The Hague, The Netherlands
24 June – 2 August 2013

STUDY MATERIALS
PART II

Codification Division of the United Nations Office of Legal Affairs

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Legal instruments and documents

1. Draft articles on diplomatic protection, with commentaries (Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), A/61/10, pp. 22-100)

Case Law

I. International Court of Justice

3. Interhandel Case (Switzerland v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 6

II. Other Tribunals

8. Delagoa Bay v. East Africa Railway Co., Award of 29 March 1900, reproduced in Lafontaine, Pasicrisie Internationale 1794-1900, Berne, 1902, p. 397 (French only)
12. The Loewen Group, Inc. and Raymond L. Loewen v. the United States of America, ICSID Case No. ARB(AF)/98/3, 26 June 2006
13. The Queen on the application of Abbasi & Anor. v. Secretary of State for Foreign Affairs and Commonwealth Affairs & Secretary of State for the Home Department, England and Wales Court of Appeal (Civil Division), [2002] EWCA Civ 1598, 6 November 2002

Legal writings [Documents not reproduced in electronic version]


Recognition of States and Governments

Professor John Dugard

* Outline

Case Law


Legal writing [Documents not reproduced in electronic version]

7. John Dugard, The Secession of States and their Recognition in the Wake of Kosovo, (to be published in Hague Academy Pocketbook, 2013), (excerpts)
The Hague, The Netherlands
24 June 2013

DIPLOMATIC PROTECTION
PROFESSOR JOHN DUGARD

Codification Division of the United Nations Office of Legal Affairs

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DIPLOMATIC PROTECTION: COURSE OUTLINE
PROFESSOR JOHN DUGARD

A. Treatment of aliens
B. Diplomatic protection
C. Nationality of natural persons
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E. Continuous nationality
F. Right to diplomatic protection?
G. Exhaustion of local remedies
Draft articles on diplomatic protection, with commentaries, 2006
United Nations

Report of the International Law Commission

Fifty-eighth session
(1 May-9 June and 3 July-11 August 2006)

General Assembly
Official Records
Sixty-first session
Supplement No. 10 (A/61/10)

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

The word Yearbook followed by suspension points and the year (e.g. Yearbook ... 1971) indicates a reference to the Yearbook of the International Law Commission.

A typeset version of the report of the Commission will be included in Part Two of volume II of the Yearbook of the International Law Commission 2006.
2. Text of the draft articles with commentaries thereto

50. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-eighth session are reproduced below.

DIPLOMATIC PROTECTION

(1) The drafting of articles on diplomatic protection was originally seen as belonging to the study on State Responsibility. Indeed the first Rapporteur on State Responsibility, Mr. F.V. Garcia Amador, included a number of draft articles on this subject in his reports presented from 1956 to 1961.16 The subsequent codification of State Responsibility paid little attention to diplomatic protection and the final draft articles on this subject expressly state that the two topics central to diplomatic protection - nationality of claims and the exhaustion of local remedies - would be dealt with more extensively by the Commission in a separate undertaking.17 Nevertheless, there is a close connection between the articles on Responsibility of States for internationally wrongful acts and the present draft articles. Many of the principles contained in the articles on Responsibility of States for internationally wrongful acts are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. A State responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. All these matters are dealt with in the articles on Responsibility of States for internationally wrongful acts.18

(2) Diplomatic protection belongs to the subject of “Treatment of Aliens”. No attempt is made, however, to deal with the primary rules on this subject - that is, the rules governing the

treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person. Instead the present draft articles are confined to secondary rules only - that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. By and large this means rules governing the admissibility of claims. Article 44 of the articles on Responsibility of States for internationally wrongful acts provides:

“The responsibility of a State may not be invoked if:

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

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

The present draft articles give content to this provision by elaborating on the rules relating to the nationality of claims and the exhaustion of local remedies.

