availability is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy.

170. If a State attaches conditions to a right of appeal which render exercise of the right impractical, the exercise of the right is neither available nor effective nor adequate. Likewise, if a State burdens the exercise of the right directly or indirectly so as to expose the complainant to severe financial consequences, it may well be that the State has by its own actions disabled the complainant from affording the State the opportunity of redressing the matter of complaint. The scope of the need to exhaust local remedies must be considered in the light of these considerations.

171. Whether it has been satisfied in this case depends upon an examination of events subsequent to the trial, events to which we now turn.

XXV. LOEWEN'S APPEAL, THE COURT DECISIONS ON THE BONDING REQUIREMENT AND THE SETTLEMENT AGREEMENT

172. On November 5, 1995, Loewen's counsel set out a timetable for future procedures. They proposed an appeal to the Supreme Court of Mississippi which was expected to take six months to two years before it was finalized. Loewen's counsel contemplated an appeal to the United States District Court, if necessary.

173. On November 6, 1995, final judgment was entered in favour of O'Keefe. On that day, Marsh & McLellan, a firm experienced in placing supersedeas bonds in appeals in civil lawsuits, began to assemble a package of parties willing to furnish a bond. By November 22, 1995, it was arranged that surety companies would underwrite a total of $625,000,000, this being the amount of the bond required by Miss. R. App. P.8(a).

By posting a bond in that amount, Loewen would have prevented O'Keefe from enforcing the judgment while Loewen's appeal was pending.

174. By about November 20, 1995, it became clear that the sureties would all require that 100% of their risk be supported by collateral in the form of bank letters of credit and that Loewen's bankers would not promise such letters. On November 25, Loewen filed an affidavit stating that it was unable to provide an appeal bond with supersedeas in the amount, form and conditions required by the Mississippi Supreme Court and the surety companies.

175. Meantime, immediately after judgment was entered, O'Keefe began to enrol it within the counties of Mississippi, enrolment being a condition precedent to execution.

176. On November 15, 1995, Loewen moved for judgment notwithstanding the verdict, and/or for a new trial and for remittitur. In these motions Loewen advanced numerous grounds, including grounds discussed in this Award, for challenging the verdict both as to liability and as to the damages awarded (compensatory and punitive). On the following day Loewen filed motions seeking a reduction of the compensatory and punitive damages awarded.

177. On November 20, 1995, the motions came on for hearing before Judge Graves. The court announced that each side would be given fifteen minutes for argument and Loewen would be allowed a further ten minutes for rebuttal. After argument, the court denied all six Loewen motions, without giving reasons.

178. On the same day, Mr Gary was reported as saying "They have ten days to post the cash bond. If they don't, my client will proceed to take over their assets. That's every funeral home they own, every insurance company, every cemetery, their corporate jet and their yacht". On November 21, 1995, Loewen's lawyers sought an assurance from O'Keefe's lawyers that they would not seek enforcement during the thirty day period for perfecting the appeal. The assurance was not forthcoming.

179. On November 27, 1995, Loewen filed an appeal of the trial court judgment with the Mississippi Supreme Court. Under Mississippi law, a party may pursue such an appeal without posting a bond.

180. On November 28, 1995, Loewen filed a motion asking the trial court to stay enforcement of its judgment on Loewen filing a conventional supersedeas bond in the penal sum of $125,000,000 and providing covenants that Loewen would maintain its financial strength and net worth. By this motion Loewen asked the trial court to reduce the bond to $125,000,000 – 125 per cent of the compensatory damages component of the judgment. The Mississippi Court Rules empower the court, for "good cause shown" and in an "appropriate" case, to grant a stay of enforcement upon a bond or upon conditions less than or other than a bond in an amount of 125 per cent of the judgment (Miss. R. App. P. Rule 8(b)). Loewen argued that security for the compensatory damages component was all that O'Keefe was entitled to, that Loewen was unable to provide more than a bond for $125,000,000 at the time, (though claiming it had the financial ability to satisfy the judgment to make for punitive damages), that its net worth was sufficient to make the judgment fully collectible. Loewen also argued that denial of the stay would cause it and innocent third parties irreparable harm and deprive it of appellate review. Loewen further argued that the appeal had strong prospects of success, in particular that the damages were grossly excessive. Loewen also stated that its major credit agreements all had cross-default clauses and agreed that an uncured default in any of their long term credit agreements would operate to vacate the stay.

181. On the same day, Loewen filed a motion in seeking a stay pending consideration by the court of the motion for a stay.

182. On November 29, 1995, the motions for a stay came on for hearing before Judge Graves in the trial court. The hearing began with Judge Graves again fixing fifteen minutes for oral argument on each side with ten minutes for rebuttal. In doing so, he exhibited resentment at statements made by Loewen's counsel in their brief that they were "stunned" by the time limits fixed for argument on the earlier motion and about the "error-infested" trial. A reading of the transcript, however, reveals that Judge Graves applied himself to the issues. He questioned O'Keefe's counsel about the

problem that would arise if execution on the judgment was not stayed and execution followed, yet on appeal the judgment was set aside or reduced. He asked whether it might not be more prudent to maintain the status quo. O'Keefe's counsel responded that there was no assurance that the status quo could be maintained, that there were other lawsuits pending against Loewen and the judgments might be bigger than the O'Keefe judgment. O'Keefe's counsel also said "they would go into Chapter Eleven [of the Bankruptcy Code] and in the meantime pursue us" and "[t]hey can appeal without supersedeas". Loewen made no response on the Chapter Eleven argument even though it had that option under consideration. In argument, Judge Graves discussed other alternatives with Loewen's counsel and finally asked whether security could be given in an amount between $125,000,000 and $625,000,000. Nothing came of this after some discussion between the parties.

183. Judge Graves then delivered judgment on the motions, dismissing them. He accepted that the court had a discretion under Rule 8(b) to reduce the amount of the bond for "good cause shown", an expression which was not defined. However, Judge Graves considered, in the light of the Mississippi Supreme Court decision in *In re Estate of Taylor* 539 So 2d 1029, that the general purpose of a supersedeas bond was to give absolute security to the party affected by the appeal and that the security was to cover the entire verdict, including the amount of punitive damages. Judge Graves concluded that, although it was arguable that a stay would not result in harm to O'Keefe,

> "the Court has no reason to believe that there are assets [of Loewen] in this case which would not dissipate or that the same assets which are subject to levy right now would still be there and subject to levy a year from now or eighteen months from now if there were an appeal allowed without the bond".

In reaching this conclusion, Judge Graves referred to matters relied upon by O'Keefe's counsel – the financial inability of Loewen to obtain the bond, the pendency of other lawsuits, that investors were looking to get out and that the price of the shares had plummeted. The critical finding in the judgment was:

> "The Court … finds that there exists no viable alternative for securing this Plaintiff's interest absent the requirement of a [$625 million] bond pursuant to Rule 8."

184. Judge Graves stressed that the Rule required that the amount of the bond was to give absolute security to the party affected by the appeal. If one accepts this interpretation of the Rules, and Judge Graves was bound by the interpretation, his decision did not reflect an error in principle. Further he took into consideration the various factors relied upon by the parties and, after weighing them, came up with a decision in favour of O'Keefe.

185. It is not a decision which we would have reached on the materials before Judge Graves. That is because we would not read the Rules as having the purpose of securing absolute security for the verdict awarded, more particularly when (a) there was a strong case for regarding the verdict as excessive and one which should be set aside, (b) the provision of absolute security was beyond the capacity of the appellant and (c) the prosecution of an appeal without a stay would work an injustice and in all probability foreclose the possibility of an appeal, eventualities rendered the more likely by the sheer size of the bond stipulated by Rule 8(a).

186. We repeat what we said earlier, that Claimants make no challenge to the bonding requirement in Rule 8(a) notwithstanding the potential harshness of its operation. That operation constitutes a very good reason for interpreting the discretion conferred by Rule 8(b) more liberally than it was construed by the Mississippi courts.

187. After this case, the Mississippi Supreme Court made changes to its Rules, in particular Rule 8, which would preclude what happened before Judge Graves, and later what happened on appeal. The changes acknowledge that Rule 8 could operate in an extreme way so as to produce an unjust result. But the challenge here is not to Rule 8(a); it is to the way Rule 8 was applied.

188. It was common ground between the parties that there is no principle of international law which requires a State to provide a right of appeal from a decision of its courts. Here the refusal to relax the bonding requirement was not a denial of the appeal. Loewen, at least in theory, could proceed with its appeal, albeit subject to the risk of execution, if it did not pursue the Chapter Eleven Bankruptcy option.

189. Claimants submit that the decisions refusing to relax the bonding requirements were a violation of Article 1105, because there was a procedural denial of justice, there was a denial of fair and equitable treatment and a denial of full protection and security. Notwithstanding the criticisms already made of Judge Graves' decision, that decision does not transgress the minimum standard of treatment mandated by Article 1105. It was at worst an erroneous or mistaken decision.

190. On November 30, 1995, the Supreme Court of Mississippi granted an interim stay of execution on the judgment, conditional on the posting of a bond in the sum of $125,000,000. On December 20, 1995, the Supreme Court extended the stay indefinitely, pending further order of the court.

191. At this time Loewen was considering raising further capital by way of equity and debt. Loewen's lawyers were examining the effect of an equity, raising on the court's appreciation of its ability to post a $625,000,000 bond.

192. On December 12, 1995, Loewen filed in the Mississippi Supreme Court an addendum to their motion for a stay, informing the court of their intention to file a preliminary prospectus for an offering of preferred securities to the public in Canada. The proceeds of the offering would be deposited with a trustee for the funding of acquisitions of funeral homes, cemeteries and related businesses. Although not available to fund a supersedeas bond, the use of the funds for acquisitions would benefit O'Keefe by increasing Loewen's underlying value.

193. While the appeal to the Mississippi Supreme Court was pending Loewen issued new stock in the Canadian equity market to fund new acquisitions and was preparing to raise an additional $200 million in a debt offering.

194. On December 17, 1995, Raymond Loewen and others conducted a conference call with financial institutions in Canada concerning an offer of some $200 million convertible preferred shares. In response to questions, Raymond Loewen stated that

> "… the Supreme Court in Mississippi has already given us one stay, and we are now waiting for the permanent stay, and the permanent reduction of the bond, and there is every reason to believe that in fact we will get that. In addition to that, our company we believe is – we are quite

> confident that with our banks and with our investment bankers we will be able to deal with the very worst case scenario".

And, in response to a question about the punitive damages owed Raymond Loewen said:

> "Obviously, we don't think that a 500 million liquidity thing will ever come, but being a responsible corporation we have the contingency plan for every possible contingency, and we've looked at that, discussed it with our bankers, and we have a plan which we believe would address that without any major long-term harm on liquidity after a brief to adjust that."

195. On January 23, 1996, Loewen's lawyers pointed out the tactical dangers of raising money to fund the existing acquisition obligations, but not the bond. They noted that Loewen's Mississippi counsel thought that this course would result in loss of credibility and could result in loss of the stay. The current settlement strategy advised by the lawyers was to get Loewen to the point where it could post the $625 million, ask the Court to be relieved of that burden and point out to O'Keefe the need for them to settle before the court acted or the bond was posted.

196. On January 24, 1996, the Supreme Court of Mississippi with two dissentients dismissed defendants' motion for stay of execution, and ordered that the interim stay entered on November 30 and extended on December 20, 1995 be dissolved with effect from 1200 pm on January 31, 1996. The Court did not give reasons for its decision. The Court's formal order simply recited:

> "The Court finds that the question before it is whether the trial court abused its discretion in refusing to lower the amount of the supersedeas bond at Appellants' request. The Court finds no abuse of discretion in the trial court's refusal to lower the amount of the supersedeas bond, and that the trial court properly followed M.R.A.P.8."

197. Whether the Supreme Court's ruling on this point was appropriate or not, it stands in the same position as Judge Graves' decision under appeal. The Supreme Court's ruling did not transgress the minimum standard of treatment under Article 1105.

198. On January 25, 1996, a memorandum was circulated within the Loewen Group reporting the decision of the Mississippi Supreme Court, and informing readers that the Group was currently pursuing three alternative avenues:

(1) securing funds to finance the bond;

(2) negotiating a reasonable settlement;

(3) filing for Chapter Eleven Bankruptcy protection without posting a bond.

Chapter Eleven was considered to be by far the least desirable but would be utilised if absolutely necessary.

199. On January 25, 1996, plaintiffs' lawyers wrote to defendants' lawyers advising that they would start execution on all Loewen's property in Mississippi and other states at noon on January 31, adding:

> "… we are willing to give you a second chance to resolve this case and avoid bankruptcy. However, I am renewing my offer to resolve this case for four hundred and seventy-five million dollars".

Respondent suggests that Loewen would have discounted O'Keefe's threats to levy execution on the judgment because O'Keefe would have been deterred by the potential liability for damages it would face if, ultimately, the judgment was set aside. In our view, Loewen was entitled to treat the threat of prompt execution on some of its assets in Mississippi as real and as having adverse consequences for market perceptions of Loewen.

200. On January 27 and 28, 1996, Loewen's lawyers were drafting and redrafting an application to the Hon Justice Scalia, as Circuit Justice for the Fifth Circuit, for a stay of execution pending the filing of a petition for writ of *certiorari*. The petition invited the court to take up a question unresolved in *Pennzoil v Texaco, Inc.* 481 U.S.1 (1987) whether it comports with due process of law to condition a stay on execution on the posting of a bond that serves no purpose where the defendant cannot obtain such a bond, and where the defendant's inability to post the bond could result in severe, irreparable harm before the defendant has the chance to obtain appellate review.

201. During the night of January 27/28, 1996, an informal agreement was reached and recorded, in a handwritten document, which was not signed formally until February 1, 1996. On January 29, 1996, Loewen announced the settlement in a press release:

> "We are confident of a successful appeal, but it would have meant several years of financial uncertainty at significant cost to the Company … After analysing the financial and other alternatives we determined that, at this time, a settlement is in the best interests of the Company and its shareholders."

202. On February 1, 1996, the formal settlement agreement was executed. On the same day the parties executed an Absolute Release with Indemnity Agreement and Covenants.

203. On February 2, 1996, on the joint motion of all parties, the Supreme Court of Mississippi dismissed Loewen's appeal with prejudice, revesting the Circuit Court with jurisdiction to consummate a release, settlement and dismissal of the suit on the terms described in the parties' joint motion to dismiss. The order of January 24, 1996 was vacated and dissolved, *nunc pro tunc*, so that the amount of the required bond reverted to $125 million. The order was conditional on the performance of the monetary part of the agreed settlement.

204. On February 2, 1996, Judge Graves ordered:

(i) that the bond be released and discharged; and

(ii) that (subject to performance of the settlement agreement) the judgment of 6 November 1996 was satisfied and cancelled.

XXVI. DOES THE SETTLEMENT AGREEMENT OPERATE TO RELEASE ALL CLAIMS AGAINST RESPONDENT?

205. It is convenient to deal here with an argument based on a release of claims provided for by the settlement agreement. Respondent submitted that, on its true construction, the settlement agreement operated to release all claims by Loewen, including the NAFTA claims in issue in this arbitration, against Respondent, notwithstanding that Respondent is not a party to the agreement. The argument is based on the release executed by Loewen which forms part and is exhibited as "Exhibit C" to the settlement agreement. The release is a release by Loewen of all claims whatsoever that Loewen may have against the O'Keefe interests and persons affiliated with the O'Keefe interests. The release incorporates the accord and satisfaction of "all claims and causes of action as against the Releases and all other persons, firms, and/or corporations having any liability in the premises". The instrument further provides that the release extends and applies to future claims. The release is expressed to be governed by the law of Mississippi.

206. Respondent relies on the "intent" rule of construction in force in Mississippi. Respondent's argument is that, according to this rule in determining whether a person falls within the class of persons intended to take the benefit of a release, a relevant factor to be taken into account is that the person is not a stranger to the agreement and has given consideration. Respondent submits that the State of Mississippi was not a stranger and gave consideration in that it dismissed the appeal and made judicial orders as requested by the parties. The answer to Respondent's submission is that when the settlement agreement and the release are read in their entirety and in context, we do not regard them as releasing Loewen's NAFTA claims. They lie outside the ambit of the claims dealt with.

XXVII. DID LOEWEN PURSUE AVAILABLE LOCAL REMEDIES?

207. In the light of the conclusions reached in para 156, the next question is whether the appeal to the Mississippi Supreme Court was an available remedy which Loewen should have pursued before it could establish that the verdict and judgment at trial constituted a measure "adopted or maintained" by Respondent amounting to a violation of Art. 1105. Respondent argues that confronted with the adverse bonding decision by the Mississippi Supreme Court, Loewen should have (i) pursued its appeal despite the risk of execution on its assets; or (ii) sought protection under Chapter Eleven of the Bankruptcy Code which would have resulted in a stay of execution against Loewen's assets; or (iii) filed a petition for *certiorari* and sought a stay of execution in the Supreme Court of the United States.

208. The first alternative suggested by Respondent raises the question whether the appeal is "a reasonably available remedy", having regard to the risk of execution against Loewen's assets if the bond was not posted. Here, the bonding requirement is attached, not to the right of appeal, but to the stay of execution. Granted the distinction, the practical impact of the requirement had severe consequences for Loewen's right of appeal. Without posting the bond, Loewen's right of appeal could be exercised only at the risk of sustaining immediate execution on Loewen's assets in Mississippi, to be followed by execution against Loewen's assets in other States, with the inevitable consequence that Loewen's share price would collapse. In this respect, we reject Respondent's contention that the risk of execution was remote and

theoretical. It is possible that O'Keefe may have exercised some restraint in relation to execution lest it might ultimately lose the appeal and suffer financial consequences by reason of executions which could not be justified. But this possibility does not persuade us that the risk of immediate execution was other than real. In these circumstances, if exercising the right of appeal, at the risk of immediate execution on Loewen's Mississippi assets, was the only alternative available to Loewen, it would not have been, "a reasonably available remedy" to Loewen.

209. Filing under Chapter Eleven of the Bankruptcy Code would have resulted in a stay of execution. In this respect, Chapter Eleven would have enabled Loewen's appeal to proceed without generating all the consequences that would have flowed from execution. Chapter Eleven results in re-organization not in liquidation, so that a company can continue to conduct its business under Court supervision. Although Court supervision would not necessarily bring to an end Loewen's acquisitions program, Court supervision could be expected to restrict and moderate the program. Quite apart from that consequence, a Chapter Eleven filing may have had an effect on the public market perception of Loewen with a detrimental impact on its share price. The question then is whether, in these circumstances, the need to pursue local remedies extends to requiring a claimant to file under Chapter Eleven in order to ensure that a right of appeal remains effective and reasonably available. No doubt there are some situations in which it would be reasonable to expect an impecunious claimant to file under Chapter Eleven in order to exercise an available right of appeal. Whether it was reasonable to expect Loewen to file under Chapter Eleven depends at least in part on the reasons why Loewen elected to enter into the settlement agreement in preference to exercising other options, a matter examined in paras. 214-216 (inclusive).

210. The third alternative is the petition for *certiorari* coupled with the application for a stay. There is a conflict of opinion about the prospects of success of such an application between Professor Drew S. Days III (former United States Solicitor-General) and Professor Tribe. Professor Days is of the opinion that Loewen would have had "a reasonable opportunity" of obtaining review by the Supreme Court of the United States of the application of the Mississippi bonding requirement on the ground that it prevented, inconsistently with due process, appellate review of the Mississippi

trial court judgment. Professor Tribe is of a contrary opinion. He bases his opinion on a number of grounds. First, the case was fact-intensive and the Court is very unlikely to review a fact-intensive case. Secondly, there was a dispute between the parties as to whether the bonding requirement precluded judicial review of the judgment. The Mississippi Supreme Court did not make such a finding and did not adopt Loewen's version of the facts. Thirdly, the presence of a substantial punitive damages award was irrelevant to the issues which the Supreme Court would have been called upon to decide.

211. This Tribunal is not in a position to decide whether the opinion of Professor Days or that of Professor Tribe is to be preferred. Nor is the Tribunal in a position to decide which of their conflicting opinions is to be preferred on a related question, namely whether collateral review was available in the Federal District Court. But the Tribunal notes that Professor Days does not assert that either the Supreme Court or the Federal Court would grant the relief suggested. It is fair to say that, on his view, there was a prospect, at most a reasonable prospect or possibility, of such relief being granted.

212. The decision not to relax the bonding requirement, an act for which Respondent is responsible in international law, generated the risk of immediate execution with its attendant detrimental consequences for Loewen. In this situation, was either the *certiorari* petition or the collateral review option a reasonably available and adequate remedy? The pursuit of either remedy, more particularly the Supreme Court remedy, if it resulted in a failure to obtain a stay, would worsen Loewen's position and reinforce adverse market perceptions about Loewen. So, the absence of any certainty about the outcome of either option is a significant consideration in deciding whether either option involved an adequate remedy which was reasonably available to Loewen.

213. Entry into the settlement agreement no doubt reflected a business judgment by Loewen that, of the various options then open, settlement was the most attractive, in all probability because it provided certainty. Other alternatives involved financial consequences which would not have been easy to predict.

214. Respondent argues that, because entry into the settlement agreement was a matter of business judgment, Loewen voluntarily decided not to pursue its local remedies. That submission does not dispose of the point. The question is whether the remedies in question were reasonably available and adequate. If they were not, it is not to the point that Loewen entered into the settlement, even as a matter of business judgment. It may be that the business judgment was inevitable or the natural outcome of adverse consequences generated by the impugned court decision.

215. Here we encounter the central difficulty in Loewen's case. Loewen failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option which it had under active consideration and preparation until the settlement agreement was reached. It is a matter on which the onus of proof rested with Loewen. It is, however, not just a matter of onus of proof. If, in all the circumstances, entry into the settlement agreement was the only course which Loewen could reasonably be expected to take, that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy.

216. Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, we are simply left to speculate on the reasons which led to the decision to adopt that course rather than to pursue other options. It is not a case in which it can be said that it was the only course which Loewen could reasonably be expected to take.

217. Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible.

XXVIII. A PRIVATE AGREEMENT IS NOT A GOVERNMENT MEASURE WITHIN THE SCOPE OF NAFTA CHAPTER ELEVEN

218. Respondent argues that a private agreement to settle litigation out of court is not a "government measure" within the scope of NAFTA Chapter Eleven (ground 3 of

Respondent's objection to competence and jurisdiction). The argument may well be correct as a general proposition. But the Claimants' case rests on the judgment and judicial orders made by the Mississippi trial court and the Mississippi Supreme Court. Claimants' case is that these judicial acts are the relevant government measures within NAFTA Chapter Eleven, not that the settlement is such a measure. This ground of objection is overruled.

XXIX. THE JURISDICTIONAL OBJECTION TO MR RAYMOND LOEWEN'S CLAIMS

219. This objection is dealt with together with the Respondent's additional objection to competence and jurisdiction.

XXX. RESPONDENT'S ADDITIONAL OBJECTION TO COMPETENCE AND JURISDICTION

220. Subsequent to the October 2001 hearings on the merits, events occurred which raised questions about TLGI's capacity to pursue its NAFTA claims and gave rise to Respondent filing a further objection to competence and jurisdiction on January 25, 2002. TLGI had filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, and a reorganization plan was approved by the bankruptcy courts of the United States and Canada. Under that plan, TLGI ceased to exist as a business entity. All of its business operations were reorganized as a United States corporation. In apparent recognition of the obvious problem that would be caused by a United States entity pursuing a claim against the United States under NAFTA, TLGI, immediately prior to its going out of business, assigned all of its right, title and interest to the NAFTA claim to a newly created corporation (discreetly called Nafcanco - a play on the words NAFTA and Canada). It would appear that the NAFTA claim is the only asset of Nafcanco, and the pursuit of the claim its only business.

221. Following the filing of Respondent's objection, appropriate pleadings were filed by both sides and on June 6, 2002, the Tribunal held a hearing on the objection. Canada and Mexico again submitted their views on the issues that were raised at the hearing.

222. NAFTA is a treaty intending to promote trade and investment between Canada, Mexico and the United States. Since most international investment occurs in the private sector, investment treaties frequently seek to provide some kind of protection for persons engaging in such investment. Until fairly recently, such protection was implemented and pursued by the States themselves. When Mexico expropriated the investment of some American oil companies many years ago, the claims of the American companies were pursued by American diplomatic authorities. When the United States seized the assets of Iranian nationals during the hostage crisis of the 1970s, Iran and the United States worked out a settlement as sovereign nations.

223. Chapter Eleven of NAFTA represents a progressive development in international law whereby the individual investor may make a claim on its own behalf and submit the claim to international arbitration, as TLGI has done in the instant case. The format of NAFTA is clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties. It was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors. Claims of that nature can only be pursued under domestic law and it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents. Such a collateral effect on the domestic laws of the NAFTA Parties was clearly not within their contemplation when the treaty was negotiated.

224. If NAFTA could be used to assert the rights of an American investor in the instant case, it would in effect create a collateral appeal from the decision of the Mississippi courts, by definition a unit of the United States government. As was pointed out earlier, the object of NAFTA is to protect outsiders who do not have access to the political or other avenues by which to seek relief from nefarious practices of governmental units.

225. Claimant TLGI urges that since it had the requisite nationality at the time the claim arose, and, antedate the time that the claim was submitted, it is of no consequence that the present real party in interest - the beneficiary of the claim - is an American citizen. Both as a matter of historical and current international precedent, this argument must fail. In international law parlance, there must be continuous national identity from the

date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.

226. Claimants' first argument strand is that NAFTA itself, in Articles 1116 and 1117, require nationality only to the date of submission. However, those articles deal only with nationality requirements at the *dies a quo*, the beginning date of the claim. There is no language in those articles, or anywhere else in the treaty, which deals with the question of whether nationality must continue to the time of resolution of the claim. It is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity.

227. Nor does the recent arbitral decision in the *Mondev case* help Claimants in any way. In that case, the Tribunal dealt with the issue of whether the investment itself had to remain of the claimant's identity. Significantly, the reasoning of the Tribunal implicated other sections of NAFTA, namely Articles 1105 and 1110. The investment in *Mondev*, some Boston real estate, had been foreclosed on by an American mortgage holder. Even though it denied Mondev's claim on the merits, the Tribunal appropriately found that the loss of the investment through foreclosure of the mortgage could not be the basis for denying Mondev's right to pursue its remedies under NAFTA. It pointed out that such a set of events could occur quite often to indenters and that the whole purpose of NAFTA's protection would be frustrated if such disputes could not be pursued. It said:

> "Secondly the Tribunal would again observe that Article 1105, and even more so Article 1110, will frequently have to be applied after the investment in question has failed. In most cases, the dispute submitted to arbitration will concern precisely the question of responsibility for that failure. To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its "sale or other disposition" (Article 1101(2)). On that basis, the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment as defined in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of. Otherwise issues of the effective protection of investment at the international level will be overshadowed by technical questions of

> the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment."

228. In sum, neither the language of the Treaty, nor any of the cases decided under it answers the question as to whether continuous nationality is required until the resolution of the claim. Respondent correctly contends that Article 1131 requires the Tribunal to decide the issues in dispute in accordance with "applicable rules of international law".