(3) The present draft articles do not deal with the protection of an agent by an international organization, generally described as “functional protection”. Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is traditionally a mechanism designed to secure reparation for injury to the national of a State premised largely on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is an institution for promoting the efficient functioning of an international organization by ensuring respect for its agents and their independence. Differences of this kind have led the Commission to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization was answered by the International Court of Justice in the Reparation for Injuries case: “In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the

18 Articles 28, 30, 31, 34-37. Much of the commentary on compensation (art. 36) is devoted to a consideration of the principles applicable to claims concerning diplomatic protection.
Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense. …”

PART ONE
GENERAL PROVISIONS

Article 1
Definition and scope

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.

Commentary

(1) Draft article 1 makes no attempt to provide a complete and comprehensive definition of diplomatic protection. Instead it describes the salient features of diplomatic protection in the sense in which the term is used in the present draft articles.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the Responsibility of States for internationally wrongful acts, maintain the distinction between primary and secondary rules and deal only with the latter.

(3) Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself. This approach has its roots, first in a statement by the Swiss jurist Emmerich de Vattel in 1758 that “whoever ill-treats a citizen indirectly injures the State, which must protect that citizen,” and, secondly in a dictum of the Permanent Court of International Justice in 1924 in the Mavrommatis Palestine Concessions case that “by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law.” Obviously it is a fiction - and an exaggeration - to say that an injury to a national is an injury to the State itself. Many of the rules of diplomatic protection contradict the correctness of this fiction, notably the rule of continuous nationality which requires a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim. A State does not “in reality” - to quote Mavrommatis - assert its own right only. “In reality” it also asserts the right of its injured national.

(4) In the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction - that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign

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22 Mavrommatis Palestine Concessions (Greece v. U.K.) P.C.J. Reports, 1924, Series A, No. 2, p. 12. This dictum was repeated by the Permanent Court of International Justice in the Panevezys Saltdukis Railway case (Estonia v. Lithuania) P.C.J. Reports, 1939, Series A/B, No. 76, p. 16.

Governments. This has been recognized by the International Court of Justice in the La Grand\textsuperscript{24} and Avena cases.\textsuperscript{25} This protection is not limited to personal rights. Bilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights. The individual has rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose human rights have been violated abroad.

(5) Draft article 1 is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national - or both. It views diplomatic protection through the prism of State responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act.

(6) Draft article 1 deliberately follows the language of the articles on Responsibility of States for internationally wrongful acts.\textsuperscript{26} It describes diplomatic protection as the invocation of the responsibility of a State that has committed an internationally wrongful act in respect of a national of another State, by the State of which that person is a national, with a view to implementing responsibility. As a claim brought within the context of State responsibility it is an inter-State claim, although it may result in the assertion of rights enjoyed by the injured national under international law.

(7) As draft article 1 is definitional by nature it does not cover exceptions. Thus no mention is made of stateless persons and refugees referred to in draft article 8 in this provision. Draft article 3 does, however, make it clear that diplomatic protection may be exercised in respect of such persons.

(8) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between “diplomatic action” and “judicial proceedings” when describing the action that may be taken by a State when it resorts to diplomatic protection.\textsuperscript{27} Draft article 1 retains this distinction but goes further by subsuming judicial proceedings under “other means of peaceful settlement”. “Diplomatic action” covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. “Other means of peaceful settlement” embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection. Diplomatic protection does not include demarches or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action.

(9) Diplomatic protection may be exercised through diplomatic action or other means of peaceful settlement. It differs from consular assistance in that it is conducted by the representatives of the State acting in the interest of the State in terms of a rule of international law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interests of the individual, acting in terms of the Vienna Convention on Consular Relations. Diplomatic protection is essentially remedial and is designed to remedy an internationally wrongful act that has been committed; while consular assistance is largely preventive and mainly aims at preventing the national from being subjected to an internationally wrongful act.