229. There is only limited dispute as to the history of the requirement of continuous nationality to the end of any international proceeding. When investment claims were negotiated and resolved only at a governmental level, any change in nationality of the claimant defeated the only reason for the negotiations to continue. The claiming government no longer had a citizen to protect. This history has changed as the nature of the claim process has changed. As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality. But those provisions have been specifically spelled out in the various treaties that TLGI cites as proof that international law has changed. Thus, in the claims settlement agreement between Iran and the United States arising out of the hostage crisis, the requirement of continuous nationality was specifically altered in the agreement. Many of the bilateral investment treaties, the so-called "BITs", contain specific modifications of the requirement. But such specific provisions in other treaties and agreements only hinder TLGI's contentions, since NAFTA has no such specific provision.

230. As with most hoary international rules of law, the requirement of continuous nationality was grounded in comity. It was not normally the business of one nation to be interfering into the manner in which another nation handled its internal commerce. Such interference would be justified only to protect the interests of one of its own nationals. If that tie were ended, so was the justification. As international law relaxed to allow aggrieved parties to pursue remedies directly, rather than through diplomatic channels, the need for a rigid rule of *dies ad quem* also was relaxed. But as was previously noted, such relaxations came about specifically in the language of the treaties. There is no such language in the NAFTA document and there are

substantial reasons why the Tribunal should not stretch the existing language to affect such a change.

231. We address at this stage an aspect of the problem which might well puzzle a private lawyer. Such a lawyer would of course be familiar with the inhibitions which can stand in the way of the enforcement of liabilities when changes in corporate status, or in the proprietorship of the claims, intervene after the proceedings to enforce the claim have commenced. Insolvency or judicial administration or a moratorium may affect one of the parties so that under the relevant domestic law the liability ceases to be enforceable for a while, or is compulsorily transferred to a third party, or entirely changes its juristic character, or may become a right to share in the proceedings of a winding up. Equally, the lawyer would recognise the potential for difficulties in enforcing a liability after a voluntary transfer to a third party, when the right to pursue the complaint may be enforceable only by the transferee, or only in the name of the transferor for the benefit of the transferee; and he could well foresee that particular difficulties could arise when, under an arbitration agreement between A and B, the former begins an arbitration, and afterwards transfers the right to C, a stranger to the arbitration agreement. These are no more than examples. These procedural difficulties are of a kind which many domestic systems of law have confronted.

232. The same lawyer might well, however, have much more difficulty in visualising the outcome in the quite different situation where, through subsequent events of the kind indicated above, a vested claim, already the subject of valid proceedings, simply ceases to exist, together with the breach of obligation or delict which have brought it into being. True, it is possible to imagine that a change of identity with a consequent change of nationality by the enforcing party might deprive a tribunal of territorial jurisdiction under its domestic rules of procedure. This is not the present case. If the submissions of the United States are right, the fatal objection to success by the Claimants is that a NAFTA claim cannot exist or cannot any longer exist, once the diversity of nationality has come to an end, so that the Tribunal cannot continue with the resolution of the original dispute, there being no dispute left to resolve. The private lawyer might well exclaim that the uncovenanted benefit to the defendant would produce a result so unjust that it could be sustained only by irrefutable logic or compelling precedent, and neither exists. The spontaneous disappearance of a vested

cause of action must be the rarest of incidents, and no warrant has been shown for it in the present context.

233. Such a reaction, though understandable, in our opinion, would be, wholly misplaced. Rights of action under private law arise from personal obligations (albeit they may be owed by or to a State) brought into existence by domestic law and enforceable through domestic tribunals and courts. NAFTA claims have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation. These means are both distinct from and exclusive of the remedies for wrongful acts under private law: see Articles 1121, 1131, 2021 and 2022. It is true that some aspects of the resolution of disputes arising in relation to private international commerce are imported into the NAFTA system via Article 1120.1(c), and that the handling of disputes within that system by professionals experienced in the handling of major international arbitrations has tended in practice to make a NAFTA arbitration look like the more familiar kind of process. But this apparent resemblance is misleading. The two forms of process, and the rights which they enforce, have nothing in common. There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states. If the effects of a change of ownership are to be ascertained we must do so, not by inapt analogies with private law rules, but from the words of Chapter Eleven, read in the context of the Treaty as a whole, and of the purpose which it sets out to achieve.

234. TLGI urges some equitable consideration be given because it was the underlying Mississippi litigation which brought about the need for it to file bankruptcy in the first place. We have already rehearsed our view of the inequities that befell TLGI in that litigation, and a chancery court would certainly take such claims into account in assessing damages. But this is an international tribunal whose jurisdiction stems from and is limited to the words of the NAFTA treaty. Whatever the reasons for TLGI's decision to follow the bankruptcy route it chose, the consequences broke the chain of nationality that the Treaty requires.

235. Claimants also seek to rely on provisions of the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID). It claims that under ICSID, there are different nationality rules that should be applied in this case. First, it must be noted that neither Canada nor Mexico are signatories of ICSID and it would be most strange to apply provisions of that Convention to a NAFTA dispute. The only relevance of ICSID to this proceeding is that the Parties have elected to function under its structure. That election cannot be used to change or supplement the substance of the Treaty that the three nations have entered into. Whatever specificity ICSID has on the requirement of continuous nationality through the resolution of the dispute only points up the absence of such provisions in NAFTA. Claimants have not shown that international law has evolved to the position where continuous nationality to the time of resolution is no longer required.

236. TLGI further contends that the International Law Commission issued a report which proposed eliminating the continuous nationality rule even in cases of diplomatic protection, a field that would seem more nationality oriented than the protection of investors. The report itself met with criticism in many quarters and from many points of view. In any event, the ILC is far from approving any recodification based on the report.

237. Article 1109 fully authorizes transfers of property by an investor. TLGI contends that such provision for free assignment somehow strengthens its position. The assignment from TLGI to Nafcanco is not being challenged, except as to what is being assigned. By the terms of the assignment, the only item being assigned was this NAFTA claim. All of the assets and business of TLGI have been reorganized under the mantle of an American corporation. All of the benefits of any award would clearly inure to the American corporation. Such a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding. Claimants also urge that TLGI remains in existence, since its charter remains in existence. The Tribunal is being asked to look at form rather than substance to resolve a complicated claim under an international treaty. Even if TLGI has some kind of ethereal existence, it sought to place any remaining NAFTA marbles in the Nafcanco ring. Claimants insist that Respondent is asking the Tribunal to “pierce” the corporate veil

of Nafcanco and point out the legal complications involved in such a piercing. The Tribunal sees no need to enter into that thicket. The question is whether there is any remaining Canadian entity capable of pursuing the NAFTA claim.

238. Claimants state that there were good and sufficient business reasons for reorganizing under an American corporate character including pressure from TLGI's creditors. The Tribunal has no reasons to doubt the legitimacy of those reasons but the choices made clearly had consequences under the Treaty. There might have been equally compelling reasons for the Loewen interests to choose a United States mantle when it first commenced doing business. NAFTA does not recognize such business choices as a substitute for its jurisdictional requirements under its provisions and under international law.

239. Raymond Loewen argues that his claims under NAFTA survive the reorganization. Respondent originally objected to Raymond Loewen's claims on the ground that he no longer had control over his stock at the commencement of the proceeding. The Tribunal allowed Raymond Loewen to continue in the proceeding to determine whether he in fact continued any stock holding in the company. No evidence was adduced to establish his interest and he certainly was not a party in interest at the time of the reorganization of TLGI.

240. In regard to the question of costs the Tribunal is of the view that the dispute raised difficult and novel questions of far-reaching importance for each party, and the Tribunal therefore makes no award of costs.

ORDERS

For the foregoing reasons the Tribunal unanimously decides -

(1) That it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.

(2) That it lacks jurisdiction to determine Raymond L. Loewen's claims under NAFTA concerning decisions of the United States courts on the ground that

it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.

(3) TLGI's claims and Raymond L. Loewen's are hereby dismissed in their entirety.

(4) That each party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat.

XXXI. CONCLUSION

241. We think it right to add one final word. A reader following our account of the injustices which were suffered by Loewen and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. After all, we have held that judicial wrongs may in principle be brought home to the State Party under Chapter Eleven, and have criticised the Mississippi proceedings in the strongest terms. There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

242. This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside

into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.

Done at Washington, D.C.

(signed)
…….
Sir Anthony Mason
President of the Tribunal
Date: 19.06.03

(signed)
……
Judge Abner J. Mikva
Arbitrator
Date: June 25, 2003

(signed)
……
Lord Mustill
Arbitrator
Date: 17.06.03

ANNEX 176

Case No. ARB(AF)/99/2

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)

BETWEEN:

MONDEV INTERNATIONAL LTD.
Claimant

and

UNITED STATES OF AMERICA
Respondent

AWARD

Before the Arbitral Tribunal
constituted under Chapter Eleven
of the North American Free Trade
Agreement, and comprised of:

Sir Ninian Stephen (President)
Professor James Crawford
Judge Stephen M. Schwebel

Date of dispatch to the parties: October 11, 2002

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	AWARD		

3. Conclusion

92. For these reasons, the Tribunal decides that it has jurisdiction over the claim under Articles 1116 and 1122 to the extent (but only to the extent) that it concerns allegations of breach of Article 1105(1) by the decisions of the United States courts. To that extent (but only to that extent) the claim is admissible.

D. The merits of Mondev's Article 1105 Claim

93. The Tribunal turns to the merits of this claim. In doing so, it will consider first a number of issues relevant to the interpretation of Article 1105, before turning to the application of Article 1105 to the facts of the case.

1. The interpretation of Article 1105

94. There was extensive debate before the Tribunal as to the meaning and effect of Article 1105. The debate included such issues as the binding effect and scope of the FTC's interpretation of Article 1105, given on 31 July 2001, the origin and meaning of the terms "fair and equitable treatment" and "full protection and security" occurring in Article 1105(1), and the extent of the various customary international law duties traditionally conceived as falling within the rubric of the "minimum standard of treatment" under international law.

95. Article 1105 is entitled "Minimum Standard of Treatment". It provides as follows:

> "(1) Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
>
> (2) Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
>
> (3) Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b)."

In the present case only Article 1105(1) is relevant. Article 1105(2) does make it clear, however, by the phrase "[w]ithout prejudice to paragraph 1", that Article 1105(1) is not limited to issues concerning the treatment of investments before the courts of the host State. This would be clear in any event, since the "minimum standard of treatment" under

international law as applied by arbitral tribunals and in State practice applies to a wide range of factual situations, whether in peace or in civil strife, and to conduct by a wide range of State organs or agencies.

96. This is significant in two ways. First, under the system of Chapter 11, it will be a matter for the investor to decide whether to commence arbitration immediately, with the concomitant requirement under Article 1121 of a waiver of any further recourse to any local remedies in the host State, or whether initially to claim damages with respect to the measure before the local courts. The standard laid down in Article 1105(1) has to be applied in both situations, i.e., whether or not local remedies have been invoked. Thus under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule "are interlocking and inseparable".[26] Secondly, in the present case, Mondev through LPA did choose to invoke its remedies before the United States courts. Indeed at the time it did so it had no NAFTA remedy, since NAFTA was not in force. The Tribunal is thus concerned only with that aspect of the Article 1105(1) which concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals.

97. In particular, since the Tribunal lacks jurisdiction to pass upon acts of the City or the BRA that took place before NAFTA came into force, it only needs to consider how Article 1105(1) applies to a case where the measure challenged is that of a local court, here the SJC. This is to be distinguished from a case where the action challenged is that of another branch of government and a court has passed upon that action under its internal law (the situation that would have obtained here if NAFTA had – as it does not have – retrospective effect).

98. In this respect the Respondent initially appeared to argue that Article 1105(1) does not protect intangible property interests such as those arising following LPA's exercise of the Hayward Parcel option.[27] In oral argument, however, the Respondent made clear that "the set of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments".[28] In the Tribunal's view, there can be no

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[26] Cf. C. Eagleton, *The Responsibility of States in International Law* (New York University Press, New York, 1928), p. 113.
[27] United States Counter-Memorial, p. 37.
[28] Transcript, p. 683.

doubt on the point. Many of the decisions cited by the parties as relevant to the scope of the standard involved intangible property, including contract claims.[29] Moreover it is clear that the protection afforded by the prohibition against expropriation or equivalent treatment in Article 1110 can extend to intangible property interests, as it can under customary international law. In the Tribunal's view, there is no reason for reading Article 1105(1) any more narrowly.

99. As to the meaning of Article 1105(1), the principal issues debated between the parties concerned the effect of the FTC's interpretations, and in particular, the content of the notion of denial of justice, which is central to Mondev's remaining NAFTA claims.

(a) The FTC's interpretations of 31 July 2001

100. Article 1131 of NAFTA provides that:

> "1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
>
> 2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

The Commission referred to in Article 1131 is the Free Trade Commission, established pursuant to Article 2001 of NAFTA. It comprises cabinet-level representatives of NAFTA Parties or their designees. One of its functions is to "resolve disputes that may arise regarding [the] interpretation or application" of NAFTA (Article 2001(2)(c)).

101. In pursuance of these provisions, on 31 July 2001 the FTC adopted, among others, "the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions":

> "B. Minimum Standard of Treatment in Accordance with International Law
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

[29] See, e.g., *Shufeldt claim (United States/Guatemala)* (1930) 2 RIAA 1081 at 1097; *Norwegian Shipowners' Claims* (1922) 1 RIAA 309 at p. 332; *Philips Petroleum Co Iran v. Islamic Republic of Iran* (1989) 21 Iran-US CTR 79 at 106 (para. 76);

> 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

Copies of the interpretations were forwarded to the Tribunal by the United States on the day of their issue. Subsequently they were the subject of extended argument both by the Claimant and the Respondent.

102. The Claimant professed to be "somewhat bewildered" by the interpretations. It maintained that the Respondent saw fit "to change the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part" and questioned whether it could do so in good faith. It contended that the FTC's decision was "more a matter of amendment" to the text of NAFTA than an interpretation of it, observing that the interpretations conflicted with "judicially found meaning of the text" in three NAFTA arbitration awards. In the view of the Claimant, the 31 July 2001 interpretations added to the text of Article 1105 by adding the word, "customary", while treating the terms "fair and equitable treatment" and "full protection and security" as surplusage. The Claimant found "astounding" what it saw as the FTC's view that a violation of a treaty may constitute treatment in accordance with international law. It submitted that the provisions of Article 1105 for "fair and equitable treatment and full protection and security" could not be read out of the Treaty by the FTC, and that those provisions governed the treatment that the Parties are obliged to extend to investors of another Party. Moreover, if those provisions were to be treated as affording investors no more than the minimum standard provided by customary international law, that law had to be given its current content, as it has been shaped by the conclusion of hundreds of bilateral investment treaties, including NAFTA, and by modern international judgments and arbitral awards.

103. The Respondent maintained that the meaning of Article 1105 had been "conclusively established" by the FTC's interpretations of 31 July 2001. These constituted "the definitive statement of what the Parties intended from the source designated by the Treaty as the ultimate and most authoritative source of its meaning, the Parties themselves." The

obligation of Article 1105(1) "was intentionally limited to that pre-existing body of customary international legal obligations." Fair and equitable treatment and full protection and security were accordingly subsumed within the minimum standard. The NAFTA Parties had adopted the interpretations in view of what they saw as "the misinterpretations" of Article 1105 by earlier NAFTA tribunals. They did not do so in order to frustrate Mondev's arguments, and there was no basis for an allegation that the Respondent had not acted in good faith or had abused its powers as a member of the FTC in order to improve its position in pending litigation. In any event, Article 1131 is "one of the rules of the game, a rule designed just so that the Parties could assure that what they meant by NAFTA's terms could be made known whenever there were misinterpretations." Nor was there ground for the Claimant's contention that the 31 July 2001 interpretations constituted an amendment to NAFTA. In particular, Paragraph B(3) simply emphasized the original intention of NAFTA Parties not to subject themselves to arbitration of obligations under other international agreements.

104. As noted already, following the Claimant's post-hearing submission of the award of the *Pope & Talbot* Tribunal on damages,[30] both parties as well as Canada and Mexico submitted post-hearing briefs.

105. In its damages award of 31 May 2002, the *Pope & Talbot* Tribunal raised the question whether it was bound by the FTC's interpretation, in particular in relation to an award already made. It noted that NAFTA treats issues of interpretation (Article 2001(2)) and amendment (Article 2202) differently, and concluded that it was for the Tribunal to determine "whether the FTC's action can properly be qualified as an 'interpretation'".[31] After referring to newly available *travaux préparatoires* of Article 1105, it expressed the view that the FTC's decision probably amounted to an amendment rather than an interpretation.[32] But even if the FTC's interpretation bound the Tribunal and had retrospective effect, this did not necessitate a revision of the Tribunal's decision on the merits. Article 1105 incorporated an evolutionary standard, which allowed subsequent practice, including treaty practice, to be taken into account.[33] In any event, even applying Canada's own version of the Article 1105 standard,

30 *Pope & Talbot Inc. v. Canada*, Award in respect of Damages, www.naftalaw.org, 31 May 2002.
31 Ibid., para. 24.
32 Ibid., para. 47.
33 Ibid., para. 59.

the conduct complained of would have constituted a breach entitling the claimant to damages.[34]

106. In a post-hearing submission of 8 July 2002 in these proceedings, the United States criticised the *Pope & Talbot* Tribunal for suggesting that it was not bound by the FTC interpretation, and it argued that the award merited little consideration. According to the Respondent, "nothing in the text of NAFTA supports the view that FTC interpretations would be subject to… review by an *ad hoc* tribunal constituted under Chapter Eleven". In any event the FTC's interpretation was supported by well-settled principles of treaty interpretation. Even if it was permissible to refer to the content of other BITs in interpreting Article 1105(1) (which it denied), the United States had consistently taken the position, for example in advising the Senate on ratification of BITs, that the "fair and equitable treatment" standard "was intended to require a minimum standard of treatment based on customary international law".[35] On the other hand the *Pope & Talbot* Tribunal had erred in its automatic equation of customary international law with the content of BITs, without regard to any question of *opinio juris*. In particular, the decision of the Chamber in the *ELSI* case,[36] on which the *Pope & Talbot* Tribunal relied, concerned a particular FCN treaty. That decision, in the United States' view, "cannot reflect an evolution in customary international law… *ELSI* did not even purport to address customary international law standards requiring treatment of an alien amounting to an 'outrage' for a finding of a violation. In any event, *ELSI* clearly does not establish that any relevant standard under customary international [law] requires mere 'surprise'."[37]

107. In its letter to the Tribunal of 15 July 2002, the Claimant noted that it had not argued that the FTC's "Interpretation" should be disregarded; nor did its claims depend on a view of Article 1105(1) which was contradicted by the FTC. It observed that the formulation of "arbitrariness" given by the Chamber in the *ELSI* case had been applied in the context of

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[34] Ibid., para. 65.

[35] Post-Hearing Submis sion of Respondent United States of America on *Pope & Talbot*, 8 July 2002, p. 11. In support the Respondent attached, by way of example, Letters of Submittal in respect of 11 BITs.

[36] ICJ Reports 1989 p. 15 at p. 76, cited by the *Pope & Talbot* Tribunal at para. 63.

[37] Post-Hearing Submission of Respondent United States of America on *Pope & Talbot*, 8 July 2002, , pp. 16-17.

denial of justice by an ICSID Tribunal in *Amco Asia*.[38] In the Claimant's view it was incorrect to seek to limit the *ELSI* dictum to the particular FCN treaty applicable in that case.

108. In its Article 1128 submission of 23 July 2002, Mexico stressed that most of the problems it saw (in common with the United States) with the *Pope & Talbot* Tribunal award concerned *obiter dicta*, i.e., statements which were not necessary to the decision in that case. In Mexico's words "[t]he *Pope & Talbot* Tribunal created the interpretative problem that it complained of", in particular in adopting an "additive" approach to Article 1105(1). Mexico noted that the customary international law standard "is relative and that conduct which may not have violated international law [in] the 1920s might very well be seen to offend internationally accepted principles today". Mexico agreed with the United States that the *ELSI* Tribunal had considered the notion of "arbitrariness" under a specific provision of a BIT, but also noted that the Chamber's discussion "is nevertheless instructive as to the standard of review that the international tribunal must employ when examining whether a State has violated the international minimum standard". In its view, the core idea was that "of arbitrary action being substituted for the rule of law".

> "The key point is that the Chamber accorded deference to the respondent's legal system in applying the standard, finding that even though the mayor's act of requisitioning the factory at issue in the case was unlawful at Italian law as an excess of power, mere domestic illegality did not equate to arbitrariness at international law."[39]

109. In its submission of 19 July 2002, Canada likewise denied the capacity of Chapter 11 Tribunal's to review FTC interpretations, and submitted that, in any event, the FTC interpretation clearly qualified as such under the standards for interpretation in Article 31 of the Vienna Convention on the Law of Treaties. As to the substance of the Article 1105 standard, Canada noted that its "position has always been that customary international law can evolve over time, but that the threshold for finding violation of the minimum standard of treatment is still high".[40]

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[38] *Amco Asia Corp. v. Republic of Indonesia*, Resubmitted Case, Award of 31 May 1990, paras. 136-137, 1 ICSID Rep. 569 at 604.

[39] Article 1128 Submission of the United Mexican States in the Matter of Mondev International Ltd. v. United States of America, 23 July 2002, p. 17.

[40] Submission of Canada on the Pope & Talbot Award, 19 July 2002, para. 33.

110. In their post-hearing submissions, all three NAFTA Parties challenged holdings of the Tribunal in *Pope & Talbot* which find that the content of contemporary international law reflects the concordant provisions of many hundreds of bilateral investment treaties. In particular, attention was drawn to what those three States saw as a failure of the *Pope & Talbot* Tribunal to consider a necessary element of the establishment of a rule of customary international law, namely *opinio juris*. These States appear to question whether the parties to the very large numbers of bilateral investment treaties have acted out of a sense of legal obligation when they include provisions in those treaties such as that for "fair and equitable" treatment of foreign investment.

111. The question is entirely legitimate. It is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties. Yet the United States itself provides an answer to this question, in contending that, when adopting provisions for fair and equitable treatment and full protection and security in NAFTA (as well as in other BITs), the intention was to incorporate principles of customary international law. Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux préparatoires* of the treaty for the purposes of its interpretation,[41] they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris*. For example the Canadian Statement on Implementation of NAFTA states that Article 1105(1) "provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law".[42] The numerous transmittal statements by the United States of BITs containing language similar to that of NAFTA show the same general approach. For example, the transmittal statement with respect to the United States-Ecuador BIT of 1993 states that the guarantee of fair and equitable treatment "sets out a minimum standard of treatment based on customary international law".[43] It is to be noted that these official statements repeatedly refer not to "the" but to "a" minimum standard of treatment.

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41 Cf. *Anglo-Iranian Oil Company Case (Preliminary Objections)*, ICJ Reports 1952 p. 93 at p. 107; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection)*, ICJ Reports 1996 p. 803 at p. 814 (para. 29).

42 Canada, Department of External Affairs, North American Free Trade Agreement, Canadian Statement on Implementation, *Canada Gazette*, 1 January 1994, p. 68 at p. 149.

43 103d Congress, 1st Session, Treaty Doc. 103-15 (Washington, 1993) p. ix.

112. More recent transmittal statements are even more explicit. For example the transmittal statement for the United States-Albania BIT of 1995 states in relevant part:

> "Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law. The obligations to accord 'fair and equitable treatment' and 'full protection and security' are explicitly cited, as is the Parties' obligation not to impair through unreasonable and discriminatory means, the management, conduct, operation, and sale or other disposition of covered investments. The general reference to international law also implicitly incorporates other fundamental rules of international law: for example, that sovereignty may not be grounds for unilateral revocation or amendment of a Party's obligations to investors and investments (especially contracts), and that an investor is entitled to have any expropriation done in accordance with previous undertakings of a Party."[44]

As Mexico noted in its post-hearing submission to the Tribunal, it did not have a practice prior to NAFTA of concluding BITs, but it expressly associated itself with the Canadian Statement on Implementation.[45]

113. Thus the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?

114. It has been suggested, particularly by Canada, that the meaning of those provisions in customary international law is that laid down by the Claims Commissions of the inter-war years, notably that of the Mexican Claims Commission in the *Neer* case. That Commission laid down a requirement that, for there to be a breach of international law, "the treatment of an alien ... should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[46]

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[44] 104th Congress, 1st Session, Treaty Doc. 104-15 (Washington, 1995) pp. viii-ix.

[45] Article 1128 Submission of the United Mexican States in the Matter of Mondev International Ltd. v. United States of America, 23 July 2002, pp. 5, 7.

[46] *U.S.A. (L.F. Neer) v. United Mexican States,* decision of the General Claims Commission, United States-Mexico, 15 October 1926, *Opinions of Commissioners, 1927,* p. 1, reproduced in the *American Journal of International Law 1927,* pp. 555, 556; 3 ILR 213.

115. The Tribunal would observe, however, that the *Neer* case, and other similar cases which were cited, concerned not the treatment of foreign investment as such but the physical security of the alien. Moreover the specific issue in *Neer* was that of Mexico's responsibility for failure to carry out an effective police investigation into the killing of a United States citizen by a number of armed men who were not even alleged to be acting under the control or at the instigation of Mexico. In general, the State is not responsible for the acts of private parties,[47] and only in special circumstances will it become internationally responsible for a failure in the conduct of the subsequent investigation. Thus there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.

116. Secondly, *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.

117. Thirdly, the vast number of bilateral and regional investment treaties (more than 2000[48]) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord

[47] As stressed by the ILC in its commentary to the Articles on Responsibility of States for Internationally Wrongful Acts; see Chapter II, para. (3), Article 11, paras. (2)-(3).

[48] According to UNCTAD's *World Investment Report 2002*, the actual number as at December 2001 was 2099: see www.unctad.org/WIR/pdfs/fullWIR02/pp.1-22.pdf.

foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927.

118. When a tribunal is faced with the claim by a foreign investor that the investment has been unfairly or inequitably treated or not accorded full protection and security, it is bound to pass upon that claim on the facts and by application of any governing treaty provisions. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these. In doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.

119. That having been said, for the purposes of the present case the Tribunal does not need to resolve all the issues raised in argument and in the written submissions concerning the FTC's interpretation. The United States itself accepted that Article 1105(1) is intended to provide a real measure of protection of investments, and that having regard to its general language and to the evolutionary character of international law, it has evolutionary potential.[49] At the same time, Article 1105(1) did not give a NAFTA tribunal an unfettered discretion to decide for itself, on a subjective basis, what was "fair" or "equitable" in the circumstances of each particular case. While possessing a power of appreciation, the United States stressed, the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is "fair" or "equitable", without reference to established sources of law.

120. The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105 (1). In light of the FTC's interpretation, and in any event, it is clear that Article 1105 was intended to put at rest for NAFTA purposes a long-standing and divisive debate about whether any such thing

as a minimum standard of treatment of investment in international law actually exists.[50] Article 1105 resolves this issue in the affirmative for NAFTA Parties. It also makes it clear that the standard of treatment, including fair and equitable treatment and full protection and security, is to be found by reference to international law, i.e., by reference to the normal sources of international law determining the minimum standard of treatment of foreign investors.