(10) Although it is in theory possible to distinguish between diplomatic protection and consular assistance, in practice this task is difficult. This is illustrated by the requirement of the exhaustion of local remedies. Clearly there is no need to exhaust local remedies in the case of consular assistance as this assistance takes place before the commission of an internationally wrongful act. Logically, as diplomatic protection arises only after the commission of an internationally wrongful act, it would seem that local remedies must always be exhausted, subject to the exceptions described in draft article 15.

\textsuperscript{24} La Grand case (Germany v. United States of America) I.C.J. Reports 2001, p. 466 at paras. 76-77.

\textsuperscript{25} Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) I.C.J. Reports, 2004, p. 12 at para. 40.

\textsuperscript{26} See Chapter 1 of Part Three titled “Invocation of the Responsibility of a State” (articles. 42-48). Part Three itself is titled “The implementation of the International Responsibility of a State”.

(11) In these circumstances draft article 1 makes no attempt to distinguish between diplomatic protection and consular assistance. The draft articles prescribe conditions for the exercise of diplomatic protection which are not applicable to consular assistance. This means that the circumstances of each case must be considered in order to decide whether it involves diplomatic protection or consular assistance.

(12) Draft article 1 makes clear the point, already raised in the general commentary, that the present draft articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded to its agent by an international organization.

(13) Diplomatic protection mainly covers the protection of nationals not engaged in official international business on behalf of the State. These officials are protected by other rules of international law and instruments such as the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963. Where, however, diplomats or consuls are injured in respect of activities outside their functions they are covered by the rules relating to diplomatic protection, as, for instance, in the case of the expropriation without compensation of property privately owned by a diplomatic official in the country to which he or she is accredited.

(14) In most circumstances it is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection, a matter that is dealt with in draft articles 4 and 9. The term “national” in this article covers both natural and legal persons. Later in the draft articles a distinction is drawn between the rules governing natural and legal persons, and, where necessary, the two concepts are treated separately.

Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

Commentary

(1) Draft article 2 is founded on the notion that diplomatic protection involves an invocation - at the State level - by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national of the former State. It recognizes that it is the State that initiates and exercises diplomatic protection; that it is the entity in which the right to bring a claim vests. It is without prejudice to the question of whose rights the State seeks to assert in the process, that is its own right or the rights of the injured national on whose behalf it acts. Like article 1 it is neutral on this subject.

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation. The position was clearly stated by the International Court of Justice in the Barcelona Traction case:

“… within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress … The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.”

(3) Today there is support in domestic legislation and judicial decisions for the view that there is some obligation, however limited, either under national law or international law, on the

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28 See general commentary, para. (3).
32 See commentary to article 1, paras. (3) to (5).
33 Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 4 at p. 44.
State to protect its nationals abroad when they have been subjected to serious violation of their human rights. Consequently, draft article 19 declares that a State entitled to exercise diplomatic protection "should ... give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred" (emphasis added). The discretionary right of a State to exercise diplomatic protection should therefore be read with draft article 19 which recommends to States that they should exercise that right in appropriate cases.

Draft article 2 deals with the right of the State to exercise diplomatic protection. It makes no attempt to describe the corresponding obligation on the respondent State to consider the assertion of diplomatic protection by a State in accordance with the present articles. This is, however, to be implied.

PART TWO
NATIONALITY

CHAPTER I
GENERAL PRINCIPLES

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

Commentary

(1) Whereas draft article 2 affirms the discretionary right of the State to exercise diplomatic protection, draft article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise diplomatic protection on behalf of such a person. The emphasis in this draft article is on the bond of nationality between State and national which entitles the State to exercise diplomatic protection. This bond differs in the cases of natural persons and legal persons. Consequently separate chapters are devoted to these different types of persons.

(2) Paragraph 2 refers to the exception contained in draft article 8 which provides for diplomatic protection in the case of stateless persons and refugees.

CHAPTER II
NATURAL PERSONS

Article 4
State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.

Commentary

(1) Draft article 4 defines the State of nationality for the purposes of diplomatic protection of natural persons. This definition is premised on two principles: first, that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality; secondly, that there are limits imposed by international law on the grant of nationality. Draft article 4 also provides a non-exhaustive list of connecting factors that usually constitute good grounds for the grant of nationality.