121. To this the FTC has added two clarifications which are relevant for present purposes. First, it makes it clear that Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties. There is no difficulty in accepting this as an interpretation of the phrase "in accordance with international law". Other treaties potentially concerned have their own systems of implementation. Chapter 11 arbitration does not even extend to claims concerning all breaches of NAFTA itself, being limited to breaches of Section A of Chapter 11 and Articles 1503(2) and 1502(3)(a).[51] If there had been an intention to incorporate by reference extraneous treaty standards in Article 1105 and to make Chapter 11 arbitration applicable to them, some clear indication of this would have been expected. Moreover the phrase "Minimum standard of treatment" has historically been understood as a reference to a minimum standard under customary international law, whatever controversies there may have been over the content of that standard.

122. Secondly, the FTC interpretation makes it clear that in Article 1105(1) the terms "fair and equitable treatment" and "full protection and security" are, in the view of the NAFTA Parties, references to *existing* elements of the customary international law standard and are not intended to add novel elements to that standard. The word "including" in paragraph (1) supports that conclusion. To say that these elements are included in the standard of treatment under international law suggests that Article 1105 does not intend to supplement or add to that standard. But it does not follow that the phrase "including fair and equitable treatment and full protection and security" adds nothing to the meaning of Article 1105(1), nor did the

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[49] This potential is likewise accepted by A.V. Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, London, 1938, reprinted by Kraus, New York, 1970), p. 570.

[50] See, e.g., E. Borchard, "The Minimum Standard of Treatment of Aliens", (1940) Michigan Law Review 445; A. Roth, *The Minimum Standard of International Law as Applied to Aliens* (The Hague, Sijthoff, 1949); F.A. Mann, "British Treaties for the Promotion and Protection of Investments", (1981) 52 *BYIL* 241, and works there cited.

FTC seek to read those words out of the article, a process which *would* have involved amendment rather than interpretation. The minimum standard of treatment as applied by tribunals and in State practice in the period prior to 1994 did precisely focus on elements calculated to ensure the treatment described in Article 1105(1).

123. A reasonable evolutionary interpretation of Article 1105(1) is consistent both with the *travaux*, with normal principles of interpretation and with the fact that, as the Respondent accepted in argument, the terms "fair and equitable treatment" and "full protection and security" had their origin in bilateral treaties in the post-war period.[52] In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s.

124. The Respondent noted that there was some common ground between the parties to the present arbitration in respect of the FCT's interpretations, namely, "that the standard adopted in Article 1105 was that as it existed in 1994, the international standard of treatment, as it had developed to that time... like all customary international law, the international minimum standard has evolved and can evolve... the sets of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments."[53] Moreover in their written submissions, summarised in paras. 107-108 above, both Canada and Mexico expressly accepted this point.

125. The Tribunal agrees. For the purposes of this Award, the Tribunal need not pass upon all the issues debated before it as to the FTC's interpretations of 31 July 2001. But in its view, there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term "customary international law" refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the

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[51] See Art. 1116 (1), 1117 (1).

[52] As noted in UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (United Nations, NY, 1998), pp. 53-55.

[53] Transcript, p. 683.

FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for "fair and equitable" treatment of, and for "full protection and security" for, the foreign investor and his investments. Correspondingly the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment and to full protection and security.

(b) The applicable standard of denial of justice

126. Enough has been said to show the importance of the specific context in which an Article 1105(1) claim is made. As noted already, in applying the international minimum standard, it is vital to distinguish the different factual and legal contexts presented for decision. It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal. As a NAFTA tribunal pointed out in *Azinian v. United Mexican States*:

> "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA."[54]

The Tribunal went on to hold:

> "A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way…
>
> There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law. In the present case, not only has no such wrongdoing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious."[55]

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54 *Azinian v. United Mexican States* (1999) 39 ILM 537 at p. 552 (para. 99).

55 Ibid., at pp. 552-3 (paras. 102-103).

127. In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays "a wilful disregard of due process of law, … which shocks, or at least surprises, a sense of judicial propriety".[56] It is true that the question there was whether certain administrative conduct was "arbitrary", contrary to the provisions of an FCN treaty. Nonetheless (and without otherwise commenting on the soundness of the decision itself) the Tribunal regards the Chamber's criterion as useful also in the context of denial of justice, and it has been applied in that context, as the Claimant pointed out. The Tribunal would stress that the word "surprises" does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.[57]

2. The application of Article 1105(1) to the present case

128. Mondev questioned the decisions of the United States courts essentially on four grounds. The Tribunal will take these in turn. Because the United States Supreme Court denied *certiorari* without giving any reasons, it is necessary in each case to focus on the unanimous decision of the SJC, delivered by Judge Fried.[58] In approaching these four issues the Tribunal has had regard to the contrasting expert opinions tendered for the Claimant by Professor Coquillette and for the Respondent by Judge Kass.

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[56] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ Reports 1989 p. 15 at p. 76 (para. 128), citing the judgment of the Court in the *Asylum* case, ICJ Reports 1950 p. 266 at p. 284, which referred to arbitrary action being "substituted for the rule of law".

[57] One may compare the rule stated in the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 8 (b), referring to a decision which "unreasonably departs from the principles of justice recognized by the principal legal systems of the world"; reprinted in L.B. Sohn & R.R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens" (1961) 55 *AJIL* 515 at p. 551.

[58] 427 Mass. 509 (1998).

(a) The dismissal of LPA's contract claim against the City

129. On this point the Supreme Judicial Court began by noting that whether there was a binding contract, and whether the City was in breach, were issues which "had to be considered together to come to a fair and sensible view of the arrangements between the parties and their dealings with each other".[59] This was because the contract contained formulae and procedures to deal with unresolved issues (including the price to be paid for the Hayward Parcel); if those formulae and procedures had not been included, the arrangement would have lacked certainty on essential terms. By the same token, however, "if a party does not follow those procedures, it should not be able to claim that the other side is in breach of what is necessarily still an open-ended arrangement".[60] For reasons given in detail in its opinion the SJC concluded "that there was sufficient evidence to find a binding agreement, as the jury indeed did find, but it is also clear, as a matter of law, that LPA failed to follow the steps required of it under the Tripartite Agreement as supplemented to put the city in breach".[61] In particular the SJC relied on earlier authority, including its own decision of 1954 in *Leigh v. Rule*, for the proposition that a material failure by a plaintiff to put the defendant in breach "bars recovery… unless the plaintiff is excused from tender because the other party has shown that he cannot or will not perform".[62] The only evidence of LPA's tender of performance was Campeau's letter of 19 December 1988, but this, in the Court's view, was far too unspecific to satisfy the test in *Leigh v. Rule*. There was accordingly no basis in law for finding the City in breach of contract.[63] Moreover, the Court held, there was no outright refusal by the City to comply with the contract, and LPA could not "attribute repudiation to the city based on the mere fact that uncertainties remained that LPA shared responsibility for resolving".[64] Nor did LPA's claim based on the City's bad faith assist it: the basis of that claim was the City's refusal to extend the expiry date for the exercise of the option, but the City was under no contractual obligation to consent to an extension.[65]

130. The Court noted that its analysis applied particularly in the case of "a complex and heavily regulated transaction such as this one, where public entities and public and elected

59 Ibid., 516.
60 Ibid.
61 Ibid., pp. 516-517.
62 Ibid., p. 519, citing *Leigh v. Rule*, 331 Mass. 664, 668 (1954).
63 427 Mass. 509, 521 (1998), qualifying the letter as "an empty gesture that could not possibly have been acted on in the time remaining" before the expiry of the option.
64 Ibid., p. 523.
65 Ibid., p. 526.

officials with changing policies and constituencies are involved, and the transaction spans many years", and it went on to note a dictum of Justice Holmes that "[m]en must turn square corners when they deal with the Government."[66] By inference, neither LPA nor Campeau had turned such corners – in the absence of which "LPA was not excused from its obligation to put the city in default".[67]

131. Claimant argued that the SJC's decision involved a "significant and serious departure" from its previous jurisprudence, which was exacerbated when the SJC completely failed to consider whether it should apply the rules it articulated retrospectively to Mondev's claims.[68] In those circumstances the SCJ's dismissal of LPA's claims "was arbitrary and profoundly unjust".[69]

132. The Respondent, on the other hand, argued that the SJC acted reasonably in accordance with its existing jurisprudence, and there was no occasion to consider any question of a new law or of its retrospective application.

133. The Tribunal is unimpressed by the "new law" argument so far as concerns the basic principle set out in *Leigh v. Rule*[70] and embodied in many other systems of contract law. The question whether an agreement in principle to transfer real property is binding, and whether all the conditions for the performance of such an agreement have been met, is one which all legal systems have to face. In the Tribunal's view, it is doubtful whether the SJC made new law in its application of the principle in *Leigh v. Rule*. But even if it had done so its decision would have fallen within the limits of common law adjudication. There is nothing here to shock or surprise even a delicate judicial sensibility.

134. On balance, the position is the same with the so-called "square corners" rule. It is true that Justice Holmes's statement was made in a tax case, not a contract case, and it stands in some tension with the general proposition (accepted as part of Massachusetts law) that

66 Ibid., p. 524, citing *Rock Island, Ark. & La. R.R. v. United States*, 254 US 141, 143 (1920).
67 427 Mass. 509, 524 (1998).
68 See, e.g., Transcript, p. 921, referring to the expert opinions of Professor Coquillette.
69 Transcript, p. 933.
70 331 Mass. 664 (1954).

governments are subject to the same rules of contractual liability as are private parties.[71] To the extent that it might suggest the contrary, the "square corners" rule might raise a delicate judicial eyebrow. Indeed a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance. But in the Tribunal's view, the SJC's remark was at most a subsidiary reason for a decision founded on normal principles of the Massachusetts law of contracts, and the SJC expressly disclaimed any intention to absolve governments from performing their contractual obligations.[72] In its context the remark was merely supplementary and was not itself the basis for the decision.

(b) The SJC's failure to remand the contract claim

135. Alternatively, Mondev argued that, once the SJC had concluded that the issue of tender of performance arose, it should have remanded questions of fact to the jury, in particular the question whether Mondev was willing and able to perform or whether the City had constructively repudiated the contract. The Respondent argued that under Massachusetts law and practice it was for the SJC to decide whether or not to remand a question, and that within extremely broad limits there was no basis on which such a decision could be questioned under Article 1105(1).

136. The Tribunal agrees with the United States on this point. Questions of fact-finding on appeal are quintessentially matters of local procedural practice. Except in extreme cases, the Tribunal does not understand how the application of local procedural rules about such matters as remand, or decisions as to the functions of juries vis-à-vis appellate courts, could violate the standards embodied in Article 1105(1). On the approach adopted by Mondev, NAFTA tribunals would turn into courts of appeal, which is not their role. Conceivably there might be a problem if the appellate decision took into account some entirely new issue of fact essential to the decision and there was a substantial failure to allow the affected party to present its case. But LPA had (and exercised) the right to apply for a rehearing and then to seek *certiorari* to the Supreme Court. In these circumstances there was no trace of a procedural denial of justice.

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[71] See e.g., *Minton Construction Corp. v. Commonwealth*, 397 Mass 879 (1986); *Space Master International, Inc. v. City of Worcester*, 940 F 2d 16 (1991).

(c) The SJC's failure to consider whether it retrospectively applied a new rule

137. The Claimant noted that the SJC had failed to consider whether the allegedly new rule it was applying to government contracts should be applied retrospectively, and thereby violated its own standards for judicial law-making. But as the Tribunal has already noted, the Court's decision on the point of Massachusetts contract law fell well within the interstitial scope of law-making exercised by courts such as those of the United States – if indeed it was new law at all. In any event, once again it is normally a matter for local courts to determine whether and in what circumstances to apply new decisional law retrospectively.[73]

138. The European Court of Human Rights has given some guidance on this question under Article 7 of the European Convention in the context of criminal proceedings, where the effect of a new judicial decision is to impose a criminal liability which did not, or arguably did not, exist when the crime was committed.[74] If there is any analogy at all, it is much fainter in civil cases.[75] Assuming, for the sake of argument, that standards of this kind might be applicable under Article 1105(1), in the Tribunal's view there was no contravention of any such standards in the present case.

(d) BRA's statutory immunity

139. The Tribunal turns to the question of BRA's statutory immunity for intentional torts under the Massachusetts Tort Claims Act (PL 258). Under §10(c) of that Act, a public employer which is not an "independent body politic and corporate" is immune from "any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations". As recalled above, the trial judge

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[72] 427 Mass. 509, 523 (1998).

[73] From the cases cited, it appears that the Massachusetts courts may sometimes announce a change in decisional law with prospective effect only (e.g., *Tucker v. Badoian*, 376 Mass 907 (1978)), but they will only do so where there are "special circumstances": *Payton v. Abbott Labs*, 386 Mass. 540, 565 (1982); *Tamerlane Corp. v. Warwick Ins. Co.*, 412 Mass. 486, 490 (1992); *MacCormack v. Boston Edison Co.*, 423 Mass. 652 (1996).

[74] See *S.W. v. United Kingdom*, ECHR, decision of 22 November 1995, paras. 34-36; *C.R. v. United Kingdom*, ECHR, decision of 22 November 1995, paras. 32-34; *Streletz, Kessler & Krenz v. Germany*, ECHR, decision of 22 March 2001, para. 50.

[75] See e.g., *Carbonara & Ventura v. Italy*, ECHR, decision of 30 May 2000, paras. 64-69; *Agoudimos & Cefallonian Sky Shipping Co. v. Greece*, ECHR, decision of 28 June 2001, paras. 29-30.

declined to enter the jury's verdict against BRA, holding that it was entitled to immunity as a "public employer" under the Massachusetts Tort Claims Act. That decision was affirmed by the SJC,[76] which emphasised "the desirability of making the [Massachusetts Tort Claims Act] regime as comprehensive as possible".[77] That decision was not challenged on *certiorari* to the United States Supreme Court, no doubt on the basis that the matter involved the interpretation of a Massachusetts statute and presented no federal claim or issue.[78]

140. In the present proceedings, Mondev did not challenge the correctness of this decision as a matter of Massachusetts law. Rather, it argued that for a NAFTA Party to confer on one of its public authorities immunity from suit in respect of wrongful conduct affecting an investment was in itself a failure to provide full protection and security to the investment, and contravened Article 1105(1). For its part the United States argued that Article 1105(1) did not preclude limited grants of immunity from suit in respect of tortious conduct. It noted that there is no consensus in international practice on whether statutory authorities should be subject to the same rules of tortious liability as private parties. In the absence of any authority under customary international law requiring statutory authorities to be generally liable for their torts, or any consistent international practice, it could not be said that the immunity of BRA infringed Article 1105(1).

International jurisprudence on immunities of public authorities

141. The parties sought to draw analogies for the present case from the field of foreign State immunity. It is well established that foreign States and their agencies may claim immunities in respect of conduct in the exercise of governmental authority, even if such conduct is or would otherwise be civilly wrongful. Moreover in a series of decisions the European Court of Human Rights has held that the conferral of immunity in ways recognised in international practice does not involve a denial of access to a court, contrary to Article 6(1) of the European Convention of Human Rights.[79] By analogy, the United States argued, the recognition of a limited statutory immunity for certain torts could not be considered a

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[76] 427 Mass. 509, 527-535 (1998).
[77] Ibid., p. 532.
[78] As explained in the expert opinion of Judge Kenneth Starr for the Claimant, 29 January 2001.
[79] See *Al-Adsani v. United Kingdom*, Application No. 35763/97, (2002) 34 EHRR 11; *McElhinney v. Ireland*, Application No. 31253/96, (2002) 34 EHRR 13; *Fogarty v. United Kingdom*, Application No. 37112/97, (2002) 34 EHRR 12.

violation of the international minimum standard or a denial of justice, given the lack of any clear or consistent State practice requiring the denial of immunity.

142. The Tribunal is not persuaded that the doctrine of foreign State immunity presents any useful analogy to the present situation. That immunity is concerned not with the position of State agencies before their own courts, but before the courts of third States, where considerations of interstate relations and the proper allocation of jurisdictional competence are raised.

143. There is a closer analogy with certain decisions concerning statutory immunities of State agencies before their own courts. In a number of cases the European Court of Human Rights has held that special governmental immunities from suit raise questions of consistency with Article 6(1) of the European Convention on Human Rights, because they effectively exclude access to the courts in the determination of civil rights. As the Court said in *Fogarty v. United Kingdom*:

> "it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons…"[80]

On the other hand the Court recognises that it "may not create by way of interpretation of Article 6(1) a substantive civil right which has no legal basis in the State concerned".[81] By parity of reasoning, there are difficulties in reading Article 1105(1) so as in effect to create a new substantive civil right to sue BRA for tortious interference with contractual relations. Moreover the distinction between the existence of a civil liability and a defence to a lawsuit

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[80] *Fogarty v. United Kingdom*, Application No. 37112/97, (2002) 34 EHRR 12, paras. 24-25, citing *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, § 65. See also *Tinnelly & Sons Ltd. v. United Kingdom*, (1999) 27 EHRR 249; *Devlin v. United Kingdom*, judgment of 30 January 2002; *Osman v. United Kingdom*, (2000) 29 EHRR 245; *TP & KM v. United Kingdom* (2002) 34 EHRR 2.

[81] *Al-Adsani v. United Kingdom*, Application No. 35763/97, (2002) 34 EHRR 11 at para. 47; *Fogarty v. United Kingdom*, Application No. 37112/97, (2002) 34 EHRR 12 at para. 25; *McElhinney v. Ireland*, Application No. 31253/96, (2002) 34 EHRR 13 at para. 24.

can be difficult to draw, as the case of *Matthews v. Ministry of Defence*, which was debated before the Tribunal, demonstrates.[82]

144. These decisions concern the "right to a court", an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region, and are not concerned, as Article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA's guarantee of "treatment in accordance with international law, including fair and equitable treatment and full protection and security". But the Tribunal would observe that, as soon as it was decided that BRA was covered by the statutory immunity (a matter for Massachusetts law), then the existence of the immunity was arguably to be classified as a matter of substance rather than procedure in terms of the distinction under Article 6(1) of the European Convention.

Rationale for exempting public authorities from liability for intentional torts

145. More important than analogies from other legal regimes is the question of the rationale for the BRA's immunity. The United States argued that the conferral of a limited immunity on certain State authorities for intentional torts was neither arbitrary nor indiscriminate. It adduced in support evidence of two kinds, first, that related to the legislative history and rationale underlying the exemption for intentional torts, and secondly, comparative law indications that there is nothing approaching an international consensus on the appropriate extent of the immunities of public authorities in tort.

146. As to the first point, the United States noted that governmental immunity in actions in tort had been general for many years. The Federal Tort Claims Act 1946 abrogated that immunity for the United States itself, but subject to various exceptions including interference with contractual rights (28 USC §2680(h)). In Massachusetts the equivalent change in the law did not occur until 1978.[83] As in other common law jurisdictions, governmental immunity could sometimes be avoided, e.g., by suing the responsible officials in person,[84] but

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82 See [2002] EWHC 13 (QB), decision of Keith J, 22 January 2002, overturned on appeal, [2002] EWCA Civ 773, [2002] 3 All ER 513, Court of Appeal, decision of 29 May 2002.

83 Following *Whitney v. City of Worcester*, 373 Mass. 208 (1977).

84 *Larson v. Domestic & Foreign Commerce Corporation*, 337 US 682, 687 (1949); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971).

this did not affect the principle that the government itself could not be sued without its consent. The United States argued that the existence of certain immunities of public authorities with respect to intentional torts is relatively well known,[85] and cannot be regarded as exceptional or eccentric in international terms.

147. For its part, the Claimant argued that any governmental immunity from suit in contract or tort, at least where the only remedy sought was damages, was increasingly seen as anomalous,[86] and that it was inconsistent with the express requirement in Article 1105(1) for "full protection and security" that the government be able to avoid liabilities arising under the general law of the land.

148. The Tribunal notes that the broad exception for intentional torts in United States legislation, and the sometimes artificial ways in which they have been circumvented,[87] have led to criticism and to suggestions that the exception be repealed, leaving the government to rely on the "discretionary functions" exception in the legislation, or to defend the case on the merits.[88] On the other hand, it does not appear that these suggestions have been acted on at federal or state level.

The comparative law experience with tortious immunity of public authorities

149. As to the second point, the United States referred to a comparative review which concluded that "in no legal system today is [the liability of officials for wrongful acts] the same as that of private individuals or corporations".[89] The authors of that study, Professors Bell and Bradley, go on to develop the range of limitations on governmental liability still existing in many States, while noting at the same time a general tendency towards widening the scope of liability. It also noted the rather brief comparative review of jurisprudence on interference with contractual rights, undertaken in the context of the ILC's work on State responsibility, which concluded that there were important differences in approach to tortious interference within Western legal systems, and even more so if non-Western systems are

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85 There is an equivalent immunity from suit for foreign States under the Foreign Sovereign Immunities Act 1976 (USA), Stat. 2891, § 1604.

86 As an early example of this trend it referred to *Larson v. Domestic & Foreign Commerce Corp.*, 337 US 682, 703-4 (1949), although the Court did in fact grant immunity in that contract case on the ground that the United States was indirectly impleaded.

87 E.g., *Andrews v. United States*, 732 F. 2d 366 (1984); *Sheridan v. United States*, 487 US 392 (1988).

88 See, e.g., Davis & Pierce, *Administrative Law Treatise* (3rd edn., 1994), pp. 244-5.

taken into account. In short, there is no international consensus on the proper scope of that tort.[90]

150. The Claimant argued that comparative reviews of the position in non-NAFTA States, and decisions of the European Court of Human Rights, were irrelevant to the question of the extent of NAFTA protection. NAFTA provided its own standard for full protection and security. The conferral on a public employer such as BRA of a blanket immunity from suit for tortious interference infringed that standard, and did so irrespective of whether the conduct immunized was itself a breach of NAFTA. According to the Claimant, Article 1105(1) requires that there be a remedy "when a State breaches its own laws in a manner that is aimed directly at and interferes with a foreign investment".[91] In any event, the conferral of a general immunity for intentional torts would be disproportionate under Article 6(1) as applied by the European Court, and *a fortiori* under the more explicit standard of full protection afforded by NAFTA.

The Tribunal's conclusions

151. In the Tribunal's opinion, circumstances can be envisaged where the conferral of a general immunity from suit for conduct of a public authority affecting a NAFTA investment could amount to a breach of Article 1105(1) of NAFTA. Indeed the United States implicitly accepted as much. It did not argue that public authorities could, for example, be given immunity in contract vis-à-vis NAFTA investors and investments.

152. But the distinction between conduct compliant with or in breach of NAFTA Article 1105(1) cannot be co-extensive with the distinction between tortious conduct and breach of contract. For example, the Massachusetts legislation immunizes public authorities from liability for assault and battery. An investor whose local staff had been assaulted by the police while at work could well claim that its investment was not accorded "treatment in accordance with international law, including… full protection and security" if the government were immune from suit for the assaults. In such a case, the availability of an

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89 J. Bell & A.W. Bradley, *Governmental Liability: A Comparative Study* (United Kingdom Comparative Law Series, vol. 13, 1991) p. 2.

90 J. Crawford, Second Report on State Responsibility, A/CN.4/498/Add. 3, 1 April 1999.

91 Transcript, p. 910.

action in tort against individual (possibly unidentifiable) officers might not be a sufficient basis to avoid the situation being characterised as a breach of Article 1105(1).

153. The function of the present Tribunal is not, however, to consider hypothetical situations, or indeed any other statutory immunity than that for tortious interference with contractual relations. This was the immunity relied on by BRA and upheld by the trial judge and the appeal courts. In that specific context, reasons can well be imagined why a legislature might decide to immunize a regulatory authority, mandated to deal with commercial redevelopment plans, from potential liability for tortious interference. Such an authority will necessarily have both detailed knowledge of the relevant contractual relations and the power to interfere in those relations by granting or not granting permissions. If sued, it will be able to plead that it was acting in good faith and in the exercise of a legitimate mandate – but such a claim may well not justify summary dismissal and will thus be a triable issue, with consequent distraction to the work of the Authority.

154. After considering carefully the evidence and argument adduced and the authorities cited by the parties, the Tribunal is not persuaded that the extension to a statutory authority of a limited immunity from suit for interference with contractual relations amounts in this case to a breach of Article 1105(1). Of course such an immunity could not protect a NAFTA State Party from a claim for conduct which was substantively in breach of NAFTA standards – but for this NAFTA provides its own remedy, since it gives an investor the right to go directly to international arbitration in respect of conduct occurring after NAFTA's entry into force. In a Chapter 11 arbitration, no local statutory immunity would apply.[92] On the other hand, within broad limits, the extent to which a State decides to immunize regulatory authorities from suit for interference with contractual relations is a matter for the competent organs of the State to decide.

155. In the same context Mondev complained that the Massachusetts Act dealing with unfair or deceptive practices in trade and commerce (G.L. Chapter 93A) was held by the trial judge to be inapplicable to BRA notwithstanding that it engaged in the regulation of commercial activity or acted for commercial motives. But if what has been said above as to the partial immunity of BRA from suit is correct, then *a fortiori* there could be no breach of

Article 1105(1) in holding Chapter 93A inapplicable to BRA. NAFTA does not require a State to apply its trade practices legislation to statutory authorities.

156. In reaching these conclusions, the Tribunal has been prepared to assume that the decision to allow BRA's statutory immunity could have involved conduct of the Respondent State in breach of Article 1105(1) after NAFTA's entry into force on 1 January 1994. That assumption may be questioned. The United States' courts, operating in accordance with the rule of law, had no choice but to give effect to a statutory immunity existing at the time the acts in question were performed and not subsequently repealed, once they had concluded that the statute in question did apply.[93] It is not disputed by the Claimant that this decision was in accordance with Massachusetts law, and it did not involve on its face anything arbitrary or discriminatory or unjust, i.e., any new act which might be characterised as in itself a breach of Article 1105(1).[94] In other words, if it was not in December 1993 a breach of NAFTA for BRA to enjoy immunity from suit for tortious interference (and, because NAFTA was not then in force, it could not have been such a breach), it is far from clear how the (*ex hypothesi* correct) decision of the United States courts as to the scope of that immunity, after 1 January 1994, could have been in itself unfair or inequitable. On this ground alone, it may well be that Mondev's Article 1105(1) claim was bound to fail, and to fail whether or not one classifies BRA's statutory immunity as "procedural" or "substantive".

E. Conclusion

157. For these reasons the Tribunal dismisses Mondev's claims in their entirety.

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[92] As noted already, in the present case the conduct immunized took place well before NAFTA entered into force, and NAFTA protections do not apply to it as such.

[93] There was earlier Massachusetts authority in favour of the (unsurprising) proposition that BRA in exercising its planning powers was "a public agency acting in its public capacity": *Reid v. Acting Commissioner of Community Affairs*, 362 Mass 136, 141 (1972).

[94] Compare *Consuelo et al. v. Argentina,* IACHR, Report N 28/92, 2 October 1992, where immunity from prosecution and suit was extended after the entry into force of the Convention in respect of acts committed before its entry into force. The Inter-American Commission had no difficulty in rejecting Respondent's objection *ratione temporis*; it went on to hold that the conferral of immunity was in breach of the Convention.

ANNEX 177

Issues of State Responsibility before International Judicial Institutions

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5

State Responsibility for the Decisions of National Courts

CHRISTOPHER GREENWOOD*

STATE RESPONSIBILITY IS a subject much considered by courts—both national and international—as the essays in this collection demonstrate. Less frequently discussed, however, is the question of when a State can be held responsible for a violation of international law incurred as a result of a decision of a national court. There can be no doubting the principle that a State can be held responsible for the acts of its courts. The national courts are as much organs of the State as are its parliament, executive government and armed forces and their decisions are thus imputable to the State. Moreover, the concept of denial of justice as a wrongful act in international law has been well established for over a 150 years. Nevertheless, the circumstances in which the actions of a State's courts amount to a denial of justice for which the State can be held responsible in international law are not as clearly defined as might be expected.

In particular, there has long been a lack of clarity on whether a State can be held responsible for a denial of justice on the basis of the decision of a lower court or whether denial of justice requires a failure of the system of justice in a State, so that only if that system fails to correct, through its appeal mechanism, deficiencies in the proceedings in a lower court can there be said to be a denial of justice for the purposes of international law.

Discussion of this subject has been bedevilled by two problems. First, most of the cases in which this question has arisen are comparatively old—the standards which they apply, and the language on which they are couched, often sits oddly with modern notions of State responsibility.

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Secondly, much of the discussion—both in the jurisprudence and the literature on the subject—confuses the substantive law on denial of justice with the application of the local remedies rule, which is now recognised as a procedural matter but has not always been seen as such even in recent times.

The purpose of the present paper is, therefore, to explore the question of whether the decision of a lower court can constitute a denial of justice irrespective of the possibility of appeal or whether only a failure of the judicial system as a whole (either through the lack of an available appeal mechanism or the failure of that mechanism to correct a flawed decision of a lower court) is required.

Particular attention will be paid to the recent arbitral award in *Loewen v United States of America*,[1] which contains a detailed discussion of this question. The *Loewen* claim was brought under Chapter 11 of NAFTA and arose out of an award by a Mississippi State court of US$500 million in punitive and compensatory damages against the Loewen Group, a Canadian company with investments in the United States, in a civil action brought against Loewen by a Mississippi businessman and his family. The Tribunal concluded that 'the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment'.[2] The Tribunal nevertheless rejected Loewen's argument that it had been the victim of a violation of Chapter 11 for which the United States could be held responsible in international proceedings. One of the reasons for reaching this conclusion was that Loewen had failed to demonstrate that it had not had available to it opportunities for correcting the decision of the Mississippi court on appeal.[3]

[1] The Final Award of 13 June 2003 appears at www.state.gov/documents/organization/22094.pdf. The Tribunal's earlier decision on the Respondent's objections to competence and jurisdiction ('the Preliminary Award') was given on 5 January 2001 and appears at www.state.gov/documents/organization/3921.pdf. The Tribunal, which was constituted under the Additional Facility of ICSID, comprised Sir Anthony Mason (Chairman), Judge Abner Mikva and Lord Mustill. Lord Mustill was appointed to replace Yves Fortier QC, who was party to the Preliminary Award but resigned in September 2001. Both awards will be reported in volume 126 of the *International Law Reports (ILR)*. The present writer was an expert witness called by the United States in these proceedings. The United States also filed an opinion by Professor Bilder, while the Claimant filed opinions from Sir Robert Jennings and Sir Ian Sinclair. All the opinions are available at www.naftalaw.org and www.state.gov/s/l/c3755.htm.

[2] Final Award, *ibid*, para 137.

[3] Space does not permit consideration of the other issues discussed in the two awards, in particular, the decision (in paras 220–239 of the Final Award, *ibid*) concerning the application of the continuing nationality principle, which was a separate ground for rejecting Loewen's claims.

1. THE CONCEPT OF DENIAL OF JUSTICE AND THE DECISIONS OF LOWER COURTS

Where a national of one State invokes international law (or where the State of his nationality claims on his behalf) against another State, there are usually three separate issues to be considered:

(a) whether there is an act which is imputable to the respondent State;
(b) whether that act is contrary to international law; and
(c) whether the respondent State can be held responsible for that act in international proceedings before local remedies have been exhausted.

The first issue presents no problems in this context. The decisions of a court—at whatever level in the judicial hierarchy—are plainly imputable to the State. As Article 4(1) of the International Law Commission's Articles on State Responsibility makes clear:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.[4]

It should, however, be noted that not all of the earlier commentators accepted that the decisions of lower courts were imputable to the State. Thus, Borchard, in an influential work published in 1915,[5] doubted whether a State could be held responsible for the decisions of a lower court. In addition, Freeman, writing in 1938, commented that the 'responsibility [of a State] is engaged as the result of a definitive judicial decision *by a court of last resort* which violates an international obligation of the State'.[6]

To the extent that these writers were suggesting that the decisions of lower courts are not imputable to the State, contemporary international law has plainly disavowed that thesis. It is important to remember, however, that the rigid distinction between the primary (or substantive) rules of law for the violation of which the State could be held responsible

[4] J Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge, 2002), p 94. See also the *Salvador Commercial Company* case, *RIAA*, Vol XV, (1902), p 455, at p 477.
[5] E Borchard, *Diplomatic Protection of Citizens Abroad* (New York, 1915), p 198.
[6] A Freeman, *International Responsibility of States for Denial of Justice* (London, 1938), pp 311–12. Emphasis added.

and the secondary (or general) rules which governed the establishment of that responsibility—that has been the hallmark of discussion of the subject in the last 40 years[7]—was not so clearly understood (or, at least, was not regarded as so important) before that time. Even if the reservations which Borchard and Freeman expressed would not now be accepted as limitations within the secondary rules regarding imputability, they may nevertheless be important when one comes to consider the primary rules that define the scope of denial of justice.

It is harder to disentangle discussion of the second and third issues outlined above. The second issue concerns the content of the primary rule that prohibits the denial of justice to aliens, while the third appears to be concerned only with the conditions in which there may be an international claim for the violation of the primary norm. In practice, however, the two have been almost inextricably linked.

So far as the content of the primary norm is concerned, international tribunals are understandably cautious in concluding that the judicial system of a State has fallen so far short of international standards that it has perpetrated a denial of justice. Only if there is clear evidence of discrimination against a foreign litigant or an outrageous failure of the judicial system is there a denial of justice in international law. The point is very clearly put by O'Connell, who states that:

> When one comes to examine failure of the courts themselves 'palpable deviations' from the accepted standards of judicial practice are not so readily ascertained. For one thing, there is a presumption in favour of the judicial process. For another, defects in procedure may be of significance only internally, and not work an international injustice. For a third, wide discretion must be allowed a court in the reception and rejection of evidence, in adjournment, and in admission of documents, and it cannot be said that deviations even from the municipal law rules of evidence are deviations from an international standard. The first thing that must be ascertained is whether as a result of court manoeuvrings substantial injustice has been done the claimant; the second is whether these manoeuvrings really amount to obstruction of the judicial process, and are extrinsic to the merits of his claim. Bad faith and not judicial error seems to be the heart of the matter, and bad faith may be indicated by an unreasonable departure from the rules of evidence and procedure.[8]

[7] In particular since the late Roberto Ago took over work on the State Responsibility project within the ILC; see Crawford, above n 4, pp 1–4 and 74.

[8] D O'Connell, *International Law,* 2nd edn (Oxford, 1970), p 948. See also the authorities cited by D O'Connell, in particular, *Chattin v United Mexican States, RIAA*, Vol IV, (1927), p 282 and *Garcia and Garza v USA, RIAA*, Vol IV (1926), p 119; J Brierly and H Waldock, *The Law of Nations* 6th edn (Oxford, 1963), p 287; and Article 9, 'Harvard Research', (1929) 23 *American Journals of International Law* Supp P 173.

Other writers have taken a similar view. Thus, Garner thought that what was required was 'manifest injustice' or 'gross unfairness'.[9] Jimenez de Arechaga spoke of 'flagrant and inexcusable violation'.[10] As Baxter and Sohn put it (in the Commentary to their Draft Convention on the International Responsibility of States for Injuries to Aliens) 'the alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice.'[11]

The remarks of the Arbitration Tribunal in the NAFTA case of *SD Myers v Canada* that 'a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making'[12] and its reference to 'the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders'[13] are particularly apposite where a case is based on an allegation of denial of justice by a municipal court.

Let us suppose, however, that a decision of a court of first instance plainly falls short of the standards laid down by international law, even applying the strict test enunciated by O'Connell. Does that decision amount to a denial of justice under international law if there exists a reasonable possibility that it might be corrected by an appeal or other form of challenge within the national court system or is there a denial of justice only if no such possibility exists or once all avenues of appeal or challenge have proved fruitless? Properly understood, this question lies at the heart of the substantive rule, for it concerns what constitutes a denial of justice in international law—the flawed decision of a court or the failure of the judicial system as a whole. Unfortunately, consideration of this question has tended to be confused with discussion of the application of the local remedies rule.

Since the normal rule is that an alien must exhaust all available domestic remedies before his case can be taken up on the international plane, consideration of whether there is a remedy in the courts of the respondent State is usually necessary whatever was the original cause of harm to the alien. As a general rule, that is the case irrespective of whether the original cause of the harm is (1) an act that is plainly imputable to the State and contrary to international law—for example a discriminatory and uncompensated expropriation, carried out either by legislative decree or

[9] J Garner, 'International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice', 10 *British Yearbook of International Law* (1929), p 181, at p 183.

[10] J de Arechaga, 'International Law in the Past Third of a Century', 159 *Recueil des Cours* (1978), p 282.

[11] F Garcia-Amador, L Sohn and R Baxter, *Recent Codification of the Law of State responsibility for Injury to Aliens* (Leiden, 1974), p 198 (commentary to Art 8; the text was prepared in 1961).

[12] 121 *International Law Reports* 72 (para 261).

[13] *Ibid*, para 262.

executive action—or (2) the act of a private party which is not imputable to the State.

Nevertheless, the significance of recourse to the courts of the respondent State in these two cases is quite different. In the first case, it is the expropriation that is the violation of international law. The function of recourse to the local courts here is properly regarded as procedural; it gives the respondent State the opportunity to rectify the original wrong in its own courts before calling it to account at the international level.[14] In the second case, the original cause of harm is not imputable to the respondent State and cannot, therefore, constitute a cause of action against that State in international law. If there is to be a cause of action at all it can only be denial of justice, arising either because the respondent State denies the alien access to the courts or because those courts behave in a way which is discriminatory or manifestly contrary to international standards of behaviour. In this case it is only the action of the courts (or of those organs of the State who deny access to the courts) which is imputable to the respondent State.

The second case is not really an instance of the application of the local remedies rule at all. Unlike the first case, where the question is whether the respondent State's courts have provided a remedy for that State's wrongful act, in the second case it is the behaviour of those courts which is itself said to constitute the wrongful act.

This distinction is clearly established. Nevertheless, discussion of it in the literature and the case law has often been confused and the second category of case has frequently been discussed as though it were an application of the local remedies rule, sometimes with the qualification that the local remedies rule is described in such a case as being 'substantive', whereas in the first category of cases it is regarded as procedural. Unless there has been a waiver of the local remedies rule, this confusion matters little, since the practical effect of the local remedies rule and the principle at issue in the second category of case is the same. Nevertheless, there is an important difference of principle between the two and once there is an agreement waiving the local remedies rule the distinction becomes critical. A waiver of the local remedies rule will affect the first case but not the second. In the second case, until the alien attempts to secure redress in a local court, there is nothing which could form the substance of an international claim, because there is nothing which is imputable to the respondent State.

Once, however, a court of the respondent State has taken a decision, then there is an act imputable to that State. Nevertheless, it is still necessary to

[14] Although some governments and commentators have sought to argue that it is the failure to provide a remedy, rather than the expropriation, that is the international wrong, this approach makes denial of justice the only cause of action in international law in cases of mistreatment of aliens. That is not the practice of most States and has not been the approach taken in the majority of judicial and arbitral decisions.

ask whether that act constitutes a violation of international law. As has been seen, it is well established that a mistake on the part of a court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.

The term denial of justice has been given different meanings by different commentators. 'Justice', however, refers to more than just the decision of an individual court. It is clear, for example, that the term denial of justice embraces a denial of access to the courts. There can also be a denial of justice because of a systematic bias or other failing on the part of the courts which would make recourse to those courts for the alien pointless or ineffective, even though there may be no decision of a court in the particular case.

While allegations of a denial of justice may turn upon decisions of the courts, what constitutes a denial of justice is a failure of the *system* of justice within a State. To put it another way, the obligation which the State owes the foreign national in this context (whether under general international law or under the specific provisions of a treaty like NAFTA or a bilateral investment treaty) is to provide a system of justice which affords fair, equitable and non-discriminatory treatment. So long as the system itself provides a sufficient guarantee of such treatment, the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal. While legal systems strive for perfection at all levels, they also recognise that such a result is unlikely to be attainable. It is precisely for that reason that legal systems today make extensive provision for appeal and that many also contain other provisions for challenging decisions of the lower courts for violations of constitutional safeguards which are frequently very similar to the standards of international law. The duty of a State towards foreign nationals is to provide a *system* of justice which ensures fairness and compliance with other standards of international law in all cases. That system includes the appellate and review procedures for which it provides.

It follows that the responsibility of the State for a denial of justice arises only if the system as a whole produces a denial of justice. Where there is a manifestly defective judgment by a lower court, this will not amount to a denial of justice—and thus will not constitute a violation of international law by the State—if there is available to the foreign national an effective means of challenging the judgment.

That consequence is not always made clear in discussion of denial of justice and, as stated above, it is frequently (and, perhaps, understandably) confused with discussion of the local remedies rule. Nevertheless, it is recognised in a number of important texts. Thus, the ninth edition of *Oppenheim's International Law* states that:

> If the courts or other appropriate tribunals of a State refuse to entertain proceedings for the redress of injury suffered by an alien, or if the proceedings

> are subject to undue delay, or if there are serious inadequacies in the administration of justice, or if there occurs an obvious and malicious act of misapplication of the law by the courts which is injurious to a foreign State or its nationals, there will be a 'denial of justice' for which the State is responsible (quite apart from the effect which such circumstances might have for the application of the local remedies rule). *The State's responsibility will at least require it to take the necessary action to secure proper conduct on the part of the court...* .[15]

This last sentence suggests a standard which would be met by the State ensuring that a manifestly deficient judgment was reversed on appeal or that judicial review were available to compel the lower court to adopt a proper decision. *Oppenheim* continues:

> Where, however, a court observes its own proper forms of justice and nevertheless pronounces a materially unjust judgment, it is controversial whether a denial of justice is thereby occasioned for which a State is internationally responsible. The judgment giving rise to the material injustice (itself a relative concept) may be the result of the proper application by the court of a law which provides for such a result (in which case it is the law which should properly be the object of complaint), or of an erroneous application by the court of a law which is itself unexceptional. In this latter case, *if the error is not remedied on appeal*, there is probably no international responsibility for a denial of justice unless the error led to a breach of a treaty obligation resting on the State or, possibly, the result is so manifestly unjust as to offend against the standards of justice recognized by civilized nations.[16]

It is axiomatic in this passage that if an error is remedied on appeal there can normally be no violation.

It has already been seen that Freeman considered that only the decision of a court of last resort could constitute a denial of justice. Elsewhere, in discussing denial of justice resulting from manifest defects in the procedure followed by the national court, he stated:

> 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. *Where this does not happen*, there is still left the question of

[15] R Jennings and A Watts, eds, *Oppenheim's International Law*, 9th edn (London, 1992), vol I, pp 543–44. Emphasis added.
[16] *Ibid*, pp 544–45.

> whether these various deviations from regular judicial activity are sufficiently flagrant to embroil the State.[17]

It is true that, later in this work, Freeman refers to the principle that 'no claim based upon a denial of justice may be predicated upon the decision of a lower court'[18] as bound up with the local remedies rule but this confusion is common in the literature. The better view is that Freeman was commenting on the content of the international law standard of denial of justice.

The same approach to the State's duties to provide a fair and effective system of justice is taken by the late Judge Jimenez de Arechaga (who also carefully distinguishes between this issue and the local remedies rule, dealing with the latter in a different section of his work). Although he adopted a narrow definition of denial of justice, confining it to cases of denial of access to a court and distinguishing it from cases where a court perpetrated an injustice, he concluded that in the latter case:

> There have been cases ... in which a State was held responsible as a result of a judicial decision in breach of municipal law. Such exceptional findings have been justified on the basis of three cumulative requirements which must be satisfied for a State to be held responsible on this account:
>
> (a) the decision must constitute a flagrant and inexcusable violation of municipal law;
>
> (b) it must be a decision of a court of last resort, all remedies available having been exhausted;
>
> (c) a subjective factor of bad faith and discriminatory intention on the part of the court must have been present.
>
> ...
>
> The reason for the second requirement is that States provide in their judicial organization remedies designed to correct the natural fallibility of its judges. A corollary of this requirement is that a State cannot base the charges made before an international tribunal or organ on objections or grounds which were not previously raised before the municipal courts.[19]

The practical importance of distinguishing between the content of the substantive norm and the local remedies rule has become greater in modern times as instances of the waiver of the local remedies rule have become more common. If the principle that, in Freeman's words, 'no claim based upon denial of justice may be predicated upon the decision of a lower court' is treated as nothing more than an application of the local remedies rule, the effect of a general waiver of the rule would be that any judgment of a

[17] Above n 6, pp 291–92. Emphasis added.
[18] Above n 6, p 415.
[19] J de Arechaga, 'International Law in the Past Third of a Century', 159 *Recueil des Cours* (1978), p 282.

court at any level in the judicial hierarchy which was alleged to constitute a denial of justice could be the subject of a challenge in international proceedings, notwithstanding that there was an avenue of appeal open to the foreign national.

The effects of such an approach are potentially very far-reaching. That would be the case even with interlocutory decisions. If any decision of a court which failed to meet international standards constitutes a denial of justice and, in the event of a waiver of the local remedies rule, is actionable on the international plane, then a decision granting interlocutory relief could give rise to a cause of action in international law. For example, an English court issues freezing orders (formerly known as *Mareva* injunctions) on the basis of an application without notice to the other party (formerly known as an *ex parte* application). The order can, of course, be challenged by the defendant at a subsequent *inter partes* hearing. Yet the act of granting the original *ex parte* order is an act imputable to the State and, if the local remedies rule has been waived, then an alien defendant (or his State of nationality) could bring an international claim alleging that the granting of the order was a denial of justice, notwithstanding that he had not exercised his undoubted right to contest the order at the *inter partes* hearing.

It is inherently implausible that States would intend to produce such a result, the effect of which would be to give the foreign litigant the opportunity to engage in some quite extraordinary forum shopping and to set aside the entire system of checks and balances within the national judicial system. In the opinion of this writer, international law does not produce such a bizarre result. That is because what constitutes a denial of justice in international law is not the isolated decision to grant a freezing order on an *ex parte* application but only a failure of the system of justice, if that system either does not correct that decision where the decision was manifestly unjust or does not offer any effective means of challenging the decision.

To say that a decision of a lower court cannot constitute a denial of justice if the means exists for an effective recourse to correct the deficiencies in that decision is not the same as saying that a foreign national must always challenge any act of government before the courts. In the case of a denial of justice based on the actions of the courts, what is involved is not a challenge to one branch of government before another (as was the case, eg, in the *Interhandel* case)[20] but a challenge to the mechanisms that exist within the judicial system for correcting errors made within that same system. These methods generally exist as of right and recourse to them is largely in the hands of the parties to the proceedings.

[20] *ICJ Reports*, 1959, p 6.

There has been very little consideration by international tribunals of the distinction between the local remedies rule and the principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice. The lack of discussion is scarcely surprising in view of the similar effects of the two principles and the fact that, until recently, the local remedies rule was seldom waived. Nevertheless, the distinction is clearly recognised by the Iran-United States Claims Tribunal in its decision in *Oil Field of Texas*.[21] The Iran-US Claims Tribunal there held that a judicial decision was capable of amounting to a measure of expropriation. The decision in question was that of the Islamic Court of Ahwaz, which appears to have been a lower court. The Tribunal held that:

> The Court order did not only have temporary effect, but, as evidenced by NIOC's continued retention of the equipment, amounted to a permanent deprivation of its use. In these circumstances, *and taking into account the Claimant's impossibility to challenge the Court order in Iran,* there was a taking of the three blowout preventers for which the Government is responsible.[22]

Since the Iran-US Tribunal operates on the basis of a waiver of the local remedies rule,[23] this passage is not referring to the need to exhaust local remedies. It is clear, therefore, that the Tribunal considered that, if there had been a means by which the Claimant could have challenged the decision of the Islamic court within the Iranian judicial system, the decision of the Islamic court would not have amounted to a violation of international law. Amongst older authorities, the decision of Umpire Thornton in *Jennings, Laughland and Co v Mexico*[24] also takes this view:

> 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.[25]

Most of the other decisions and awards say little, if anything, on the relationship between recourse to appeal as a requirement of the substantive law of denial of justice and recourse to appeal as part of the exhaustion of local

[21] 12 *Iran-US CTR*, p 308, at pp 318–19.
[22] *Ibid*, p 319.
[23] See Principle B of the General Declaration, G Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, 1996), pp 129–31.
[24] Case No 374, J Moore, 3 *International Arbitrations* (Washington D C, 1898), p 3135.
[25] *Ibid*, p 3136. Umpire Thornton reached the same conclusion in *Green v Mexico* (*ibid*, p 3139), *Burn v Mexico* (*ibid*, p 3140), *The Ada* (*ibid*, p 3143), *Smith v Mexico* (*ibid*, p 3146) and *Blumhardt v Mexico* (*ibid*, p 3146). The decision of Umpire Little in *The Mechanic* (*Corwin v Venezuela*) (*ibid*, p 3210, at p 3218) is to the same effect.

remedies. For example, the famous award in the *Finnish Ships* case[26] does not address this question, because the issue before the arbitrator was specifically confined to whether or not local remedies had been exhausted; the arbitrator was not asked to address the merits of the shipowners' claim. Moreover, it was the original requisition of the ships, not the decision of the English tribunal, which had given rise to those claims.

Although the International Law Commission's work on State responsibility was concerned with the secondary rules, rather than the content of primary norms such as that on denial of justice, the discussion of the various drafts by the Commission and those States which commented thereon also sheds some light on the content of the relevant primary norms.

The earlier Draft Articles drawn up by Ago included, in Draft Articles 20 and 21, a complex distinction between 'obligations of conduct' and 'obligations of result':

> *Article 20*
>
> There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.
>
> *Article 21*
>
> 1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.
> 2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.[27]

In commenting on these provisions in 1998, the United Kingdom observed that:

> ... in a case where international law requires only that a certain result be achieved, the situation falls under draft article 21(2). *The duty to provide a fair and efficient system of justice is an example. Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court.* In the case of such obligations, no breach occurs until the State

[26] *RIAA*, Vol III, (1937), p 1497.
[27] Crawford, above n 4, p 353.

> has failed to take any of the opportunities available to it to produce the required result.[28]

The italicised passage is directly in point. It constitutes recent State practice, which clearly indicates that the substantive obligation imposed upon the State is to provide a fair and efficient *system* of justice and that the decision of a lower court (even if it is not merely wrong but 'corrupt') does not put the State in breach of that obligation if the State has provided the means within that system whereby that decision can be corrected.

This approach to the duty to provide a system of justice was accepted by the new ILC rapporteur, Professor James Crawford SC. After quoting the United Kingdom comments set out in the preceding paragraph, he observed that:-

> There are also cases where the obligation is to have a *system* of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and 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.[29]

The International Law Commission subsequently discarded the provisions on obligations of conduct and obligations of result. It did so because the distinction was not considered useful in a set of general articles dealing with the secondary rules of State responsibility (ie the legal framework of responsibility rather than the specific rules—the 'primary rules'—for the breach of which the State would incur responsibility). The decision to drop the distinction from the Final Articles did not suggest that there was any doubt about the fact that certain obligations are plainly obligations of result, nor that there was any dissent regarding the statements quoted above.[30]

In light of the above discussion, it is suggested that the concept of denial of justice is systemic, ie, as Professor Crawford puts it, the obligation of the State is to provide a fair and efficient system of justice. That obligation is only violated by an unfair decision of a lower court if two requirements are met. First, the unfairness must be of such an extreme character that it

[28] UN Doc A/CN.4/488, p 68. Emphasis added.
[29] UN Doc A/CN.4/498, para 75. Original emphasis.
[30] The Commission's original approach to the local remedies rule was closely bound up with the distinction between obligations of conduct and obligations of result. Draft Art 22 on the application of the local remedies rule took the position that, in the case of an obligation of result, the local remedies rule took on a substantive character. This approach, of course, serves further to confuse the requirement of recourse to appeal as a part of the definition of denial of justice with the requirement of exhaustion of local remedies. It was heavily criticised and was not adopted in the Final Articles. Art 44 of the Final Articles (Crawford, above n 4, p 264) treats the local remedies rule as procedural in character.

satisfies the stringent criteria identified by O'Connell. While bad faith may not be necessary, what is required is something which goes far beyond mere error. Secondly, the decision of a national court, however badly flawed, will not amount to a denial of justice engaging the international responsibility of the State unless the system of appeals and other challenges which exists in that State either does not correct the deficiencies of the lower court's decision or is such that it does not afford a prospect of correcting those deficiencies which is reasonably available to the alien who has suffered from that decision.

2. THE *LOEWEN* CASE

These tentative conclusions receive considerable support from the Final Award in the *Loewen* case. The claimants in that case alleged that the conduct of the trial in the Mississippi court and the award of $500 million in damages amounted to a violation of Article 1105 of the NAFTA Treaty. Article 1105, which is headed 'Minimum Standard of Treatment', provides:

> 1. Each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

This provision was the subject of an interpretation by the Free Trade Commission, a body comprising the representatives of the three NAFTA States (Canada, Mexico and the United States of America), in the following terms:

> (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
> (2) The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
> (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[31]

The Tribunal accepted that this interpretation was binding upon it, notwithstanding that other tribunals had earlier taken a different view of

[31] 122 *ILR* 681.

Article 1105.[32] It considered, however, that the relevant international law standards were those of the present day and not those applied in the 1920's.

On the question of what constitutes unfair and inequitable treatment by a court (which appears, in the light of the interpretation given by the Free Trade Commission, to be the same as the concept of a denial of justice) today, the Tribunal followed the approach taken by an earlier NAFTA Tribunal in *Mondev International Ltd v United States of America*, which held that:

> ... the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable' treatment.[33]

The *Loewen* Tribunal considered that bad faith was not required but what had to be shown was 'manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety'.[34]

Applying this standard, the Tribunal held that the proceedings in the Mississippi court had been unfair and inequitable. It then went on, however, to state that:

> because the trial court proceedings are only part of the judicial process that is available to the parties, the rest of the process, and its availability to Loewen, must be examined before a violation of Article 1105 is established.[35]

There was no doubt that Loewen had a right of appeal against the decision and, in the view of the Tribunal, a good prospect of success in that appeal, at least as regards the amount of damages awarded (which was the largest ever awarded in a Mississippi court). The problem was that Mississippi law did not permit a stay of execution pending appeal unless the appellant posted a bond for 125 per cent of the amount of the damages within a short period of time. Although Mississippi law permitted either the trial judge or the Mississippi Supreme Court to relax the bond requirement, neither agreed to do so in this case. Loewen maintained that it could not afford the bond of $625 million. Rather than pursuing the appeal while allowing the

[32] Cf the Award on Damages in *Pope and Talbot v Canada*, 31 May 2002; available at www.naftalaw.org.
[33] 125 *ILR* 90.
[34] Final Award, above n 1, para 132.
[35] *Ibid*, para 137. Loewen also complained of violations of Art 1102 (discriminatory treatment) and Art 1110 (expropriation), but the Tribunal dismissed its claims under the former and held that the latter added nothing to Art 1105 in the present case.

judgment to be enforced, Loewen settled the case out of court for a sum estimated at $175 million.