(2) The principle that it is for each State to decide in accordance with its law who are its nationals is backed by both judicial decisions and treaties. In 1923, the Permanent Court of International Justice stated in the *Nationality Decrees in Tunis and Morocco* case that:

"in the present state of international law, questions of nationality are ... in principle within the reserved domain".  

This principle was confirmed by article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

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36 *Nationality Decrees issued in Tunis and Morocco (French Zone), advisory opinion. P.C.I.J. Reports, Series B, No. 4, 1923, at p. 24.*
“It is for each State to determine under its own law who are its nationals.”

More recently it has been endorsed by the 1997 European Convention on Nationality.


40 See Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, Yearbook ... 1989, vol. II (Part Two), para. 47.

41 In the Nottebohm case the International Court of Justice stated: “According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection which has made him its national”, op. cit. at p. 23.

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require States to comply with international standards in the granting of nationality. For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

“States parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”

(7) Draft article 4 recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Draft article 4 requires that nationality should be acquired in a manner “not inconsistent with international law”. The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the State conferring nationality must be given a “margin of appreciation” in deciding upon the conferment of nationality and that there is a presumption in favour of the validity of a State’s conferment of nationality.

(8) Where a person acquires nationality involuntarily in a manner inconsistent with international law, as where a woman automatically acquires the nationality of her husband on marriage, that person should in principle be allowed to be protected diplomatically by her or his former State of nationality. If, however, the acquisition of nationality in such circumstances results in the loss of the individual’s former nationality, equitable considerations require that the new State of nationality be entitled to exercise diplomatic protection. This would accord with the ruling of the International Court of Justice in its 1971 Opinion on Namibia that individual rights should not be affected by an illegal act on the part of the State with which the individual is associated.

Article 5
Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

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46 This was stressed by the Inter-American Court of Human Rights in its advisory opinion on Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC–4/84 of 19 January 1984, Series A, No. 4, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State “with the further principle that international law imposes certain limits on the State’s power, which limits are linked to the demands imposed by the international system for the protection of human rights”, at para. 35. See also ILR vol. 79, p. 296.


50 See article 2 of the Convention on the Nationality of Married Women.

Commentary

(1) Although the continuous nationality rule is well established, it has been subjected to considerable criticism on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to “nationality shopping” for the purpose of diplomatic protection. For this reason draft article 5 retains the continuous nationality rule but allows exceptions to accommodate cases in which unfairness might otherwise result.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises. For these reasons the Institute of International Law in 1965 left open the question whether continuity of nationality was required between the two dates. It is, however, incongruous to require that the same nationality be shown both at the date of injury and at the date of the official presentation of the claim without requiring it to continue between these two dates. Thus, in an exercise in progressive development of the law, the rule has been drafted to require that the injured person be a national continuously from the date of the injury to the date of the official presentation of the claim. Given the difficulty of providing evidence of continuity, it is presumed if the same nationality existed at both these dates. This presumption is of course rebuttable.

52 See, for instance, the decision of the United States, International Claims Commission 1951-1954 in the Kren claim, ILR vol. 20, p. 233 at p. 234.
53 See the comment of Judge Sir Gerald Fitzmaurice in the Barcelona Traction case, at pp. 101-102; see, too, E. Wylot, La Règle Dite de la Continuité de la Nationalité dans le Contentieux International (Paris: PUF, 1990).
54 See the statement of Umpire Parker in Administrative Decision No. V (United States v. Germany), UNRIAA vol. VII, p. 119 at p. 141 (1925): “Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims.”