The United States maintained that Loewen had failed to exhaust the avenues open to it within the United States and Mississippi court systems. In particular, the United States argued that Loewen could have challenged the bond requirement and its application in this case before the United States Supreme Court or filed for bankruptcy under Chapter 11 of the US Bankruptcy Code (which allows a form of protective bankruptcy and would have precluded enforcement of the judgment). Loewen denied that there was any realistic prospect of success in the Federal courts and rejected the Chapter 11 route as a viable option.

Two separate questions thus arose. First, assuming that there was an avenue—reasonably available to Loewen and offering some prospect of success—within the United States or Mississippi judicial systems by which it could challenge the judgment of the Mississippi court and that Loewen had failed to take advantage of that avenue, could the decision of the Mississippi court nevertheless amount to a violation of Article 1105 of NAFTA? Secondly, if that question was answered in the negative, was there, in fact, such an avenue reasonably available to Loewen? The first question is obviously the one which is of interest for the purposes of the present paper, although brief comment will be made on the second.

The Tribunal held that the decision of the Mississippi court, flawed though the Tribunal held it to be, could not constitute a violation of Article 1105 (and therefore of the customary law on denial of justice) if United States or Mississippi law offered Loewen a reasonably available means of challenging that decision. The Tribunal was impressed by the fact 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.[36]

It held that:

> The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision. The requirement has application to breaches of Articles 1102 and 1110 as well as Article 1105.[37]

[36] Final Award, above n 1, para 154.
[37] *Ibid*, para 156.

The Tribunal then considered the application of the local remedies rule in the context of a NAFTA claim. It started from the premise that the local remedies rule was an important part of international law, not a mere technical requirement, and that, as the International Court had held in the *Elettronica Sicula* case,[38] clear language in a Treaty was required before the rule would be held to have been waived. The Tribunal also rejected Loewen's submission that the rule was applicable only to cases of diplomatic protection, where a State brought a claim on behalf of one of its nationals. The local remedies rule was, therefore, applicable to a claim under NAFTA Chapter 11 unless Article 1121 of NAFTA[39] operated to waive the rule. The Tribunal held that the precise purpose of Article 1121(1) was not altogether clear but added that:

> One thing, however, is reasonably clear about Article 1121 and that is that it says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level.
>
> Nor is there any basis for implying any dispensation of that requirement. It would be strange indeed if *sub silentio* the international rule were to be swept away. And it would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer

[38] *United States of America v Italy, ICJ Reports*, 1989, p 15, at p 42.

[39] Art 1121 (which is entitled 'Conditions Precedent to Submission of a Claim to Arbitration') provides that: '1. A disputing investor may submit a claim under Art 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the provisions of this Subchapter; and

(b) both the investor and an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, waive their right to initiate or continue before any administrative tribunal or court under the domestic law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of Subchapter A of this Chapter, Art 1502(3)(a) (Monopolies and State Enterprises) or Art 1503(2) (State Enterprises), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the domestic law of the disputing Party.'

> more wide-ranging review as they are not confined to breaches of international law.[40]

While this passage appears to elide the requirements of the local remedies rule with those of the substantive law on denial of justice, it seems that the Tribunal found against Loewen on both counts. The reasoning in this part of the award supports the following conclusions:

(1) that the substantive law on denial of justice (and other wrongs by a court) is such that a State does not incur responsibility for a flawed decision of a court if its legal system provides adequate and effective means for challenging that decision which are reasonably available to the foreign national and that foreign national does not take advantage of those means of challenge;
(2) that the local remedies rule is applicable in principle in claims brought directly by a foreign investor against a State;
(3) that NAFTA Article 1121 does not waive the application of the local remedies rule 'in its application to a breach of international law constituted by a judicial act'.[41]

Accordingly, if there was an adequate and effective remedy within the US or Mississippi court system, which was reasonably available to Loewen, then there was no violation of NAFTA unless Loewen had taken sufficient steps to pursue that remedy. That leads to the second question posed above, whether there were such remedies reasonably available to Loewen or whether Loewen had had no choice but to enter into the settlement agreement. On this aspect of the case, the Tribunal held that the onus was on Loewen to show why the various remedies that it might have pursued, noticeably the challenge to the bonding requirement in the United States Supreme Court, were not in fact reasonably available to it and found that Lowen had failed to discharge this burden. The Tribunal was 'simply left to speculate on the reasons which led to the decision to [conclude the settlement] rather than to pursue other options' and 'it is not a case in which it can be said that it was the only course which Loewen could reasonably be expected to take'.[42]

3. CONCLUSION

The award in *Loewen* is welcome confirmation of the principle, set out in Part 1, above, that the responsibility of a State for the decisions of its courts

[40] Final Award, above n 1, paras 161–62.
[41] *Ibid*, para 164.
[42] *Ibid*, para 216.

arises only when all adequate and effective means of challenge to a decision which exist within the national court system and which are reasonably available to the alien complaining of the decision have been exhausted. The contrary view would have allowed foreign investors who were covered by NAFTA to choose freely, and at will, between using the appellate system of the host State and resorting to NAFTA arbitration. The latter choice would inevitably have meant substituting a claim against the host State (in *Loewen*, the United States of America) for whatever redress might have been available against the other party to the proceedings before the national courts. Such a consequence is unlikely to have been what was intended by the parties to NAFTA and had the potential to wreak havoc with the orderly conduct of claims. While the *Loewen* award is not, of course, binding on other tribunals and, in so far as it addresses the question of waiver, is confined to the NAFTA framework, its careful analysis of the nature of a State's obligations with regard to the provision of a fair system of justice is likely to be highly influential not only with other NAFTA tribunals but in a broader investment context.

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INTERNATIONAL RESPONSIBILITY FOR DOMESTIC ADJUDICATION: DENIAL OF JUSTICE DECONSTRUCTED

ZACHARY DOUGLAS*

Abstract This article revisits the core difficulties with the international delict known as a denial of justice and, drawing insights from philosophical writing on adjudication, offers novel solutions to three principal issues: (a) the scope of the acts and omissions that can form the predicate conduct for a denial of justice; (b) the proper threshold for liability in respect of those acts or omissions; (c) the relationship between denial of justice and other international norms impacting upon domestic adjudication. The article concludes with a restatement of the law of denial of justice.

Keywords: denial of justice, exhaustion of local remedies, international law, procedural rights, theory of adjudication.

I. INTRODUCTION: A DELICT IN SEARCH OF A JUSTIFICATION

The secondary rules of State responsibility do not differentiate among the three principal branches of constitutional power in the sense that an act of any State organ is attributable to the State on the international plane and thus can supply the predicate conduct for a breach of an international obligation.[1] No exception is made for the judiciary or the system for the 'administration of justice' more generally. And yet among the primary rules of international law there is a special form of delictual responsibility known as denial of justice. Why is that the case?

The leading writers on denial of justice are surprisingly reticent in identifying the *raison d'être* for a concept which they have devoted so much energy

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[1] Art 4(1), Responsibility of States for Internationally Wrongful Acts (2001) in *Yearbook of the International Law Commission*, 2001, vol II (Pt Two); C de Visscher, 'Le déni de justice en droit international' (1935) 52 Recueil des Cours 376–7; AV Freeman, *The International Responsibility of States for Denial of Justice* (Periodicals Service Co 1938) 28; EJ de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 Recueil des Cours 1, 278; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Advisory Opinion of 29 April 1999, (1999) ICJ Rep 62, para 63; *Gerhard Köbler v Republik Österreich*, ECJ Case No C-224/01, Judgment of 30 September 2003, para 41ff.

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in expounding. A review of the principal treatises on the subject[2] permits the conclusion that 'denial of justice' is a useful label for the collection of various paradigmatic examples of international responsibility for acts and omissions relating loosely to the 'administration of justice'[3] as revealed through a close study of the historical jurisprudence. If this is as good as it gets in terms of a justification for the delict of denial of justice, then we would have to surmise that its days are numbered. It would be vulnerable to the next spring-cleaning of legal concepts relating to international responsibility towards foreign nationals[4] because it is not self-evident why a singular notion of delictual responsibility in international law for the mistreatment of foreign nationals by any State organ could not subsume denial of justice. The international minimum standard in general international law might do the job within the realm of diplomatic protection,[5] as might the rights to a fair trial or due process embedded in human rights treaties[6] or the fair and equitable standard of treatment commonly found in investment treaties[7] in the context of those more specialized regimes. Indeed, it is within those specialized regimes that the fate of denial of justice looks particularly uncertain. Litigants are motivated by pragmatism rather than fidelity to historical usage. Why plead a denial of justice, with its substantive requirement that the victim must have had recourse to local procedures to redress the putative injustice for the State's responsibility to be consummated, when a range of other international obligations might be interpreted as also extending to the same acts or omissions relating to the administration of justice in the particular State? This pragmatic consideration is particularly forceful in the investment treaty regime because there is generally no procedural requirement to exhaust local remedies.[8]

What is strikingly absent from the leading texts on denial of justice is an argument of *principle* for the existence of a separate international delict for misfeasance or nonfeasance in respect of the 'administration of justice'. And yet it is clear that unless the retention of 'denial of justice' is to be motivated for reasons of form, such as a tool of classification or as fidelity to historical usage,

[2] EM Borchard, *The Diplomatic Protection of Citizens Abroad* ([1919] WS Hein & Co Reprint 2003); CT Eustathiades, *La responsabilité internationale de l'État pour les actes des organes judiciaires* (Pedone 1936); Freeman (n 1); de Visscher (n 1); J Paulsson, *Denial of Justice in International Law* (CUP 2005).

[3] Freeman (n 1) 1; de Visscher (n 1) 390; Paulsson (n 2) 4; F Francioni, 'Access to Justice, Denial of Justice and International Investment Law' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009).

[4] The term 'foreign nationals' is intended to cover legal entities such as companies as well as individuals.

[5] CF Amerasinghe, *Diplomatic Protection* (OUP 2008) 37.

[6] Commentary on art 6 of the ECHR in MW Janis, RS Kay and AW Bradley (eds), *European Human Rights Law* (3rd edn, OUP 2008); R Clayton and H Tomlinson, *The Law of Human Rights* (2nd edn, OUP 2009) 823–98.

[7] M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013).

[8] Z Douglas, *The International Law of Investment Claims* (CUP 2009) paras 56–60.

then the continued vitality of the concept can only be assured by a justification of principle.

The logical starting point is whether there are unique normative consequences attaching to a denial of justice that do not pertain to other international wrongs relating to the treatment of foreign nationals, such as the international minimum standard in general international law.[9] The answer appears to be straightforward: what distinguishes a denial of justice is that the State's responsibility is said to arise only at the point when the whole system for the administration of justice has spoken.[10] A prejudicial decision from a court of first instance does not suffice: the foreign national must have sought redress against that decision by having recourse to the remedies provided by the State's system for the administration of justice.

If we were analysing species of the animal kingdom then we could stop there. We are now equipped to identify what is distinctive about denial of justice as an international delict and distinguish it from other grounds for delictual responsibility for wrongs to foreign nationals. But that is not enough for legal concepts: we are obliged to provide an argument of principle to justify why this rule on recourse to local remedies must be applied to certain acts or omissions of the State and not to others.

The thesis advanced here is that there is something special about the form of decision-making known as adjudication that justifies both the imposition of this additional burden for establishing liability in the form of the rule on recourse to local remedies as well as the existence of a separate delict relating to acts or omissions relating to an adjudicative process more generally. This thesis borrows heavily from Fuller's insights relating to the essential characteristics of adjudication, which he described as a 'device which gives formal and institutional expression to the influence of reasoned argument in human affairs'.[11] International law has in the past and should continue in the future to treat this most exacting and also most vulnerable form of decision-making in a special way through the delict of denial of justice.

Contrary to the received wisdom, it is not the identity of the State organ or the title of the office that counts; hence the debate as to whether denial of justice is confined to acts of the judicial organs or includes administrative

[9] It should be remembered that it was once fashionable to characterize any international delict towards a foreign national as a denial of justice: Borchard (n 2) 336; Freeman (n 1) 97–8; *Neer (USA) v United Mexican States*, Mexico/USA General Claims Commission, Nielsen's Separate Opinion (1926) IV UNRIAA 62, 64; *Robert E. Brown (USA) v Great Britain* (1923) VI UNRIAA 120; *Claim of the Salvador Commercial Company* ('El Triunfo Company') (1902) XV UNRIAA 467–479.

[10] *Ambatielos Claim (Greece v United Kingdom)* (1956) XII UNRIAA 83, 120; International Law Commission (Crawford) 'Second Report on State Responsibility' UN Doc A/Cn.4/498 (1999) para 75 ('An Aberrant decision by an official lower in hierarchy, which is capable of being reconsidered, does not itself amount to an unlawful act.').

[11] LL Fuller and KI Winston, 'The Forms and Limits of Adjudication' (1978) 92 HarvLRev 353, 367.

organs and so on,[12] which has never been resolved in the literature, can be left to one side. Instead what counts is whether the organ or official has committed itself to a process of adjudication. As a matter of form, that organ or official is likely in most nations to be part of the judiciary, but this is not dispositive.

In terms of the scope of acts or omissions attributable to the State that can provide the predicate conduct for a denial of justice, this is likely to be judged as a narrow conception as compared with the existing definitions offered by other writers. Cases of executive interference in a pending domestic trial, for instance, would not be treated as a denial of justice pursuant to the conception defended here. The president does not commit to a process of adjudication when the president decrees the removal of the judge assigned to a pending trial.[13] As a result, in accordance with the thesis advanced in this study, international law should not accord any particular deference to the president's decision by making the State's liability contingent upon the subsequent failure of the system for the administration of justice to repair that interference. In the context of a claim for diplomatic protection, the president's interference would be actionable as a breach of the international minimum standard but not as a denial of justice.

If this thesis on the special nature of adjudication can be defended then the question of the *scope* of acts or omissions attributable to the State that can provide the predicate conduct for a denial of justice will be resolved. But that does not address the other fundamental problem that has preoccupied both judges and writers since time immemorial: what is the *threshold* for a denial of justice? Here the traditional preoccupation has been to ensure that the international tribunal does not act as a court of appeal on questions of national law. This concern has generated a keen interest in differentiating between the substantive and procedural aspects of the domestic adjudication and has led to a dogma that international law is not concerned with the substantive aspects of the judgment or decision in adjudication. This purely 'procedural' approach, however, is unsustainable as a matter of principle. The purpose of a system for the administration of justice is to decide cases and generate good outcomes. The merits of an outcome are inexorably linked to the substantive law governing the rights and obligations in question. A theory of procedural fairness must be linked to substantive rights and outcomes to have any explanatory force in terms of identifying the fundamental elements of procedural fairness.

Can a delay of five years in progressing a domestic adjudication, for instance, amount to a denial of justice? The answer must be that it depends on the substantive rights in play. Delay in proceedings to establish the criminal responsibility of a defendant who has been remanded in custody since the indictment is not the same as delay in proceedings to establish a defendant's civil responsibility to pay damages for a breach of contract. International law

[12] Freeman (n 1) 106; GG Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 BYBIL 93, 94.

[13] *Robert E Brown* (n 9).

has traditionally imposed more exacting procedural standards upon a State in relation to proceedings in which an individual's right to liberty is at stake and for sound reasons.[14] Such an approach is only possible if the requirements of procedural fairness are tied to substantive rights and outcomes.

The final question that must then be tackled is the relationship between the concept of denial of justice and other international norms that might potentially be implicated in a domestic adjudication. There is a line of international cases that supports the proposition that domestic adjudicative decisions can supply the predicate conduct for other forms of delictual responsibility to foreign nationals.[15] The corollary of this approach, although it is hardly free from doubt, is that the rule relating to recourse to local remedies is not then applicable to this separate delict.[16] Such a view has significant repercussions given the rapid expansion of international norms that place substantive demands upon the domestic adjudication of cases. If there is something special about a commitment to adjudication as a form of decision-making then the justification for imposing the additional burden for establishing a denial of justice applies to other types of delictual responsibility regardless of whether another international norm is implicated in that adjudication. This question has become critical in investment treaty arbitration as claimants have sought to opt out of the requirement to have recourse to local remedies in a substantive sense by characterizing their claims as anything but a denial of justice. The tribunal in *Loewen v USA* rejected this possibility,[17] whereas the tribunal in *Saipem v Bangladesh* admitted it.[18] Neither elaborated reasons for its decision on this point.

In summary, this study will address three principal questions: (a) the scope of the acts and omissions that can form the predicate conduct for a denial of justice; (b) the proper threshold for liability in respect of those acts or omissions; (c) the relationship between denial of justice and other international norms impacting upon domestic adjudication. This study concludes with a restatement of denial of justice taking into account the conclusions reached in respect of each of these questions.

[14] *BE Chattin (USA) v United Mexican States* (1927) IV UNRIAA 282.

[15] *Saipem SPA v Bangladesh*, Award of 30 June 2009, ICSID Case No ARB/05/7, paras 128–131; *White Industries Australia Ltd v India*, Final Award of 30 November 2011, paras 10.4, 11.3-4; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, Partial Award on the Merits, 30 March 2010, UNCITRAL, PCA Case No 34877, paras 242–244, 251, 275.

[16] *Saipem*, ibid, paras 181–182; *White Industries*, ibid, para 181; or the application of a lax finality requirement in *Chevron*, ibid, paras 326–331.

[17] *Loewen Group Incorporated and Loewen (Raymond L) v United States*, Award of 26 June 2003, ICSID Case No ARB(AF)/98/3, para 14. ('The Claimants' reliance on Article 1110 [Expropriation] adds nothing to the claim on Article 1105 [Fair and Equitable Treatment]. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if *Loewen* establishes a denial of justice under Article 1105.')

[18] *Saipem* (n 15) para 181. ('[The tribunal] tends to consider that exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court.')

Before attempting to answer these three questions, however, it is necessary to set the scene by recalling two developments in modern international law that have already been alluded to in this introduction: the demise of the procedural requirement to exhaust local remedies within some specialized international regimes and the expansion of the corpus of international norms that regulate transnational legal relationships. The combined effect of these developments has made the quest for answers to these three questions more important than ever.

II. TWO MODERN DEVELOPMENTS

A. The Limited Demise of the Procedural Rule Requiring the Exhaustion of Local Remedies

There are two manifestations of the principle that an individual must have recourse to the remedies afforded by the domestic legal system. The first manifestation is a requirement for the jurisdiction of the court or tribunal or the admissibility of the claim at the international level. In this context it is a general requirement for the admissibility of a State's diplomatic interposition on behalf of its national in customary international law[19] but it is also a common stipulation in modern human rights treaties that allow the right of individual petition.[20] Less frequently it is a condition precedent for the conferral of jurisdiction to tribunals constituted on the basis of investment treaties.[21] The second manifestation is a substantive element for the responsibility of a State for a certain type of delictual conduct which has traditionally been described as denial of justice.[22] A State is only responsible for the *final* result produced by its system for the 'administration of justice'.

These manifestations of the principle are so different in fundamental respects that to refer to them as a single concept is misleading and indeed it has been a source of confusion throughout the long history of engagement with the concept of denial of justice. In this article the term 'local remedies rule' will be

[19] In diplomatic protection it is a rule of admissibility: *Interhandel Case*, Judgment of 21 March 1959 (1959) ICJ Rep 6, 28–29; *Elettronica Sicula SPA (ELSI)*, Judgment (1989) ICJ Rep 15, para 52; JES Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?' (1954) 31 BYBIL 457; de Visscher (n 1) 427; International Law Commission, *Articles on Diplomatic Protection* (2006), art 14(1).

[20] European Convention on Human Rights, art 35(1).

[21] *Kılıç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, Award of 2 July 2013, ICSID Case No ARB/10/1, paras 6.2.1-8.

[22] *Loewen* (n 17) paras 151–154; *Jan De Nul NV and Dredging International NV v Egypt*, Award of 6 November 2008, ICSID Case No ARB/04/13, para 255; *Amto LLC v Ukraine*, Final Award of 26 March 2008, SCC Case No 080/2005, para 76. Paulsson (n 2) 8 with further references ('Exhaustion of local remedies in the context of denial of justice is ... not a matter of procedure or admissibility, but an inherent material element of the delict.'); AAC Trindade, 'Denial of Justice and Its Relationship with the Exhaustion of Local Remedies in International Law' (1978) 53 Philippine Law Journal 404; International Law Commission (Dugard), Second Report on Diplomatic Protection, UN Doc A/CN.4/514 (2001) 6.

reserved for reference to the rule on jurisdiction or admissibility of claims at the international level, whereas the term 'finality rule' will denote the substantive requirement for international responsibility for a denial of justice.

Until quite recently, the impulse of international courts and writers to conflate the 'local remedies rule' and the 'finality rule' was irresistible for the simple reason that the distinction made little difference in practice. At least prior to World War II, the local remedies rule was virtually ubiquitous as a requirement for the admissibility of claims before international courts and tribunals.[23] Hence regardless of whether the impugned conduct of the respondent State related to its system for the administration of justice, it was incumbent upon the injured foreign national to exhaust the local remedies available before that national's State could take up the claim by way of diplomatic protection. If the impugned conduct did relate to the administration of justice, then this necessity to discharge the local remedies rule simultaneously satisfied the finality rule. In other words, the local remedies rule did the work of the finality rule. So whilst a distinction was sometimes made in theory,[24] there does not appear to be a reported instance until *Loewen v United States* in 2004 where the finality rule was held to defeat a claim for denial of justice in circumstances where the local remedies rule was not applicable. In that case the Tribunal expressly recognized that the rules 'serve two different purposes'.[25]

In summary, the demise of the local remedies rule as a requirement for jurisdiction or the admissibility of claims in special regimes such as the Iran/US Claims Tribunal[26] and investment treaty arbitration[27] has cast a spotlight upon the role of the finality rule for denial of justice because in those domains where the local remedies rule no longer applies, it cannot do the work of the finality rule. This is particularly significant for investment treaty arbitration. By contrast, the importance of the next development that will be analysed—the collapse of dualism in the relationship between international and domestic law—transcends all instances for the international adjudication of claims.

B. The Collapse of Dualism

Modern international law is characterized by a heightened regulation of transnational activity among foreign nationals in areas that have always been justiciable before national courts such as extradition, custody of children, sale of goods, arbitration, corrupt practices, maritime safety and so on.

[23] AAC Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (CUP 1983).
[24] Freeman (n 1) 407, 441, 445–6.
[25] *Loewen* (n 17) para 159.
[26] GH Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press 1996) 130.
[27] Douglas (n 9) para 59.

This means that domestic courts are adjudicating upon issues to which both domestic norms and international norms apply with ever increasing frequency. The extent to which domestic courts can give effect to those international norms through the medium of domestic litigation depends upon the constitutional law of the particular State.[28] But however the national constitution resolves this question, it remains the case that modern international law places demands upon vast areas of domestic regulation.

The old certainties about international law regulating sovereign relations between States and no one else have long vanished and with that the ability to differentiate sharply between the norms applicable in domestic proceedings and in international proceedings. This presents an obvious challenge to conceptualizing denial of justice: should a domestic court's failure to adhere to an international norm be characterized as a denial of justice or something else? Should the finality rule apply to those other types of violations?

There is a whole spectrum of views on this question of characterization. Some writers, such as Borchard, extended the concept of denial of justice to the violation of any international obligation towards an individual.[29] Conversely, Fitzmaurice thought that the concept would be deprived of utility unless confined to the administration of justice in which case it would have 'a definite value as describing a particular species of international wrong'.[30] Paulsson agreed: '[w]hen national courts misapply international law, they commit substantive violations which should not be called denial of justice'[31] and then noted that, given the more extensive corpus of conventional norms directed to the treatment of foreign nationals today, 'denial of justice may lose currency as petitioners find it more convenient to invoke a breach of specific provisions of the relevant treaty'.[32]

For these writers the debate can be reduced to a battle for correct terminological usage because they do not divine any normative consequences attaching to any particular characterization. This is an important oversight because there are principles at stake. There is first the question of when it is appropriate to condition responsibility for the breach of an international obligation upon the finality rule. The second question is whether there is something special about adjudication that requires international law to approach the question of responsibility differently to the activities of the other branches of State power. These problems must now be confronted.

[28] DS Shelton (ed), *International Law and Domestic Legal Systems* (OUP 2011).

[29] Borchard (n 2) 337–8; C Eagleton, 'Denial of Justice in International Law' (1928) 22 AJIL 538, 539; CC Hyde, *International Law Chiefly As Interpreted and Applied by the United States* (Little, Brown & Co 1922) 491–2; AO Adede, 'A Fresh Look at the Meaning of the Denial of Justice under International Law' (1976) 73 Canadian YBIL 82; OJ Lissitzyn, 'The Meaning of the Term Denial of Justice in International Law' (1936) 30 AJIL 632, 637.

[30] Fitzmaurice (n 12) 95. [31] Paulsson (n 2) 5, 69ff, 84ff. [32] Ibid 6.

III. THE QUESTION OF SCOPE: ACTS AND OMISSIONS RELATING TO DOMESTIC ADJUDICATION

A. In Search of a Justification of Principle

From the time a consensus formed on discarding the idea that a denial of justice denotes any violation of international law towards a foreign national, the debate shifted to the proper basis for limiting the scope of acts attributable to the State that might supply the predicate conduct for a denial of justice. This debate has never achieved a satisfactory resolution. The orthodox position is that only the final product of the domestic system for the administration of justice can be the object of a denial of justice. And yet it is generally accepted that the 'system for the administration of justice' is not synonymous with the judiciary as one of the three branches of constitutional authority under the doctrine of the separation of powers. Denial of justice, according to the prevailing view, extends to all acts associated with the 'administration of justice', whatever the source of the constitutional authority.[33] But the 'administration of justice' is not a term of art in comparative constitutional law, and international law contains no set of rules to determine what counts as the 'administration of justice' within a domestic legal system and what does not.[34]

So how can we ascribe meaning to the term 'administration of justice'? If it *does not* simply denote whatever happens in a court room then it follows that it must be neutral as to source of constitutional authority exercised by the State organ or official in question. Who then can 'administer justice'? To administer justice is to commit to a certain set of ideals elaborated in political philosophy. To do justice is the ultimate purpose or end of a range of institutional activities within a State. And here lies the problem: we cannot define the scope of acts that might supply the predicate conduct for denial of justice by asking whether justice was actually done as a result of a particular institutional activity. That would be entirely circular; it would be akin to defining international responsibility as any act for which a State is internationally responsible. Unfortunately this is the essence of many accounts of denial of justice. In the words of one writer: 'the legal efficacy of a final judgment, from the point of view of international law, must depend... on the international obligation not to administer justice in a *notoriously unjust* manner'.[35] The arbitral commission in *Cotesworth & Powell* likewise held that 'nations are responsible to those of strangers ... for acts of notorious

[33] Most writers support the thesis that a denial of justice can be committed by any branch of power so long as it is directed to the administration of justice: de Visscher (n 1) 390–1; Fitzmaurice (n 12) 105; Eagleton (n 48) 547; Freeman (n 1) 149–50, 161; Paulsson, (n 2) 44ff.

[34] Freeman (n 1) 148–9, 161.

[35] J Irizarry y Puente, 'The Concept of "Denial of Justice" in Latin America' (1944) 43 MichLRev 383, 406 (emphasis in original).

injustice',[36] whereas the Harvard Draft Convention on State Responsibility includes 'a manifestly unjust judgment'[37] in its typology for a denial of justice.

B. The Special Nature of Adjudication

The only way to approach this problem coherently is to ask what is special about a certain range of acts attributable to the State that justifies (a) the existence of a distinct cause of action for invoking international responsibility for such acts and (b) the application of the finality rule as a constituent element of that cause of action.

The thesis defended here is that there is something special about a State's commitment to adjudication as a form of decision-making. The special characteristics of adjudication have been identified by Fuller:

> Adjudication is . . . a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength *and the weakness* of adjudication as a form of social ordering.[38]

It is this particular 'burden' of rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process,[39] that sets adjudication apart from other institutions of social ordering within the State. By virtue of this commitment to reasoned argument and to a special form of participation by affected parties, the process of adjudication gives rise to a moral obligation to comply with the decision resulting from that process which is independent of the coercive powers at the disposal of the State. The decision, in other words, is a legitimate source of authority in and of itself. But this 'higher responsibility toward rationality' identified by Fuller also explains the vulnerability of adjudication in the sense that a transparent set of justifications for a particular decision that claims to be the most rational is always exposed to being undermined by a better claim to rationality. Within a

[36] *Cotesworth & Powell (Great Britain) v Colombia*, Award of August 1875 (cited in B Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* [1898] 2050) 2083.

[37] Harvard Law School (EM Borchard), Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners (1929) 23 AJIL Spec Supp 133, 134.

[38] Fuller and Winston (n 11) 367.

[39] Fuller described this right of participation in the following terms: '[t]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.' Fuller and Winston (n 11) 364.

domestic judiciary this vulnerability is even institutionalized through a hierarchical court system affording rights of appeal.

This is the most compelling explanation for international law's special treatment of responsibility for domestic adjudication through the medium of denial of justice.[40] An authoritative determination of a claim of right or accusation of guilt by a domestic adjudicative body[41] cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that domestic adjudicative body. That would be tantamount to exploiting the vulnerability of decisions produced through adjudication; a vulnerability caused by the very necessity of justifying decisions through a special discourse of argumentation appealing to rationality. International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces. This deference is manifest in the finality rule and the idea that denial of justice focuses upon the procedural aspects of the adjudication rather than the substantive reasons for the decision.

C. The Proper Justification for the Finality Rule

As already noted, the judicial landscape at the international level now includes important domains where the writ of the local remedies rule does not run. Modern writers and international tribunals have yet to appreciate the full significance of this development for the law on the international review of domestic adjudication. It is no longer sufficient merely to identify the different functions of the local remedies rule and the finality rule. What is at stake is whether the finality rule should be applicable to the impugned conduct of the State as a matter of principle.

The finality rule can be justified by the particularities of adjudication as a decision-making process that have been examined above. There is no such thing as a perfect adjudicative process. International law does not recognize a right of any litigant to the best possible procedure in terms of the accuracy of the outcomes it produces. Nor does any domestic legal system endorse such a right. To a significant extent each State is entitled to construct its adjudicative

[40] International judges and writers have often expressed the sentiment that there is something special about adjudication or judicial proceedings in particular but without drawing any normative inferences from that sentiment. Paulsson (n 2) 228 ('there is something exceptionally emotive about challenges to national justice. they seem to strike at the heart of national pride'); de Aréchaga (n 1) 278; de Visscher (n 1) 381; Eustathiades (n 2) 308; Freeman (n 1) 33; *Yuille, Shortridge and Co Case* (1861) II Lapradelle and Politis Recueil 101, 103; *Croft (UK v Portugal)* (1856) II Lapradelle and Politis Recueil 22, 24; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain), Second Phase*, ICJ, Separate Opinion of Judge Tanaka, (1970) ICJ Rep 114, 153–156; *Rosinvestco v The Russian Federation*, Final Award of 12 September 2010, SCC Arbitration (079/2005) para 274.

[41] To paraphrase Fuller's statement on the province of adjudication: Fuller and Winston (n 11) 368.

procedures on the basis of a utilitarian calculation of the costs of maintaining those procedures to the community at large versus the benefits afforded to the litigants in any given case.[42] Every adjudicative procedure for which the State is responsible is the embodiment of a compromise along these lines. The finality rule reflects the reality that this compromise can and does produce error at different stages of the adjudicative process. States have uniformly accepted the inevitability of such error by incorporating corrective mechanisms within their systems of adjudication and international law defers to such corrective mechanisms by making the finality rule a constituent element for responsibility in respect of misfeasance or nonfeasance in domestic adjudication.[43]

The finality rule can also be justified by the purpose of an adjudicative process, which is to produce good or correct substantive outcomes. As will be explored in greater detail in Part IV, the proper approach to establishing the requisite threshold for a denial of justice is to link the procedural aspects of the adjudication with the substantive outcome it produces. A denial of justice can only be committed if the substantive right sought to be vindicated is denied in a procedurally unjust manner. That substantive right must have been definitively denied and this is ensured by the operation of the finality rule.

D. The Question of Scope Reformulated

The doctrine of jurisdiction in international law includes a tripartite classification for the exercise of sovereign powers: prescriptive, adjudicative and enforcement.[44] This classification transcends the constitutional doctrine of the separation of powers, which cannot dictate outcomes within the law of international responsibility, in the sense that a single judicial organ can, by way of example, exercise prescriptive, adjudicative and enforcement powers.

The thesis that has been defended is that denial of justice relates to the exercise of adjudicative power and this can be situated within this tripartite scheme. Having recourse to this taxonomy supplied by the doctrine of jurisdiction is not without certain benefits; the chief among them being that the descriptive labels for the three functions underlying the exercise of sovereign powers have a settled meaning in international law.

[42] R Dworkin, 'Principle, Policy, Procedure' in *A Matter of Principle* (OUP 1985).

[43] Some legal systems rely on appellate mechanisms more than others: PD Hansen, 'Stacking Appellate Dissents: Due Process in the Appellate Arena' (1983) 18 ValULRev 141, 144; JH Merryman, *The Civil Law Tradition* (2nd edn, Stanford University Press 1985) 120; MR Damaska, 'Structures of Authority and Comparative Criminal Law' (1975) 84 YaleJIntlL 480.

[44] *Restatement (Third) Foreign Relations Law of the United States*, section 401; FA Mann, 'The Doctrine of Jurisdiction in International Law' in *Studies in International Law* (1973) 2–31; M Akehurst, 'Jurisdiction in International Law' (1974) 46 BYBIL 145, 170–7.

E. The Conclusions on the Scope of Denial of Justice Applied

All the major treatises on denial of justice set out a list of paradigmatic examples of a denial of justice by reference to the historic jurisprudence. In this section the foregoing conclusions on the proper scope of denial of justice will be applied to the taxonomy of examples suggested in the leading treatise by Freeman with illustrative reference to some of the cases he cites as well as to some more recent precedents.

1. Unlawful arrest, detention and harsh treatment during imprisonment[45]

Such acts are an exercise of the State's enforcement power and should not be adjudged as a denial of justice. The prejudice suffered by a victim of unlawful arrest, detention and harsh treatment is immediate and there should be no question of the delict only being consummated upon an unsuccessful attempt to seek recourse through local remedies. In modern international law, these acts would be adjudged in accordance with the rules governing the fundamental right to liberty.

2. Refusal of access to court or its equivalent[46]

It is important to distinguish between access to an adjudicatory process and access to justice within an adjudicatory process. A denial of access to an adjudicatory process will normally be based upon an exercise of enforcement power. For example, in *Golder v UK*,[47] the European Court of Human Rights for the first time interpreted the right to a fair hearing to include a right of access to a court or tribunal. The applicant was a prisoner who was prevented by the prison authority from consulting a solicitor in relation to a potential civil action against a guard who had accused the applicant of participating in a disturbance at the prison. This should not be considered as a denial of justice but as a separate delict encompassed by the international minimum standard. It would be absurd to apply the finality rule to an applicant in the circumstances of *Golder v UK*, who was said to be blocked by an exercise of enforcement power from gaining access to an adjudicatory process. The same would apply to a litigant that is detained by the security services to prevent that person's attendance at a trial.

Turning now to access to justice within an adjudicatory process, any decision by a State adjudicative body to the effect that it will not rule upon the merits of a dispute is capable of constituting a denial of justice. This would

[45] Freeman (n 1) ch VIII. Freeman acknowledged in propounding this category that there was a disagreement among the writers as to whether it constituted a denial of justice: Borchard thought it did, Durand, Rabasa and Eagleton disagreed and preferred to classify the international wrong differently. Ibid 213–14.

[46] Ibid ch IX.

[47] ECHR Case No 4451/70, Judgment of 21 February 1975.

include cases relating to the immunities afforded to a respondent State or State organ.[48] As decisions in such cases will themselves be the product of an adjudicative process, the application of the finality rule is justified.

3. Unreasonable delay in administering justice[49]

There is no difficulty with this as a category of denial of justice, which must logically include nonfeasance as well as malfeasance in the adjudicative process. The complexity, of course, arises in the assessment of what is an 'unreasonable delay' and for that, as Freeman rightly noted, 'the substance of the litigation must be known ... to determine whether there were justifiable causes for the delays complained of'.[50] This correlation between procedural justice and the substantive aspects of the adjudication is explored in Part IV.

4. Irregularities in the conduct of the proceedings[51]

This might be said to be the heart of the matter for denial of justice. The principal treatises on denial of justice collate a formidable number of examples in the historic jurisprudence; for present purposes it will suffice to note that cases involving executive interference with the adjudicative process[52] would not, in accordance with the thesis defended here, fall to be considered as a denial of justice.

For instance, the case of *Robert E Brown*,[53] which is notorious by virtue of the President of South Africa's decision to remove the Chief Justice of the High Court from office after the latter had rendered a judgment in favour of the US engineer, Mr Brown, should not be considered as a denial of justice case.[54] A proclamation was issued by the President allowing individuals to be issued with gold-prospecting licences over a property in South African known as Witfontein farm. Mr Brown then incurred substantial costs in pegging out the areas on that farm for which he intended to apply for such licenses. He duly made his application to the responsible official, who was mandated to grant it in accordance with the terms of the proclamation. Instead that official refused to do so and later informed Mr Brown that the proclamation had been revoked. The legislature subsequently enacted a law that denied anyone who had suffered damage from the revocation the right to seek compensation. The High Court struck down that law as unconstitutional and this is what led to the removal of the Chief Justice.

[48] eg *Fogarty v UK*, ECHR Case No 37112/97, Judgment of 21 October 2001; *Mondev International Limited v United States*, Award of 11 October 2002, ICSID Case No ARB(AF)/99/2.
[49] Freeman (n 1) ch X.
[50] Freeman (n 1) 246.
[51] Ibid ch XI.
[52] ibid 300–3.
[53] *Robert E Brown* (n 9).
[54] *Accord* Freeman (n 1) 101, 110; *Contra* Paulsson (n 2) 51.

The claim was submitted to an arbitral tribunal under clause 1 of the Special Agreement between Great Britain and the United States of 18 August 1910 'as a claim based on the denial in whole or in part of real property rights'.[55] In other words, the claim was treated in essence as a claim for expropriation even if the term 'denial of justice' was used. According to the Tribunal: 'Brown had substantial rights of a character entitling him to an interest in real property or to damages for the deprivation thereof, and that he was deprived of these rights'.[56] The wrong to Brown was consummated upon the revocation of the proclamation and there would be no reason of principle to apply the finality rule to this type of wrong. The executive interference in the adjudicative process in this case was indeed shocking, but it was irrelevant to the basic elements of the expropriation. It was, however, relevant to the local remedies rule, which applied as a procedural matter to arbitrations under the Special Agreement.

The Tribunal had no difficulty in concluding in the light of these facts that any further resort to local remedies would be futile. A denial of justice could have been constituted by the ultimate dismissal of Mr Brown's case by the reconstituted High Court if, on analysis, he had suffered a procedural injustice in that context, but this was not the focus of the claim before the Tribunal.

By contrast, in *Petrobart v Kyrgyzstan*,[57] the executive inference in question was a letter sent by the Vice Prime Minister to the Chairman of the Bishkek Court requesting the suspension of the execution of the judgment in favour of Petrobart and contrary to the interest of a State enterprise. The issuance of such a letter caused no damage to Petrobart's investment *per se*; it only caused damage when it was acted upon by the Bishkek Court in the context of an adjudicative procedure. The claim thus should be analysed as a claim for denial of justice.[58]

5. Responsibility arising from the content of the judgment[59]

The traditional accounts of denial of justice insist that only *procedural* misfeasance or nonfeasance is actionable. International law only intervenes if the authoritative determination of a domestic adjudicator was made in violation of the fundamental requirements of an adjudicative procedure. A central tenet of the orthodox position is that international courts and tribunals cannot exercise substantive review over determinations of domestic law. International responsibility cannot, therefore, arise from an erroneous application of domestic law by a domestic adjudicator.[60]

[55] *Robert E Brown* (n 9) 128.
[56] ibid.
[57] *Petrobart Limited v Kyrgyzstan*, Award of 29 March 2005, SCC Case No 126/2003.
[58] *Amto* (n 22).
[59] Freeman (n 1) ch XII.
[60] ibid 317 (see also authorities listed in note at 318); D Anzilotti, 'La responsabilité internationale des États à raison des dommages soufferts par des étrangers' (1906) 13 Revue

In order to ring-fence the forbidden territory, international courts and writers have drawn a sharp distinction between the substantive determinations of a domestic court judgment and the procedure generating those determinations. International law, according to the orthodox position, is only concerned with the latter: '[d]enial of justice is always procedural'.[61] If the focus of international review is purely procedural, so the theory goes, then the ring fence remains impenetrable; the international court is thereby disabled from second-guessing the application of domestic law by a domestic judge.

There has been sporadic dissent against this orthodox position in the context of the debate as to whether a domestic judgment tainted by some manifest or perverse error of domestic law should nonetheless attract international responsibility. Some international courts and writers have answered this question in the affirmative[62] but the prevailing view is that judicial error in this context is simply evidence of a flawed procedure (such as bias or fraud on the part of the judge) such that the substantive determinations of domestic law, *as determinations of law*, remain shielded from substantive review by an international court.[63] According to this approach, substantive injustice only has evidential value in demonstrating a procedural injustice:

> The relevance of the degree of injustice really lies only in its evidential value. An injust judgment may and often does afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence, if the injustice be sufficiently flagrant, so that the judgment of a kind which no honest and competent court could possibly have given.[64]

The theory at work here is that denial of justice is limited to instances of procedural injustice but that substantive injustice can provide conclusive or strong evidence of procedural injustice. The problem with this theory is that it is nothing more than semantic camouflage for what amounts to a review of the

générale de droit international public 285, 297; P Fauchille, *Traité de droit international public* (Rousseau 1921) vol 1, 533–4; de Visscher (n 1) 376 ('jamais la seule violation du droit interne ne peut former la base d'une réclamation internationale fondée sur un déni de justice'); International Law Commission (Crawford), Second Report on State Responsibility, UN Doc A/CN.4/498 (1999) para 75; *SS Lotus (France v Turkey)*, 1927 PCIJ (Ser A) No 10 (Sept 7) 24; *Robert Azinian v Mexico*, Award on Jurisdiction and Merits of 1 November 1999, ICSID Case No ARB(AF)/97/2, 39, para 99; *Waste Management Incorporated v Mexico*, Award of 30 April 2004, ICSID Case No ARB(AF)/00/3 para 129; *Jan De Nul* (n 22) para 209; *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, Partial Award on Jurisdiction and Liability of 2 September 2009, SCC Case No (064/2008) para 237; *Chevron* (n 15) para 247; *Rosinvest Co UK Ltd v Russian Federation*, Final Award of 12 September 2011, SCC Case No 075/2009, para 272; *Amto* (n 22) para 80; *Iberdrola Energía SA v Guatemala*, Award of 17 August 2012, ICSID Case No ARB/09/5, paras 491, 502, 507; *Albert Jan Oostergetel Theodora Laurentius v Slovak Republic*, Final Award of 23 April 2012, UNCITRAL para 273; Fitzmaurice (n 12) 110; Harvard Law School (EM Borchard), Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners (1929) 23 AJIL Spec Supp 133, 134.

[61] Paulsson (n 2) 98.

[62] Freeman (n 1) 309–17.

[63] Fitzmaurice (n 12) 110–11.

[64] Ibid 112–13.

substantive outcome produced by the domestic court. An international court cannot draw inferences from an injustice caused by substantive error unless it has determined that there has actually been a substantive error through an assessment of the applicable domestic law and that it is a particularly grave error. There is simply no difference in principle between the statements: 'the domestic court got the point hopelessly wrong' and 'no competent domestic court could have decided the point in that way'.[65] The latter statement is merely a reformulation of the first but perhaps with a different rhetorical sting.

The truth is that international courts and tribunals are compelled, in conducting their review of domestic adjudication, to assess the reasonableness of the substantive outcome of the procedure.[66] In some cases the impugned procedural conduct is so flagrant that the substantive outcome is relegated to the background of the review.[67] But even in those cases there would be no claim in the first place unless the substantive outcome was unfavourable to the foreign national. A theory of procedural justice cannot be divorced from substantive outcomes: this will be explored in some detail in Part IV.

5. Inadequate measures to apprehend, prosecute and punish persons guilty of crimes against aliens[68]

Such measures are likely to result from the exercise of enforcement powers by prosecutorial authorities and hence would not fall within the concept of denial of justice defended here. Claims for misfeasance or nonfeasance in respect of the prosecutorial authorities are generally formulated as a breach of the obligation to accord full protection and security or fair and equitable treatment in international investment law rather than a denial of justice.[69] Modern international human rights law would not approach such measures in terms of a right to a fair trial or to due process either. The right to life in Article 2 of the European Convention on Human Rights, for instance, requires the State to have effective criminal laws in place to deter the commission of offences against the person which are 'backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches' of such laws.[70]

[65] A distinction made by Fitzmaurice: ibid 113.

[66] Freeman (n 1) 171 ('It is idle to suppose that the international body is not going to consider the substance of the national court's judicial pronouncements but only the question of whether the state has complied with its international obligations. The gravamen of the complaint involved in many of these cases is whether the judicial proceedings were "regular". How can an international tribunal decide this without reverting to the substance of the original cause of action giving rise to the claim?').

[67] For reasons discussed below, such instances are not properly to be considered within the context of denial of justice.

[68] Freeman (n 1) ch XIII.

[69] Such claims were dismissed in: *GEA Group Aktiengesellschaft v Ukraine*, Award of 31 March 2011, ICSID Case No ARB/08/16, paras 322–323; *Frontier Petroleum Services Ltd v Czech Republic*, Final Award of 12 November 2010, PCA, paras 434–438.

[70] *Osman v UK*, ECHR Case 87/1997/871/1083, Judgment of 28 October 1998, para 90.

6. Non-execution of the judgment[71]

A judgment or arbitral award is a chose-in-action and thus a form of intangible property. As intangible property, a judgment or award can be expropriated by the State. Such was the case, for instance, in the leading decision of the European Court of Human Rights in *Stran Greek Refineries and Stratis Andreadis v Greece*.[72] The Court characterized an arbitral award rendered in Greece as a 'debt ... that was sufficiently established to be enforceable' because it was subject to no further appeal or challenge under the applicable law. It was thus a 'possession' with the meaning of Article 1 of Protocol 1 of the European Convention on Human Rights. The applicant had been deprived of that possession by virtue of a government decree that rendered unenforceable any arbitral award arising out of a contract that had been concluded by the military junta that ruled Greece between 1967 and 1974. This was an executive act outside the framework of adjudication and thus should not be adjudged as a denial of justice in accordance with the thesis defended here.[73]

By way of contrast, the complaint in *Kin-Stib and Majkić v Serbia* would be characterized as a case of denial of justice because the issue of the enforceability of the arbitral award was the subject of an adjudicatory procedure in the Serbian courts that had been tainted by excessive delay.[74]

IV. THE QUESTION OF THRESHOLD: A THEORY OF PROCEDURAL RIGHTS

A. Defining the Problem

The essential basis of a denial of justice is that an individual has suffered a procedural injustice, according to the standards of international law, in seeking to vindicate a substantive right.[75]

What, then, is the threshold for a procedural injustice? What, in other words, are the minimum standards that international law imposes upon a domestic adjudicative procedure? In the course of answering this question, international courts and tribunals have resorted to two techniques. The first is to supplement the concept of procedural fairness with an appropriate adverb to formulate a threshold for responsibility such as 'gross procedural unfairness' or 'fundamental procedural unfairness'. The poverty of this technique, as well

[71] Freeman (n 1) Ch XIV.

[72] ECHR Case No 13427/87, Judgment of 9 December 1994.

[73] It should be noted that the ECtHR held that the Hellenic Government's acts constituted a violation of the right to a fair trial in art 6 as well as a deprivation of a possession under art 1 of Protocol 1 (A1P1) of ECHR.

[74] This is not the way the European court approached the matter: the court found that there had been a breach of A1P1 and this rendered the claim for breach of art 6 moot. *Regent Company v Ukraine*, ECHR Case No 773/03, 29 September 2008; *GEA Group* (n 69); *White Industries* (n 15).

[75] By this I do not mean that only claimants can suffer a denial of justice: a defendant in criminal proceedings has a substantive right not to be subjected to a criminal sanction if he is innocent.

as its propensity to generate arbitrary decisions, does not require further elaboration.[76]

The second technique is to draw upon a list of paradigmatic examples of serious procedural irregularities, whether inductively from past decisions or otherwise, that generate international responsibility for something akin to a denial of justice. The problem with this approach is that whilst it might identify the common types of grievances leading to responsibility as a matter of the historic record, it provides precious little by way of normative guidance.

It is asserted, for example, that gross delay is a classic instance of a denial of justice. But a delay of ten years in the adjudication of a damages claim for breach of contract is not the same as a delay of ten years in disposing of a charge of murder where the accused is incarcerated pending the outcome of the trial. Can the problem be resolved simply by adding the caveat that whether or not delay in domestic adjudication has been 'gross' depends upon the circumstances of the particular case? The answer is no because an international judge cannot determine *which* circumstances are relevant to this assessment unless the judge has a theory for *why* delay is productive of unfairness.

Suppose that substantively-correct decisions were ultimately rendered after a delay of ten years in both the breach of contract case and the murder trial: liability for breach of contract was correctly found and compensation for the expected benefits under the contract together with interest was assessed with complete accuracy; so too in the murder trial the accused was properly acquitted after an exhaustive examination of all the evidence. Has there been a denial of justice in either (or both) cases? One approach might be to adjudge the fairness of a procedure purely by reference to the quality of the outcomes it generates. The value of participation in an adjudicative procedure might be justified instrumentally in terms of facilitating sound judicial reasoning and, particularly in common law systems, good law-making.[77] In line with this approach, the impeccable results produced by the domestic adjudication would be a complete defence to the denial of justice claims in both cases. But this fails to capture what intuitively at least seems to be an important distinction between the cases: the delay was likely to have caused more harm to the accused in the criminal proceedings, who was deprived of the right to liberty for ten years, than to the claimant in the breach of contract case, who was awarded the value of its contractual benefit in today's terms by virtue of a retrospective account of interest.

Another approach might recognize that there is an inherent value in participating in an adjudicative process, in terms of respect for human dignity and autonomy, and procedural fairness must be tested by reference to the way

[76] A criticism can be found in Freeman (n 1) 327–8.

[77] Fuller defended this 'outcome-based' theory: Fuller and Winston (n 11) 364; See generally RG Bone, 'Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation' (1995) 75 BULRev 1273.

in which litigants are treated within that process, independently of the outcome it produces.[78] This appeals to our sense that there is a fundamental distinction between losing and being treated unfairly,[79] and perhaps following that approach it might be concluded that the delay of ten years is productive of a denial of justice in both cases. This theory, however, fails to provide any real guidance as to what specific elements must be guaranteed by a procedure to satisfy a general right of adequate participation.[80] Why must an oral hearing be afforded to an accused instead of merely an opportunity to present a written pleading? In a critique of Ely's process-based constitutional theory,[81] Tribe argued that the 'process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values'.[82] He was right for US constitutional law and equally correct for denial of justice in international law.

Another problem is that such a theory assumes that a distinct harm is inflicted upon a party who is denied adequate participation in a procedure. But is it really possible to separate the harm occasioned by inadequate participation from the harm of an erroneous decision?[83] Can there be an institutional value in guaranteeing participation beyond what is required for an accurate decision?[84] In the words of one writer: 'ones does not often hear stories of individuals who win complaining that they did not get their day in court'.[85]

The purpose of a system of adjudication is to decide cases and generate good outcomes. The merits of an outcome are inexorably linked to the substantive law governing the rights and obligations in question. The procedural aspects of an adjudication are important because they impact upon the magnitude of the risk of error and hence the quality of the substantive outcome in the adjudication. A theory of procedural justice is required to identify the normative

[78] DJ Galligan, *Discretionary Powers* (Clarendon Press 1986) 335; OM Fiss, 'The Allure of Individualism' (1993) 78 IowaLRev 965, 978 ('participation has a value in its own right, manifesting a public commitment to the dignity and worth of the individual'). By linking participation with the legitimacy of the decision itself such a theory can also provide a justification for an obligation to comply with a decision that is known to be substantively wrong: LB Solum, 'Procedural Justice' (2004) 78 SCalLRev 181, 190.

[79] JL Mashaw, *Due Process in the Administrative State* (Yale University Press 1985) 162–3.

[80] Galligan (n 78) 333.

[81] JH Ely, *Democracy and Distrust* (Harvard University Press 1980).

[82] LH Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 YaleLJ 1063, 1064. In the same article he said: 'even the constitution's most procedural prescriptions cannot be adequately understood, much less applied, in the absence of a developed theory of fundamental rights that are secured to persons against the state—a theory whose derivation demands ... controversial substantive choices...' Ibid 1067. Also RG Bone, 'Making Effective Rules: The Need for Procedure Theory' (2008) 61 OklaLRev 319, 329, 334.

[83] Dworkin (n 61) 101–3.

[84] RG Bone, 'Rethinking the "Day in Court" Ideal and Nonparty Preclusion' (1992) 68 NYULR 193, 282.

[85] L Kaplow, 'The Value of Accuracy in Adjudication: An Economic Analysis' (1994) 23 JLS 307, 390 n 249.

constraints on the distribution of this risk in the design and application of procedural rules.

We can draw some preliminary conclusions from the foregoing observations. First, the international obligation to uphold minimum standards within a domestic adjudicative procedure cannot be framed as an obligation to entrench the most accurate procedures for ascertaining the merits of a claim of a substantive right that can possibly be devised regardless of their cost to society.[86] All States are entitled to balance the interests of litigants resorting to their systems for the administration of justice and the interests of the community of taxpayers. No one has a right to a perfect or infallible procedure in any legal system.