(3) The first requirement is that the injured national be a national of the claimant State at the date of the injury. The date of the injury need not be a precise date but could extend over a period of time if the injury consists of several acts or a continuing act committed over a period of time.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different language to identify the date of the claim. The phrase “presentation of the claim” is that most frequently used in treaties, judicial decisions and doctrine to indicate the outer date or dies ad quem required for the exercise of diplomatic protection. The word “official” has been added to this formulation to indicate that the date of the presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The dies ad quem for the exercise of diplomatic protection is the date of the official presentation of the claim. There is, however, support for the view that if the individual should change his nationality between this date and the making of an award or a judgment he ceases to be a national for the purposes of diplomatic protection. In 2003 in Loewen Group Inc. v. USA an ICSID arbitral tribunal held that “there must be continuous material identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through to the date of the resolution of the claim, which date is known as the dies ad quem”. On the facts, the Loewen case dealt with the situation in which the person sought to be protected changed nationality after the presentation of the claim to that of the respondent State, in which circumstances a claim for diplomatic protection can clearly not be upheld, as is made clear in draft article 5, paragraph (4). However, the Commission was not prepared to follow the Loewen tribunal in adopting a blanket

rule that nationality must be maintained to the date of resolution of the claim. Such a rule could be contrary to the interests of the individual, as many years may pass between the presentation of the claim and its final resolution and it could be unfair to penalize the individual for changing nationality, through marriage or naturalization, during this period. Instead, preference is given to the date of the official presentation of the claim as the dies ad quem. This date is significant as it is the date on which the State of nationality shows its clear intention to exercise diplomatic protection - a fact that was hitherto uncertain. Moreover, it is the date on which the admissibility of the claim must be judged. This determination could not be left to the later date of the resolution of the claim, the making of the award.

(6) The word “claim” in paragraphs 1, 2 and 4 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take. This matter is dealt with more fully in article 43 of the articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and the commentary thereto.

(7) While the Commission decided that it was necessary to retain the continuous nationality rule it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury provided that three conditions are met: first, the person seeking diplomatic protection had the nationality of a predecessor State or has lost his or her previous nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

(8) Paragraph 2 is concerned with cases in which the injured person has lost his or her previous nationality, either voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

(9) In the case of the succession of States this paragraph is limited to the question of the continuity of nationality for purposes of diplomatic protection. It makes no attempt to regulate succession to nationality, a subject that is covered by the Commission’s articles on Nationality of Natural Persons in relation to the Succession of States.

(10) As stated above, fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired his or her new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule mainly to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States. The exception in paragraph 2 will not apply where the person has acquired a new nationality for commercial reasons connected with the bringing of the claim.

(11) The third condition that must be met for the rule of continuous nationality not to apply is that the new nationality has been acquired in a manner not inconsistent with international law. This condition must be read in conjunction with draft article 4.

(12) Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality.

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61 See para. (1) of commentary to the present draft article.
(13) Paragraph 4 provides that if a person in respect of whom a claim is brought becomes a national of the respondent State after the presentation of the claim, the applicant State loses its right to proceed with the claim as in such a case the respondent State would in effect be required to pay compensation to its own national. This was the situation in *Loeven Group Inc v. USA* and a number of other cases in which a change in nationality after presentation of the claim was held to preclude its continuation. In practice, in most cases of this kind, the applicant State will withdraw its claim, despite the fact that in terms of the fiction proclaimed in *Muravannantis* the claim is that of the State and the purpose of the claim is to seek reparation for injury caused to itself through the person of its national. The applicant State may likewise decide to withdraw its claim when the injured person becomes a national of a third State after the presentation of the claim. If the injured person has in bad faith retained the nationality of the claimant State until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated, but the burden of proof will be upon the respondent State.

(14) Draft article 5 leaves open the question whether the heirs of an injured national, who dies as a consequence of the injury or thereafter, but before the official presentation of the claim, may be protected by the State of nationality of the injured person if he or she has the nationality of another State. Judicial decisions on this subject, while inconclusive as most deal with the interpretation of particular treaties, tend to support the position that no claim may be brought by the State of nationality of the deceased person if the heir has the nationality of a third State. Where the heir has the nationality of the respondent State it is clear that no such claim may be brought. There is some support for the view that where the injured national dies before the official presentation of the claim, the claim may be continued because it has assumed a national character. Although considerations of equity might seem to endorse such a position, it has on occasion been repudiated. The inconclusiveness of the authorities make it unwise to propose a rule on this subject.

**Article 6**

**Multiple nationality and claim against a third State**

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

**Commentary**

(1) Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* or of the conferment of nationality by naturalization or any other manner as envisaged in draft article 4, which does not result in the renunciation of a prior nationality. Although the laws of some States do not permit their nationals to be nationals of other States, international law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides:

“... a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.”

It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Draft article 6 is limited to the exercise of diplomatic protection by one or all of the States of which the injured person is a national...

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63 See commentary to art. 1, para. (3).

64 *Eschauzier* claim, UNRIA vol. 1V, p. 207; *Kren* claim; *Gladei* claim (*Great Britain v. Mexico*) UNRIA vol. V, p. 44; *Sed contra*, Straw claim, ILR vol. 20, p. 228.


67 *Eschauzier* claim (*Great Britain v. Mexico*), at p. 209.
national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in draft article 7.

(2) Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like draft article 4, it does not require a genuine or effective link between the national and the State exercising diplomatic protection.

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions and codification endeavours, the weight of authority does not require such a condition. In the Salem case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:

“the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power.”

This rule has been followed in other cases and has more recently been upheld by the Iran-United States Claim Tribunal. The decision not to require a genuine or effective link in such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

(4) In principle, there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. Paragraph 2 therefore recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which that person is not a national. While the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or different forums or where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect to that claim. Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is difficult to codify rules governing varied situations of this kind. They should be dealt with in accordance with the general principles of law recognized by international and national tribunals governing the satisfaction of joint claims.

Article 7

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Commentary

(1) Draft article 7 deals with the exercise of diplomatic protection by one State of nationality against another State of nationality. Whereas draft article 6, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, draft article 7 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.

68 See the decision of the Yugoslav-Hungarian Mixed Arbitral Tribunal in the de Born case, Annual Digest of Public International Law Cases, vol. 3, 1925-1926, case No. 205 of 12 July 1926.


70 Award of 8 June 1932, UNRIAA vol. II, p. 1165 at p. 1188.


(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declares in article 4 that:

“A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”

Later codification proposals adopted a similar approach and there was also support for this position in arbitral awards. In 1949 in its advisory opinion in the case concerning Reparation for Injuries, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as “the ordinary practice”.

(3) Even before 1930 there was, however, support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality. This jurisprudence was relied on by the

International Court of Justice in another context in the Nottebohm case and was given explicit approval by Italian-United States Conciliation Commission in the Mergé claim in 1955. Here the Conciliation Commission stated that:

“The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.”

In its opinion, the Conciliation Commission held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals. Relying on these cases, the Iran-United States Claims Tribunal has applied the principle of dominant and effective nationality in a number of cases. Codification proposals have given approval to this approach. In his Third Report on State Responsibility to the Commission, Garcia Amador proposed that:

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75 See, too, art. 16 (a) of the 1929 Harvard Draft Convention of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, AJIL, vol. 23, Special Supplement (1929), pp. 133-139.
76 I.C.J. Reports 1949, p. 186.
78 I.C.J. Reports 1955, pp. 22-23. Nottebohm was not concerned with dual nationality but the Court found support for its finding that Nottebohm had no effective link with Liechtenstein in cases dealing with dual nationality. See also the judicial decisions referred to in footnote 65.
“In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties.”82

A similar view was advanced by Orrego Vicuña in his report to the International Law Association in 2000.83

(4) Even though the two concepts are different the authorities use the term “effective” or “predominant” without distinction to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. Draft article 7 does not use either of these words to describe the required link but instead uses the term “predominant” as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term “predominant” when applied to nationality than either “effective” or “predominant”. It is moreover the term used by the Italian–United States Conciliation Commission in the Mergé claim which may be seen as the starting point for the development of the present customary rule.84

(5) No attempt is made to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.