Second, the international obligation cannot be formulated as an obligation to have reached the correct substantive outcome in the particular case. This would be tantamount to elevating the substantive rights in question to rights protected by international law.[87] And yet a denial of justice may occur if the vindication of a contractual right in a private agreement is frustrated in the domestic courts even though international law is entirely neutral on whether this substantive right should be recognized and protected within the domestic legal system.

Third, the international obligation must nevertheless be linked in some way to the substantive outcomes produced by the domestic adjudication given that the purpose of a system of adjudication is to decide cases and generate good outcomes.[88]

Fourth, the obligation cannot simply require that the correct procedures are followed in domestic law because that would eliminate the objectivity of the minimum standards.[89] No doubt a breach of the rules establishing the domestic procedures may be an important factor in adjudging a denial of justice in accordance with an international standard, but it cannot be definitive. It cannot be right, for example, to conclude that a judge's *ultra vires* decision to admit hearsay evidence must, *ipso facto*, amount to a denial of justice.

[86] Galligan (n 78) 327.

[87] Formulated differently, the international obligation cannot guarantee the content of any substantive right in domestic law. This principle has been reinforced on many occasions in relation to art 6 of the European Convention on Human Rights: *H v Belgium*, ECHR Case No 8950/80, Judgment of 30 November 1987; *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42 (in relation to civil rights); *R v G* [2008] 1 WLR 1379 (in relation to the criminal law).

[88] Bone (n 77) 332.

[89] Freeman (n 1) 264, 292–3, 299. It should be noted that even if the standard is to ensure that domestic procedural rules are followed then this has value in upholding the principle of legality. If the standard is to impose limitations on the possible range of procedures that can be prescribed by legislatures then obviously this goes further than securing the principle of legality. The expansive interpretation is favoured by the US Supreme Court in respect of the due process clause: *Murray's Lessee v Hoboken Land & Improvement Co*, 59 US (18 How) 272 (1856). See generally on substantive due process: RG Dixon, 'The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon' (1976) BYULRev 43, 84; LH Tribe, 'Substantive Due Process' in L Levy (ed), *Encyclopedia of American Constitutional Law* (1986).

All these conclusions are consistent with the approach taken by the US Supreme Court towards the due process protection in the Fifth Amendment of the Constitution. In a case about whether a person's social security benefits could be terminated without a hearing, the Court said:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[90]

Elsewhere the Court has confirmed that compliance with the standing rules of procedure is not dispositive of compliance with the due process requirements of the Constitution.[91]

B. A Theory of Procedural Rights

We have defined the outer contours of the international obligation but are still a long way from elucidating its core. The immediate difficulty is that there is no clear conception of what fundamental procedural standards must be protected in the design and application of procedural rules within the domestic legal systems themselves. The orthodox view is simply that a balance must be struck between the interests of the individual litigant and in the interests of the political community as a whole. That is merely restating the problem.

The only way out of this conundrum is for international law to adopt a theory of procedural *rights* as the object of international protection through the delict of denial of justice. The concept of 'rights' is important in this context for it carves out a space within which a respondent State is not permitted to argue that the alleged procedural injustice was the product of a legitimate cost–benefit analysis in the design or application of the procedural rules in question. A right in the sense used here is the repository of an argument that must prevail over all others in adjudication, including the utilitarian argument that the costs to the community embodied in procedural rules conducive of greater accuracy of substantive outcomes outweighs the benefits to individual litigants. What should be obvious from the foregoing discussion is that the concept of procedural rights upon which international protection depends must be tailored to the *content* of the substantive right being adjudicated within the national legal system.

[90] *Mathews v Eldridge*, 424 US 319, 334–335 (1976). The Court decided that a hearing was not required based on these three factors.

[91] *Murray's Lessee v Hoboken Land & Improvement Co*, 59 US (18 How) 272 (1856).

We must have a theory of procedural rights that is linked to substantive outcomes. The most compelling articulation of such a theory has come from the pen of Dworkin,[92] who conceptualizes procedural rights as normative constraints upon the acceptable level of risk of substantive error in adjudicative procedures. Every person has a procedural right to a level of risk that reflects equal concern and respect for the importance of the moral harm that might be inflicted by a substantive error in an adjudicative procedure.[93] The theory can be summarized as three propositions, which will be elaborated by reference to the task facing an international tribunal with competence over a denial of justice claim.

First, there is a special kind of injustice that occurs when an adjudicative body erroneously finds against an individual's right in substantive law.[94] This is characterized as 'moral harm' in contradistinction to other types of harm in the form of economic loss or physical suffering that might result from an erroneous decision that is referred to as 'bare harm'. Moral harm is a 'distinct kind of harm against which people must be specially protected'[95] by the State.

Suppose the constitution of a particular State enshrines an absolute right not to be convicted of a crime unless proven guilty in a court of law. The constitution is silent, however, on the procedural aspects of a criminal trial. The State's legislature designs a code of procedural rules in criminal cases by engaging in a type of balancing exercise: it quantifies the estimated suffering of those that would be mistakenly convicted if a procedural rule were adopted against the cost to taxpayers in maintaining that rule in the criminal justice system. If a different procedural rule would reduce the risk of someone being mistakenly convicted without imposing additional costs on taxpayers, then that rule should be preferred.[96] Has the State's legislature discharged its obligation to respect the substantive right in the constitution?

The answer is no. There is a contradiction in adhering to an absolute right not to be convicted if innocent without recognizing that there is something special about the violation of that right, which cannot be captured in a utilitarian cost–benefit analysis that can only take into account bare harm.[97] What is special is that a person wrongly convicted of a crime suffers moral harm and the State has a particular duty to ensure that people within its jurisdiction do not suffer moral harm:[98] '[t]he utilitarian approach ignores the special moral value that make the substantive right a *right*'.[99]

[92] R Dworkin, 'Principle, Policy, Procedure' in *A Matter of Principle* (1985).
[93] Ibid 84–5; RG Bone, 'Procedure, Participation, Rights' (2010) 90 BULRev 1011, 1019.
[94] Dworkin (n 92) 80. [95] ibid 81. [96] ibid 81.
[97] The classic exposition of such an approach is: RA Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 JLS 399.
[98] Dworkin (n 92) 81. [99] RG Bone (n 93) 1011, 1015.

Second, people have a right to adjudicative procedures that attach an appropriate level of importance to the risk of moral harm.[100] If the foundation of the denial of justice claim is the moral harm produced by the content of the procedural rules themselves, an international tribunal would have to assess the risk of moral harm associated with an erroneous decision on the substantive right in question in the domestic proceedings and determine whether the impugned procedural rule attaches an appropriate weight to the risk of that moral harm. Dworkin's stark example of a procedure that would violate this first right is a rule to the effect that criminal cases would be decided by flipping a coin.[101]

In mature legal systems a consensus will emerge on the elements of an adjudicative procedure that are particularly valuable in minimalizing the risk of moral harm. Such elements might be described as basic requirements of due process or the right to a fair trial.[102]

Third, people have a right to a 'consistent weighting of the importance of moral harm'[103] in an adjudicative procedure. This second right is particularly important if the question of whether a procedural rule has been designed to give appropriate weight to the risk of moral harm is controversial such that reasonable people might disagree.[104] It allows the claimant in a denial of justice claim to demonstrate that even if the weight given to the risk of moral harm in the design of the rule is within the margin of appreciation given to States, the application of the rule is nevertheless inconsistent with 'the community's own evaluation of moral harm embedded in the law as a whole'.[105] The claimant has a right to equal treatment in relation to that evaluation. Dworkin gives the example of the number of jurors in a criminal trial.[106] It would be difficult to postulate that only a jury of twelve rather than six members is consistent with giving appropriate weight to the risk of moral harm occasioned by a false conviction. There would be no violation of the first right. But if the practice in a given State over hundreds of years has been to empanel twelve members for a criminal trial, but in the case of a particular accused only six members were empanelled, this would be a violation of the second right. The community's law has evaluated the risk of moral harm as requiring a jury of twelve members and the accused is entitled to equal treatment in that evaluation.

Dworkin had in mind the national community in question and that should certainly be the starting point in an international tribunal's assessment as well.

[100] Dworkin (n 92) 89. Dworkin formulates the right as to procedures that attach the 'correct importance' to the risk of moral harm. For present purposes the right is formulated as the 'appropriate level of importance' to reflect the margin of appreciation that must be afforded by an international tribunal to its assessment of domestic laws.

[101] ibid.

[102] A classic description of which can be found in: T Bingham, 'The Rule of Law' (2007) 66 CLJ 67, 80.

[103] Dworkin (n 92) 89.

[104] Ibid 89.

[105] ibid.

[106] ibid 90–1.

But international law, and in particular its treatment of fundamental rights, must supplement this analysis.

C. The Theory of Procedural Rights Applied

In *Chevron v Ecuador* the Tribunal found that delays of 13 to 15 years in respect of seven claims for breach of contract before the Ecuadorian courts violated the obligation to provide 'effective means' to enforce rights in the USA/Ecuador bilateral investment treaty.[107] At the time of the Tribunal's award, the appellate process had been completed in two cases thus yielding final judgments subject to no further recourse. In two other cases appeals in respect of first instance judgments were still pending. In two further cases there had been judgments at first instance and in the final case there had been no judgment at all.[108] The Tribunal nonetheless found that all such judgments were a nullity as a matter of international law due to the actionable delay that had been consummated by the time that Chevron had filed its notice of arbitration. In accordance with the Tribunal's logic, it followed that it could ignore the substantive findings of the Ecuadorian courts and decide the questions of Ecuadorian law for itself in assessing the damages that would have been awarded by (hypothetical) Ecuadorian courts had they adjudicated the claims in a timely manner.

Suppose the Tribunal was comprised of three arbitrators, each adhering to one of the three theories of procedural fairness outlined above. The first arbitrator, who is concerned only with substantive outcomes, might conclude that in those cases in which the Ecuadorian courts have rendered decisions, there could be no violation of international law in respect of the delay. In those cases in which no decisions had been rendered and thus there were no substantive outcomes at all, the first arbitrator might be prepared to accept a violation of international law so long as the delay attained a particular threshold.

The second arbitrator, who is concerned about the independent value of participating in an adjudicatory procedure, might conclude that inordinate delay in all the cases could amount to a violation of international law regardless of whether decisions had been rendered in individual cases.[109]

The third arbitrator, armed with Dworkin's theory of procedural rights, would approach the cases in the following way. All the seven cases concerned the vindication of Chevron's alleged contractual rights to recover damages from its counterparty. As there was no allegation of impropriety concerning the actual judgments rendered in some of those cases it follows that Chevron's substantive rights had not been denied in those cases. A denial of justice arises when the alleged victim has suffered a procedural injustice, according to the

[107] *Chevron* (n 15) para 270. [108] ibid para 149.

[109] The second arbitrator might be said to adhere to a 'pure' theory of procedural justice in the sense articulated by Rawls: J Rawls, *A Theory of Justice* (Harvard University Press 1971) 86.

standards of international law, in seeking to vindicate a substantive right. In those cases in which judgments had been rendered, there could be no denial of justice unless the delay had somehow undermined the substantive right.[110] This might be the case in a criminal trial but unlikely to pertain to a case for contractual damages, especially if interest is awarded on the amount in dispute.

In relation to the cases in which no judgment had been rendered after 13 to 15 years it is clear that Chevron had not been able to vindicate its substantive right to contractual damages for procedural reasons. The unjustified denial of a substantive right is productive of moral harm. In this case is was not that the procedural rules in question were defective in failing to give appropriate weight to that risk of moral harm, but instead it was the application of those procedures in the particular cases that may have violated Chevron's procedural right to the consistent weighting of the importance of moral harm as disclosed by the best interpretation of how Ecuadorian law and international law as a whole assigns relative importance to different types of moral harm. In approaching this analysis it would be critical to ascertain the weight given by those legal systems to the risk of the type of moral harm suffered by Chevron. That moral harm could be described as the unjustified denial of an economic benefit. The best interpretation of Ecuadorian law and international law is likely to reveal that the avoidance of such moral harm is not at the apex of the legal system's concern as compared with the moral harm associated with, for instance, an unjustified criminal conviction. It would also be important to investigate the average length of proceedings in other cases involving claims for contractual damages in Ecuador to ascertain whether the Ecuadorian legal system has given consistent weight to the risk of moral harm in respect of the seven contractual claims involving Chevron.

The third arbitrator might not dissent from the Tribunal's ultimate ruling that, in respect of the cases in which no judgment had been rendered, a delay of 13 to 15 years constituted a denial of justice. But the third arbitrator would be concerned by the absence of any account of the nature of the harm suffered by the claimant as a result of that delay in the Tribunal's formulation of the threshold for a denial of justice, in contrast with the approach taken by other international courts.[111] Nor was there an analysis of the length of proceedings

[110] This has been the approach of courts interpreting art 6 of the ECHR when there has been excessive delay in rendering a judgment: the judgment will only be quashed if, apart from the excessive delay, it is not safe and it would be unfair to allow it to stand: *Cobham v Frett* [2001] 1 WLR 1775, 1783–1784 (PC); *Bangs v Connex South Eastern Ltd* [2005] 2 All ER 316 (CA).

[111] For instance, the ECHR considers that the threshold for unreasonable delay for the purposes of art 6 of the ECHR is lower in criminal proceedings: *Kalashnikov v Russia*, ECHR Case No 27095/99, Judgment of 12 May 2002, para 132. It has also taken into account the fact that the defendant was detained in custody during the proceedings: *Abdoella v Netherlands*, ECHR Case No 12728/87, 25 November 1992, paras 18–25. In civil cases involving the important substantive rights such as the custody of children, the ECHR has also lowered the threshold for a violation of art 6: *Nuutinen v Finland*, ECHR Case No 32842/96, 27 June 2000. The importance of expediency in criminal proceedings was mentioned in investment cases: *White Industries* (n 15) para 10.4.14; *Roussalis v Romania*, Award of 7 December 2011, ICSID Case No ARB/06/1, para 602.

in like cases in Ecuador. Instead, apart from the length of the delay itself, the Tribunal only took into account the complexity of the cases and whether the claimant's own conduct contributed to the delay.[112]

V. THE RELATIONSHIP BETWEEN DENIAL OF JUSTICE AND OTHER INTERNATIONAL NORMS IN RESPECT OF THE ADJUDICATIVE PROCESS

Now that the contours of denial of justice have been defined, the problem of the relationship between denial of justice and other norms of international law that may be relevant to a domestic adjudication can be addressed. There are two issues. First, are there other forms of international delictual responsibility towards foreign nationals other than denial of justice that can apply to acts and omissions associated with a domestic adjudicative process? Can, for instance, a first instance court decision be attacked as an expropriation rather than a denial of justice, such that there would be no need to adhere to the finality rule? The second issue is the significance that should attach to the transgression of an international legal norm within the context of a domestic adjudication. Is such a transgression actionable as a denial of justice or through some other form of delictual responsibility towards foreign nationals? To give a topical example, is a domestic court decision that is inconsistent with the State's obligations under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards capable of amounting to a denial of justice or some other form of delictual responsibility towards foreign nationals?

A. Is Denial of Justice the Exclusive Form of Delictual Responsibility towards Foreign Nationals for Acts or Omissions Associated with a Domestic Adjudicative Process?

A constituent element of all forms of delictual responsibility toward foreign nationals in international law is damage.[113] This is the case for delictual responsibility under general international law[114] and for the special regime of delictual responsibility established by investment treaties.[115] It is also a

[112] *Chevron* (n 15) paras 253–254.

[113] It is different, of course, in respect of international responsibility vis-à-vis States, which is why the ILC's Articles on State Responsibility are neutral on this point: Commentary to art 2, para 9 in J Crawford, *The International Law Commission's Articles on State Responsibility* (2002) 84.

[114] The invocation of responsibility by diplomatic protection is contingent upon an 'injury'. Art 1 of the ILC's Draft Articles reads: 'For the purposes of the present draft articles, diplomatic protection consists of the invocation by a state, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility.'

[115] Z Douglas, 'The Enforcement of Environmental Norms in Investment Treaty Arbitration' in P-M Dupuy and J Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection* (CUP 2013); *Merrill & Ring Forestry LP v Canada*, Award of 31 March 2010, UNCITRAL, para 245. There is an express provision to that effect in some treaties: art 24(1)(A)(II)

requirement, although possibly less stringent, for the special regimes established by human rights treaties.[116] The element of damage will, however, arise at different times depending on the delict. In respect of forms of delictual responsibility for acts and omissions relating to the exercise of enforcement powers, such as for unlawful expropriation, or breach of the international minimum standard or failure to accord full protection and security, the damage occurs simultaneously with the misfeasance or nonfeasance in question. The situation is different in respect of acts or omissions in the context of an adjudicative procedure. An adjudicative procedure that fails to respect the foreign national's fundamental procedural rights causes damage to that national when the substantive rights sought to be vindicated in that process are finally denied.[117] A first instance court decision cannot, therefore, generate the predicate conduct for delictual responsibility towards a foreign national in international law because at that point in the adjudicative process there is no cognizable damage to that national or its interests produced by the adjudicative process. The decision may be reversed on appeal and with the result that the national's substantive rights are vindicated. Another way of putting the point is that international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.

It can be seen from this analysis that the finality rule for denial of justice works in tandem with the requirement of damage as a constituent element of delictual responsibility towards foreign nationals. Damage can only occur when the adjudicative process reaches its final conclusion. The finality rule places the onus on the foreign national to ensure that the adjudicative process has reached its final conclusion.

With these initial observations in mind, the essence of the problem under review can be revealed through a simple hypothetical. In an investment treaty arbitration, can an investor elect not to seek the reversal of a first instance court decision, which has failed to uphold its putative substantive rights, and claim

of US Model BIT; art 82(1) of 2002 Japan/Singapore FTA. There would be no requirement for damage, however, in any State/State proceedings under the investment treaty.

[116] Under art 34 of the ECHR the claimant must be the 'victim of a violation ... of one of the rights set forth in [the] convention'. *Klass v Germany*, ECHR Case No 5029/71, Judgment of 6 September 1978, para 33 ('Article [34] requires that an individual applicant should claim to have been actually affected by the violation he alleges. Article [34] does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice an individual applicant to claim that the mere existence of a law violate his rights under the Convention; it is necessary to show that the law should have been applied to his detriment.')

[117] See Part IV above linking procedural rights with substantive outcomes; Freeman (n 1) 269 ('[t]he act of misconduct complained of must be such as to prejudice materially the alien's defense or espousal of his rights. only then will it amount to a denial of justice.')

that, as a result of that decision becoming final and binding, it has suffered damage, and that the host State should be liable to pay compensation for that damage because the court decision amounts to an expropriation or some other violation of the investment treaty? Can the investor avoid the application of the finality rule in this way?

These questions must be answered in the negative if the integrity of domestic adjudication is to be preserved. All national legal systems rely upon corrective mechanisms to alleviate the risk of substantive error in adjudicative procedures. All national legal systems accept by the very architecture of the institutions created for adjudicative procedures that substantive errors do routinely occur at the first level of the institutional hierarchy. Some national legal systems even accept a greater risk of substantive error at the first level of the hierarchy by design as a trade-off for securing more efficient and less costly adjudicative procedures at that first level. This is generally the position in civil law countries and the trade-off is perfectly legitimate because it is premised upon a wider access to appellate procedures at the second level of the court hierarchy than would be the case in common law systems, which generally seek to achieve greater accuracy at the first level of the court hierarchy but with the less efficiency and greater costs that entails. Civil law countries thus tend to afford the right to a *de novo* appeal in respect of first-level judicial decisions, a right which is far more circumscribed in common law countries.[118] This distribution of the risk of substantive error within the different levels of the hierarchical system for the administration of justice is an ubiquitous feature of every legal system and it must be respected by international law.[119]

These universal features of national adjudicative systems have traditionally been acknowledged by international law through the finality rule and the margin of appreciation afforded to domestic adjudicative decisions reflected in the principle that mere substantive error cannot provide the predicate conduct for a denial of justice. Delictual responsibility towards foreign nationals within specialized regimes such as investment treaty arbitration must continue to be shaped through deference to these universal features of national adjudicative systems.

The conclusion must be that acts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial of justice and not for any other form of delictual responsibility towards foreign nationals. The national does not suffer damage until its substantive rights have finally been denied as a result of the breach of its procedural rights. This constituent element of the delict only occurs when the domestic adjudicative procedure has reached is final conclusion and the finality rule obliges the national to pursue the adjudicative procedure to its final conclusion. To answer the hypothetical question: a claim for

[118] MR Damaska, 'Structures of Authority and Comparative Criminal Law' (1975) 84 YaleJIntlL 480.

[119] Eustathiades (n 2) 202.

expropriation in respect of a first instance court decision is inadmissible. A claim for denial of justice would have to be made through the medium of the fair and equitable standard of treatment.

B. Can the Transgression of an International Legal Norm within the Context of a Domestic Adjudicative Procedure Supply the Predicate Conduct for Delictual Responsibility towards Foreign Nationals?

A decision of a national adjudicatory body that is simply inconsistent with a rule or norm of international law does not, without more, entail the international responsibility of the State in question. International responsibility is contingent upon a breach of an international obligation of the State owed to another State or States or indeed to the community of States. An obligation is not the same as a rule or norm and for this reason the former term of art was deliberately chosen over the latter by the International Law Commission during the course of elaborating its Articles on State Responsibility.[120] In explaining the reference to an 'obligation' in Article 2 of those Articles, the Commission notes: '[w]hat matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State'.[121] The breach of an international norm only has a delictual character in classical international law if the norm constitutes an obligation on the part of a State towards another State.[122] By way of example, a national court may fail to apply a choice of law rule prescribed in a treaty for the harmonization of private international law. That failure is a breach of an international norm; but whether it is also a breach of an international obligation to a particular State will require a separate analysis.[123]

When we shift from classical international law as regulating relations between States to modern international law which places specific demands on domestic regulation, there is a further element requiring analysis: can non-compliance with a particular international norm within the context of a domestic adjudicative procedure form the predicate conduct for delictual responsibility towards foreign nationals? As this question reveals, a link between a breach of an international norm and delictual responsibility to an

[120] R Ago, 'Second Report on State Responsibility—The Origin of International Responsibility' (1970) A/CN.4/233, II Yearbook of the ILC, para 45.

[121] Commentary to art 2 in J Crawford, *The International Law Commission's Articles on State Responsibility* (CUP 2002) 85.

[122] This appears to have been overlooked by Fitzmaurice (n 12) 110 ('[I]t is generally admitted, and there is ample authority for the view, that the judgments of municipal courts applying international law will, if they misapply international law, *ipso facto* involve the responsibility of the state (at any rate if acted upon) even though rendered in perfect good faith by an honest and competent court').

[123] Suppose the court proceedings involved a national of a State not party to the treaty in which the harmonized choice of law rule is prescribed. [*Application of the Convention of 1902 Governing the Guardianship of Infant (The Netherlands v Sweden)*, Judgment of 28 November 1958, (1958) ICJ Rep 55, 64.]

individual must be established separately from the position that would pertain as between States on the international plane.

This issue has arisen with recent frequency before international courts and tribunals in respect of international norms for the recognition and enforcement of foreign arbitral awards.[124] In *Frontier v Czech Republic*,[125] the foreign arbitral award in question was rendered in favour of Frontier Petroleum in a dispute with a Czech State-owned company ('LET') by an arbitral tribunal with its seat in Stockholm. While those arbitration proceedings were pending, LET was declared to be insolvent by the Czech courts. When Frontier Petroleum later sought to enforce the award in the Czech Republic, and in particular the orders directing the bankruptcy trustees to grant a first secured charge against the assets of LET, the Czech courts refused by reference to the public policy exception in Article V(2)(b) of the New York Convention on the basis that such enforcement would be inconsistent with the Czech insolvency regime requiring the equality of creditors and the equitable and orderly distribution of assets. An international tribunal was constituted to determine whether this refusal to enforce amounted to a breach of the fair and equitable standard of treatment under the applicable investment treaty. That Tribunal formulated the threshold of liability under that standard as follows: 'whether the conclusion reached by the Czech courts applied a plausible interpretation of the public policy ground in Article V(2)(b) of the New York Convention'.[126]

It is generally accepted that no delictual responsibility towards foreign nationals can arise from an 'implausible interpretation' of national law by national courts. So what is special about Article V(2)(b) of the New York Convention such that an implausible interpretation of that provision can, without more, lead to delictual responsibility towards a foreign national through a breach of the fair and equitable standard of treatment? This question was not addressed in the Tribunal's reasoning and yet it is surely the crux of the matter.

Is the public policy exception in Article V(2)(b) of the New York Convention special simply because it is an international norm? Such an argument is untenable and yet it appears to have been implicitly accepted by the international tribunals that have considered the matter. It is untenable because it fails to recognize the difference between a court decision that is inconsistent with an international norm and a court decision that provides the predicate conduct for delictual responsibility towards a foreign national under

[124] In assessing this chaotic jurisprudence, it is first important to exclude those cases that are not concerned with delictual responsibility in relation to domestic adjudicative processes as peripheral to the specific problem under investigation. Once an arbitral award is final and binding and not subject to further judicial review, it is a chose-in-action (intangible property) that is capable of being expropriated by the exercise of the State's enforcement powers. Thus, in accordance with the thesis on the scope of denial of justice presented here, such cases would not fall to be considered as denial of justice cases. This applies to *Stran Greek Refineries* (n 72), concerning legislation rendering an arbitration award a nullity.

[125] *Frontier* (n 69).

[126] ibid para 527. In the next sentence that Tribunal elaborated: 'put another way, was the decision by the Czech courts reasonably tenable and made in good faith?'.

international law. When a driver exceeds the speed limit and collides with another vehicle and thereby injures a passenger in that other vehicle, the driver has violated a legal norm contained in the rules of the road. But that violation does not, *ipso facto*, conclude the matter in respect of the victim's entitlement to compensation. To get compensation, the victim has to establish the delictual responsibility of the driver through the tort of negligence. The driver's violation of the rules of the road will no doubt be relevant to the question of whether there was a breach of the standard of care, but it will not be dispositive and it will also not discharge the victim's burden of establishing the other elements of negligence. In the context of the New York Convention, a national court decision inconsistent with an international norm prescribed by that convention may give rise to international responsibility on the part of the State in question vis-à-vis the other State parties. But for the same national court decision to give rise to delictual responsibility in international law to a foreign national, inconsistency with a New York Convention norm is not sufficient. The source of delictual responsibility in this instance is not the New York Convention but instead the fair and equitable standard of treatment under the investment treaty, which can be usefully compared to cause of action in tort in domestic law.[127]

How, then, must an international tribunal approach a claim to the effect that a domestic court decision, which is alleged to be inconsistent with an international norm contained in the New York Convention, constitutes a breach of the fair and equitable standard of treatment? The answer is that it must be approached as a denial of justice claim. If the petitioner has been finally denied a substantive right to the enforcement of a foreign arbitral award by an adjudicative procedure that has failed to respect the petitioner's fundamental procedural rights, then delictual responsibility will be established. The finality rule must apply. Delictual responsibility cannot result from a first instance decision that fails to uphold the petitioner's substantive right to the enforcement of an award.

There is no valid distinction in respect of substantive outcomes resting upon a domestic court's interpretation of international norms and substantive outcomes resting upon a domestic court's interpretation of domestic norms. When the cause of action at the international level is for delictual responsibility to a foreign national, the focus of the inquiry at the international level cannot be whether the domestic court arrived at a 'plausible interpretation' of an international norm; instead the focus must be on whether the domestic court denied the national's substantive rights (whether their source is international law or domestic law) in a manner that was violative of that national's procedural rights as protected by international law. This is not to say that a court decision, independently of constituting a denial of justice, might also constitute an

[127] Z Douglas, 'The Enforcement of Environmental Norms in Investment Treaty Arbitration' in Dupuy and Viñuales (n 115) 418–24.

international wrong to another State by virtue of the court's transgression of an international norm. But the focus here is on a State's delictual responsibility to foreign nationals and the only route to such responsibility is through denial of justice.

Any other approach would serve to vest international tribunals with appellate jurisdiction over the substantive outcomes in domestic adjudicative procedures. This can be demonstrated in *Frontier* by the Tribunal's reasoning directed to confirming the 'plausibility' of the decision of the Czech courts on Article V(2)(b) of the New York Convention. First, the Tribunal noted that national courts in other countries have reached similar decisions by invoking the principle of the equality of creditors in insolvency proceedings to deny the enforcement of a foreign arbitral award. Then the Tribunal continued:

> In the present case, Claimant's central claim was that it should receive preferential treatment (a first secured charge) on the strength of the Stockholm Award. This would have given it preference over other creditors who had participated and complied with a broad scheme which ensured the equal treatment of creditors. Inevitably, this would have worked to the detriment of the other creditors in the bankruptcy proceedings. In fact, it would have defeated the right of all the other creditors given the size of Claimant's claim and the limited assets available. The full enforcement of the Stockholm Award would have seriously affected the position of the other creditors who had no part in the Stockholm proceedings and had never consented to them. The Tribunal considers that this consideration helps to support the point that the Czech courts' interpretation of the notion of 'public policy' under the New York Convention was not unreasonable or impossible.[128]

In this passage, the Tribunal provides (unimpeachable) reasons to agree with the substantive outcome of the adjudicative process before the Czech courts as it related to the interpretation of Article V(2)(b) of the New York Convention. It is a passage that would have added sophistication to an appellate decision, save perhaps for the final sentence in which the Tribunal, unsurprising in light of what preceded, sought to disavow its role as an arbiter of substantive correctness. But it is not a passage that is directed to the proper issues arising in the adjudication of international delictual responsibiltity for the results of domestic adjudication.

Foreign nationals do not have a general right to reparation for damage caused when States to do not comply with their international obligations to other States. The obligations to accord various minimum standards of treatment to foreign nationals in general international law and investment treaties do not operationalize such a general right. An exercise of enforcement power that is inconsistent with an international norm may give rise to delictual responsibility to a foreign national in different forms. But an exercise of adjudicative power can only do so through the medium of a denial of justice. International

[128] *Frontier* (n 69) para 530.

norms enter the domestic adjudicative process through their judicial interpretation and application to a set of facts. Some international tribunals, such as the European Court of Human Rights, have the competence to adjudge the correct interpretation or application of international norms by a domestic court. They have thus been delegated the power to substitute their conception of the most rational interpretation and application of those norms for that of the domestic court. But no such right is conferred upon international tribunals with competence to adjudge the delictual responsibility to foreign nationals that might result from the domestic court's decision. That is the position of tribunals established by investments treaties and the Iran/US Claims Tribunal.

VI. DENIAL OF JUSTICE: A RESTATEMENT

The principal conclusions in this article will now be set out in the form of a restatement of denial of justice.

1. The essential basis of a denial of justice is that a foreign national has suffered a procedural injustice, according to the standards of international law, in seeking to vindicate a substantive right within an adjudicative procedure for which the State is responsible in international law.
2. The acts or omissions of the State must be an exercise of adjudicative power rather than prescriptive or enforcement power.
3. The source of the substantive right can be domestic law or international law.
4. A denial of justice is not consummated until the foreign national's substantive right has been finally denied within the adjudicative procedure. The onus is on the national to resort to all the available remedies afforded by that adjudicative procedure provided that resort to such remedies would not be futile.
5. A foreign national suffers a procedural injustice in seeking to vindicate a substantive right if the adjudicative procedure does not attach an appropriate level of importance to the risk of moral harm that could be inflicted upon the national by an erroneous decision on the substantive right in question or if the adjudicative procedure does not reflect a consistent weighting of the importance of the moral harm as reflected in the State's own evaluation of moral harm embedded in the law as a whole.
6. Denial of justice is the sole form of international delictual responsibility towards foreign nationals for acts or omissions within an adjudicative procedure for which the State is responsible.
7. A decision produced by an adjudicative procedure for which the State is responsible is not a denial of justice merely because it is inconsistent with an international norm binding upon the State. International delictual responsibility to foreign nationals is not the same as international responsibility towards States for the violation of the treaty establishing the international norm.

ANNEX 179

Public Version

In The Matter Of Two Arbitrations Under Chapter 11 Of The NAFTA And The UNCITRAL Arbitration Rules (1976)

B e t w e e n:

APOTEX INC.

Claimant

– and –

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent

AWARD ON JURISDICTION AND ADMISSIBILITY

The Arbitral Tribunal:

Hon. Fern M. Smith
Mr. Clifford M. Davidson
Mr. Toby T. Landau QC *(Presiding Arbitrator)*

Secretary to the Tribunal: Ms. Aurélia Antonietti

Annex 179

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277. The starting point is to recall the very serious nature of the allegations against the U.S. judicial system in Apotex's Pravastatin Claim. Apotex asserts that the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the D.C. Circuit, administered justice so deficiently as to violate Apotex's rights under the U.S. Constitution, and to put the United States in breach of its international law obligations under the NAFTA. Yet, at the same time (and notwithstanding the gravity of the alleged breaches), Apotex elected not to allow the U.S. Supreme Court all possible opportunities to correct the alleged errors and transgressions. Instead, Apotex now requests that this Tribunal – in effect – substitute itself for the U.S. Supreme Court, and sit as a supranational appellate court, to review the judicial decisions of lower U.S. courts. The Tribunal declines to do so, for three reasons.

278. First, as a general proposition, it is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court. This has been repeatedly emphasised in previous decisions. For example:

(a) ***Mondev*** Award, at paragraph 126:[135]

> "Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal."

(b) ***Azinian*** Award, at paragraph 99:[136]

> "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA."

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[135] ***Mondev Int'l Ltd. v. United States***, NAFTA/ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002).

[136] ***Azinian v. United Mexican States***, NAFTA/ICSID Case No. ARB(AF)/97/2, Award (1 Nov. 1999).

(c) ***Waste Management*** Award, at paragraph 129:[137]

> "Turning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties."

279. Second, and related to this, the "obvious futility" threshold is a high one. This necessarily follows from the nature of the rule to which it is an exception.

280. The requirement that local judicial remedies be exhausted before judicial acts may found an international complaint was said by both Parties to flow from two sources: (a) NAFTA Article 1101, by which any impugned act must be a "*measure adopted or maintained*" by the host State (and the proposition that a judicial act is not a measure adopted or maintained by the State unless "final"); and (b) customary international law, as applicable by virtue of NAFTA Article 1131, which provides that:

> "A tribunal established under this section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law."

281. As a matter of customary international law, both Parties asserted that an act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate State responsibility - unless such recourse is obviously futile. As summarised on behalf of the Respondent:

> "The finality requirement is fundamental to claims that may result in holding a State's Judiciary in violation of international law. National judicial systems including those of the three NAFTA Parties, provide for higher courts to correct errors below. Decisions by higher courts harmonise the interpretation and application of the law by lower courts. A finding by an International Tribunal such as this one, that national courts violated

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[137] ***Waste Management Inc. v. United Mexican States***, NAFTA/ICSID Case No. ARB(AF)/00/3, Award (30 Apr. 2004).

> international law implicates a systemic failure of the national judiciary. International law recognises, therefore, that the national court system must be given a chance to correct errors."[138]

282. Although both Parties asserted that this rule applies to all causes of action premised upon judicial acts, both Parties primarily invoked authorities concerning denial of justice claims.[139] Such claims depend upon the demonstration of a systemic failure in the judicial system. Hence, a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself. In the words of Jan Paulsson, *Denial of Justice in International Law* 108 (2005):

> "For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself."

And as stated in ***Loewen Group v. United States***:

> "The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."[140]

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[138] Transcript, Day 1, pages 162-3.

[139] There is a live issue in the context of NAFTA as to whether the "finality" rule, or the requirement that local judicial remedies be exhausted, applies to <u>any</u> claim arising out of a judicial act, or merely "denial of justice" claims (or claims within the category of FET). This issue, however, was not pursued by the Parties in this case. Instead, both Parties relied upon the analysis in ***The Loewen Group, Inc. and Raymond L. Loewen v. United States of America,*** ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), in which the obligation to exhaust local remedies in a case in which the alleged violation of international law is founded upon a judicial act was applied to claims under NAFTA Articles 1102 and 1110 as well as Article 1105 (see ***Loewen,*** Award, para. 165, by reference, *inter alia*, to ***The Finnish Ships Arbitration Award***, 3 R. INT'L ARB. AWARDS 1480, 1495, 1503-05 (9 May 1934) and ***Nielsen v. Denmark*** [1958-1959] Y.B. EUR. COMM'N H.R. 412 at 436, 438, 440, 444).

[140] ***Loewen***, Award, para. 156. The same basic principle has a long and broader heritage. *See e.g.*, Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad 198 (1915) ("*It is a fundamental principle that*

ANNEX 180

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

CASE NO. V (064/2008)

IN THE MATTER OF THE ARBITRATION

MOHAMMAD AMMAR AL-BAHLOUL

v.

REPUBLIC OF TAJIKISTAN

PARTIAL AWARD ON JURISDICTION AND LIABILITY

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founding agreement and which may not exceed one year from the moment of State registration of the company." (Article 18(1)).

236. In reaching its decision to order the reduction of Vivalo's share in Petroleum SUGD, the court relied on Article 22(2) of the Tajik Law on Limited Liability Companies which provides: *"In case of non full payment of the charter capital of the company within one year from the moment of its State registration, the company shall either reduce its charter capital to the actual amount paid in and register its reduction in the established manner, or take a decision on liquidation of the company."*

237. While this Tribunal finds the position taken by the court to be more persuasive than that taken by Mr. Nasrulloyev, it is not the role of this Tribunal to sit as an appellate court on questions of Tajik law. Suffice it to say, we do not find the Tajik court's application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for Claimant's claim of denial of justice.

d) Breach of Due Process by Failure to Issue Licenses

238. Claimant alleges essentially the same facts here as in the claim based on unfair and inequitable treatment with respect to the issuance or non-issuance of licenses.

239. The Tribunal considers that this claim fails here for the reasons already given in that section of the present Award.

ANNEX 181

Responsibility of States for Internationally Wrongful Acts

2001

Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2001*, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

Responsibility of States for Internationally Wrongful Acts

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

GENERAL PRINCIPLES

Article l

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

ATTRIBUTION OF CONDUCT TO A STATE

Article 4

Conduct of organs of a State

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

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

ANNEX 182

Draft articles on
Responsibility of States for Internationally Wrongful Acts, with commentaries

2001

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term "internal law" is preferred to "municipal law", because the latter is sometimes used in a narrower sense, and because the 1969 Vienna Convention speaks of "internal law". Still less would it be appropriate to use the term "national law", which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.[91] In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

[91] Cf. *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.

Chapter II

ATTRIBUTION OF CONDUCT TO A STATE

Commentary

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.[92]

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece.[93] This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Commission stated that:

> The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.[94]

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link

[92] See, e.g., I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, "The basis of responsibility: attribution and other trans-substantive rules", *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; L. Condorelli, "L'imputation à l'État d'un fait internationalement illicite : solutions classiques et nouvelles tendances", *Recueil des cours…, 1984–VI* (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p. 9; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris, Pedone, 1994); A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours…, 1955–II* (Leiden, Sijthoff, 1956), vol. 88, p. 261; and F. Przetacznik, "The international responsibility of States for the unauthorized acts of their organs", *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

[93] League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

[94] *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[95] In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.[96] Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.[97] Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[98] Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.[99]

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*[100]), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the Iran-United States Claims Tribunal has affirmed, "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State".[101] This follows already from the provisions of article 2.

[95] See *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above).

[96] See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

[97] The point was emphasized, in the context of federal States, in *LaGrand* (see footnote 91 above). It is not of course limited to federal States. See further article 5 and commentary.

[98] See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

[99] See article 7 and commentary.

[100] See article 55 and commentary.

[101] *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 17 , p. 92, at pp. 101–102 (1987).

Article 4. Conduct of organs of a State

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

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Commentary

(1) *Paragraph 1* of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority."[102] There have been many statements of the principle since then.[103]

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference[104] were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State".[105]

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the tribunal said that:

> a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.[106]

ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

> According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule … is of a customary character.[107]

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.[108] As PCIJ said in *Certain German Interests in Polish Upper Silesia (Merits)*:

[102] Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

[103] See, e.g., *Claims of Italian Nationals* (footnote 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

[104] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), pp. 25, 41 and 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (document C.75(a)M.69(a).1929.V), pp. 2–3 and 6.

[105] Reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

[106] See *Salvador Commercial Company* (footnote 103 above). See also *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid.*, vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

[107] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

[108] As to legislative acts, see, e.g., *German Settlers in Poland* (footnote 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote 34 above), at pp. 25–26; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, at pp. 193–194. As to executive acts, see, e.g., *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above); and *ELSI* (footnote 85 above). As to judicial acts, see, e.g., *"Lotus"* (footnote 76 above); *Jurisdiction of the Courts of Danzig* (footnote 82 above); and *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at pp. 21–22. In some cases, the conduct in question may involve both executive and judicial acts; see, e.g., *Application of the Convention of 1902* (footnote 83 above) at p. 65.

From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[109]

Thus, article 4 covers organs, whether they exercise "legislative, executive, judicial or any other functions". This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words "or any other functions".[110] It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law.[111] Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,[112] and it might in certain circumstances amount to an internationally wrongful act.[113]

(7) Nor is any distinction made at the level of principle between the acts of "superior" and "subordinate" officials, provided they are acting in their official capacity. This is expressed in the phrase "whatever position it holds in the organization of the State" in article 4. No doubt lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.[114]

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.[115]

This principle was strongly supported during the preparatory work for the 1930 Hague Conference. Governments were expressly asked whether the State became responsible as a result of "[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)". All answered in the affirmative.[116]

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the *"Montijo"* case is the starting point for a consistent series of decisions to this effect.[117] The French-Mexican Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "... cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".[118] That rule has since been consistently applied. Thus, for example, in the *LaGrand* case, ICJ said:

Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.[119]

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[109] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

[110] These functions might involve, e.g. the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as "guidance" it is clearly attributable to the State. See, e.g., GATT, Report of the Panel, Japan–Trade in Semi-conductors, 24 March 1988, paras. 110–111; and WTO, Report of the Panel, Japan–Measures affecting Consumer Photographic Film and Paper (WT/DS44/R), paras. 10.12–10.16.

[111] See article 3 and commentary.

[112] See, e.g., the decisions of the European Court of Human Rights in *Swedish Engine Drivers' Union* v. *Sweden, Eur. Court H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström* v. *Sweden, ibid., Series A, No. 21* (1976), at p. 15.

[113] The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission (see *Yearbook ... 1998*, vol. II (Part Two), p. 17, para. 35).

[114] See, e.g., the *Currie* case, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 21, at p. 24 (1954); *Dispute concerning the interpretation of article 79* (footnote 106 above), at pp. 431–432; and *Mossé* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 486, at pp. 492–493 (1953). For earlier decisions, see the *Roper* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 145 (1927); *Massey, ibid.*, p. 155 (1927); *Way, ibid.*, p. 391, at p. 400 (1928); and *Baldwin, ibid.*, vol. VI (Sales No. 1955.V.3), p. 328 (1933). Cf. the consideration of the requisition of a plant by the Mayor of Palermo in *ELSI* (see footnote 85 above), e.g. at p. 50, para. 70.

[115] UNRIAA, vol. XIII (Sales No. 64.V.3), p. 150, at p. 161 (1951). For earlier decisions, see, e.g., the *Pieri Dominique and Co.* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 139, at p. 156 (1905).

[116] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 104 above), p. 90; *Supplement to Vol. III …* (*ibid.*), pp. 3 and 18.

[117] See Moore, *History and Digest*, vol. II, p. 1440, at p. 1440 (1874). See also *De Brissot and others*, Moore, *History and Digest*, vol. III, p. 2967, at pp. 2970–2971 (1855); *Pieri Dominique and Co.* (footnote 115 above), at pp. 156–157; *Davy* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 467, at p. 468 (1903); *Janes* case (footnote 94 above); *Swinney*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 101 (1925); *Quintanilla*, *ibid.*, p. 101, at p. 103 (1925); *Youmans*, *ibid.*, p. 110, at p. 116 (1925); *Mallén*, *ibid.*, p. 173, at p. 177 (1927); *Venable*, *ibid.*, p. 218, at p. 230 (1925); and *Tribolet*, *ibid.*, p. 598, at p. 601 (1925).

[118] UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

[119] *LaGrand, Provisional Measures* (see footnote 91 above). See also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J.Reports 2001*, p. 466, at p. 495, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,[120] the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.[121] This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) *Paragraph 2* explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term "government" refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[122] Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.

(12) The term "person or entity" is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term "entity" is used in a similar sense[123] in the draft articles on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.[124] The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connexion with the official function and was, in fact, merely the act of a private individual".[125] The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.[126] In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

Article 5. Conduct of persons or entities exercising elements of governmental authority

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

Commentary

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

[120] See, e.g., articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

[121] See, e.g., article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

[122] See, e.g., the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. *VI ZR* 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

[123] See *Yearbook … 1991*, vol. II (Part Two), pp. 14–18.

[124] *Mallén* (see footnote 117 above), at p. 175.

[125] UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929). See also the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) ("a wanton trespass … under no color of official proceedings, and without any connection with his official duties"); and the *Castelain* case *ibid.*, p. 2999 (1880). See further article 7 and commentary.

[126] See paragraph (7) of the commentary to article 7.

(2) The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[127]

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

> when, by delegation of powers, bodies act in a public capacity, *e.g.*, police an area … the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.[128]

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Committee of the Conference was unable in the time available to examine it:

> A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such … autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.[129]

(5) The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).

(6) Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

Article 6. Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is

[127] *Hyatt International Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

[128] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (see footnote 88 above), p. 90. The German Government noted that these remarks would extend to the situation where "the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force", *ibid.*

[129] *Ibid.*, p. 92.

acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Commentary

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.[130]

(3) Examples of situations that could come within this limited notion of a State organ "placed at the disposal" of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.[131]

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ "placed at the disposal" of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the "beneficiary" State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.[132]

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be "acting in the exercise of elements of the governmental authority" of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of "transferred responsibility". Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that: "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power."[133] It is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul's acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[134] At the relevant time Liechtenstein was not

[130] Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others* v. *Italy and Albania*, application No. 39473/98, *Eur. Court H.R.*, decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

[131] See also article 47 and commentary.

[132] For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

[133] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

[134] *X and Y* v. *Switzerland*, application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights, 1977*, vol. 20 (1978), p. 372, at pp. 402–406.

a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.[135]

(8) A further, long-standing example of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[136] There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.[137] In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

Article 7. Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Commentary

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.[138] Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,[139] State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity".[140] As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."[141] At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but

[135] See also *Drozd and Janousek* v. *France and Spain, Eur. Court H.R., Series A, No. 240* (1992), paras. 96 and 110. See also *Controller and Auditor-General* v. *Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan* v. *Davison*, *ibid.*, vol. 108, p. 622.

[136] For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series*, vol. 1216, No. 19617, p. 151).

[137] See, e.g., article 89 of the Rome Statute of the International Criminal Court.

[138] See, e.g., the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

[139] In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., the following cases: *"Only Son"*, Moore, *History and Digest*, vol. IV, pp. 3404–3405; *"William Lee"*, *ibid.*, p. 3405; and *Donoughho's*, *ibid.*, vol. III, p. 3012. Where the question was expressly examined, tribunals did not consistently apply any single principle: see, e.g., the *Lewis's* case, *ibid.*, p. 3019; the *Gadino* case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the *Lacaze* case, Lapradelle-Politis, vol. II, p. 290, at pp. 297–298; and the *"William Yeaton"* case, Moore, *History and Digest*, vol. III, p. 2944, at p. 2946.

[140] For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

[141] Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

of their apparent authority".[142] It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed "by virtue of … official capacity". In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".[143] The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

> International responsibility is … incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.[144]

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[145] It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: "A Party to the conflict … shall be responsible for all acts committed by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".[146]

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

> that the two officers, even if they are deemed to have acted outside their competence … and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.[147]

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

> This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[148]

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".[149]

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.[150] In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e.

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[142] "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. V, p. 575; and "Miller", *ibid.*, pp. 570–571.

[143] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), point V, No. 2 (*b*), p. 74, and *Supplement to Vol. III …* (see footnote 104 above), pp. 3 and 17.

[144] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* ..., document C.351(c)M.145(c).1930. V (see footnote 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook … 1975*, vol. II, pp. 61–70.

[145] For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity" (*Yearbook ... 1961*, vol. II, p. 53).

[146] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

[147] *Caire* (see footnote 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica, ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Youmans* (footnote 117 above); *Mallén*, *ibid.*; *Stephens*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd* v. *United States*, 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

[148] *Velásquez Rodríguez* (see footnote 63 above); see also ILR, vol. 95, p. 232, at p. 296.

[149] *Petrolane, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

[150] One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.[151] Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.[152]

Article 8. Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Commentary

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.[153] Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.[154] In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the contras was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan operatives.[155] But it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. It concluded that:

> [D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.
>
> …
>
> All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[156]

Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be

[151] See *ELSI* (footnote 85 above), especially at pp. 52, 62 and 74.

[152] See further article 44, subparagraph (*b*), and commentary.

[153] Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

[154] See, e.g., the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.)* v. *Germany (Sabotage* cases*)*: "*Black Tom"* and *"Kingsland"* incidents, *ibid*., vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

[155] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 51, para. 86.

[156] *Ibid.*, pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid.*, p. 189, para. 17.

insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić*, case, the Chamber stressed that:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[157]

The Appeals Chamber held that the requisite degree of control by the Yugoslavian "authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[158] In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.[159] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.[160]

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.[161] The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[162] Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[163] On the other hand, where there was evidence that the corporation was exercising public powers,[164] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[165] the conduct in question has been attributed to the State.[166]

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

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State's responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.

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[157] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94-1-T (1997)), see ILR, vol. 112, p. 1.

[158] ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

[159] See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

[160] The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (see footnote 101 above), p. 103. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou* v. *Turkey, Merits, Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid., Preliminary Objections, Eur. Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

[161] *Barcelona Traction* (see footnote 25 above), p. 39, paras. 56–58.

[162] For example, the Workers' Councils considered in *Schering Corporation* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984); *Otis Elevator Company* v. *The Islamic Republic of Iran, ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company* v. *The Government of Iran, ibid.*, vol. 17, p. 153 (1987).

[163] *SEDCO, Inc.* v. *National Iranian Oil Company*, *ibid*., vol. 15, p. 23 (1987). See also *International Technical Products Corporation* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

[164] *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (see footnote 149 above).

[165] *Foremost Tehran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. *ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc.* v. *The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

[166] See *Hertzberg et al.* v. *Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X* v. *Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights, 1971*, vol. 14 (1973), p. 199; and *Young, James and Webster* v. *the United Kingdom, Eur. Court H.R., Series A, No. 44* (1981).

The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words "person or group of persons", reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus, while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

Article 9. Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Commentary

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:[167] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus, the position of the Revolutionary Guards or "Komitehs" immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.[168]

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.[169]

(5) In respect of the second condition, the phrase "in the absence or default of" is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase "absence or default" seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term "call for" conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.[170]

[167] This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

[168] *Yeager* (see footnote 101 above), p. 104, para. 43.

[169] See, e.g., the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* Governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

[170] See, e.g., the *Sambiaggio* case, UNRIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

Article 10. Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Commentary

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions[171] and arbitral tribunals[172] have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a "well-established principle of international law", that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[173] Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (*a*) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (*b*) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.[174]

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term "conduct" only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity be-

[171] See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *History and Digest*, vol. III, p. 2873; *McKenny* case, *ibid.*, p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

[172] See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

[173] UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio* case (footnote 170 above), p. 524.

[174] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (see footnote 88 above), p. 108; and *Supplement to Volume III* … (see footnote 104 above), pp. 3 and 20.

tween the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) *Paragraph 1* of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase "which becomes the new Government" is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of Governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) *Paragraph 2* of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression "or in a territory under its administration" is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement's actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (art. 1, para. 2). This definition of "dissident armed forces" reflects, in the context of the Protocols, the essential idea of an "insurrectional movement".

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include "insurrectional or other" movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts.[175] From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.[176] Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

> The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.[177]

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law".[178] In the *Pinson* case, the French-Mexican Claims Commission ruled that:

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[175] See H. Atlam, "National liberation movements and international responsibility", *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

[176] As ICJ said, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

[177] UNRIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, p. 510, at p. 513 (1903).

[178] *Ibid.*, vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid.*, vol. IX (Sales No. 59.V.5), p. 119 (1902).

if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused ... by offences committed by successful revolutionary forces, the responsibility of the State ... cannot be denied.[179]

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis of Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." [180] Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case, the Supreme Court of Namibia went even further in accepting responsibility for "anything done" by the predecessor administration of South Africa.[181]

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

[179] *Ibid.*, vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

[180] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), pp. 108 and 116; and Basis of discussion No. 22 (*c*), *ibid.*, p. 118; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224, document A/CN.4/96.

[181] Guided in particular by a constitutional provision, the Supreme Court of Namibia held that "the new government inherits responsibility for the acts committed by the previous organs of the State", *Minister of Defence, Namibia* v. *Mwandinghi, South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd.* v. *Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

Article 11. Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Commentary

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus, like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction … and eventually continued by her, even after the acquisition of territorial sovereignty over the island".[182] In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.[183] However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a

[182] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

[183] The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").

State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.[184]

In that case it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[185] In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.[186] This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann's captors as a "volunteer group".[187] Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of, or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.[188] ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".[189] These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies, States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of

[184] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 35, para. 74.

[185] *Ibid.*, pp. 31–33, paras. 63–68.

[186] *Lighthouses* arbitration (see footnote 182 above), pp. 197–198.

[187] *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

[188] The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

[189] See footnote 59 above.

events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Commentary

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (*b*), when such conduct constitutes "a breach of an international obligation of the State". This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.[190] In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless, a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

[190] See paragraphs (2) to (4) of the general commentary.

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.[191]

Article 12. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Commentary

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State—i.e. between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example, ICJ has used such expressions as "incompatibility with the obligations" of a State,[192] acts "contrary to" or "inconsistent with" a given rule,[193] and

[191] See, e.g., the classification of obligations of conduct and results, paragraphs (11) to (12) of the commentary to article 12.

[192] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 29, para. 56.

[193] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 64, para. 115, and p. 98, para. 186, respectively.