(6) Draft article 7 is framed in negative language: “A State of nationality may not exercise diplomatic protection … unless” its nationality is predominant. This is intended to show that the circumstances envisaged by draft article 7 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.

(7) The main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State, with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality, to bring a claim against that State. This objection is overcome by the requirement that the nationality of the claimant State must be predominant both at the date of the injury and at the date of the official presentation of the claim. Although this requirement echoes the principle affirmed in draft article 5, paragraph 1, on the subject of continuous nationality, it is not necessary in this case to prove continuity of predominant nationality between these two dates. The phrases “at the date of injury” and “at the date of the official presentation of the claim” are explained in the commentary on draft article 5. The exception to the continuous nationality rule contained in draft article 5, paragraph 2, is not applicable here as the injured person contemplated in draft article 7 will not have lost his or her other nationality.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

82 Document ACN 4/111, in Yearbook ... 1958, vol. II, p. 61, draft art. 21, para. 4.
Commentary

(1) The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. In 1931 the United States-Mexican Claims Commission in *Dickson Car Wheel Company v. United Mexican States* held that a stateless person could not be the beneficiary of diplomatic protection when it stated:

“A State … does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.”

This dictum no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961 and the Convention Relating to the Status of Refugees of 1951.

(2) Draft article 8, an exercise in progressive development of the law, departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Although draft article 8 is to be seen within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954 which defines a stateless person "as a person who is not considered as a national by any State under the operation of its law." This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim. Habitual residence in this context is intended to convey continuous residence.

(4) The requirement of both lawful residence and habitual residence sets a high threshold. Although this threshold is high and leads to a lack of effective protection for some individuals, the combination of lawful residence and habitual residence is justified in the case of an exceptional measure introduced de lege ferenda.

(5) The temporal requirements for the bringing of a claim are contained in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are “unable or unwilling to avail [themselves] of the protection of [the State of Nationality]” and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain why a separate paragraph has been allocated to each category.

(7) Lawful residence and habitual residence are required as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons, despite the fact that article 28 of the Convention Relating to the Status of Refugees sets the lower threshold of “lawfully

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86 UNRIA, vol. IV, p. 669 at p. 678.
88 Ibid., vol. 189, p. 150.
89 In *Al Rawi & Others, R on the Application of v. Secretary of State for Foreign Affairs and Another* (2006) EWHC (Admin) an English court held that draft article 8 was to be considered *lex ferenda* and “not yet part of international law” (para. 63).
90 Article 1.
91 The terms “lawful and habitual” residence are based on the 1997 European Convention on Nationality, article 6 (4) (g), where they are used in connection with the acquisition of nationality. See, too, the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which includes for the purpose of protection under this Convention a “stateless person having his habitual residence in that State”, article 21 (3) (c).
92 Article 1 (A) (2) of the Convention Relating to the Status of Refugees.
93 Habitual residence in this context connotes continuous residence.
staying":94 for Contracting States in the issuing of travel documents to refugees. Two factors justify this position. First, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection.95 Secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, de lege ferenda.96

(8) The term “refugee” in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term “recognized refugees”, which appears in the 1997 European Convention on Nationality,97 which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa,98 widely seen as the model for the international protection of refugees,99 and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America, approved by the General Assembly of the O.A.U. in 1985.100 However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it recognized and treated as a refugee.101 Such recognition must, however, be based on “internationally accepted standards” relating to the recognition of refugees. This term emphasizes that the standards expounded in different conventions and other international instruments are to apply as well as the legal rules contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

94 The travaux préparatoires of the Convention make it clear that “stay” means less than habitual residence.
95 See para. 16 of the Schedule to the Convention.
96 See para. (4) of the commentary to this draft article.
97 Article 6 (4) (g).
98 United Nations, Treaty Series, vol. 1001, p. 45. This Convention extends the definition of refugee to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.
100 O.A.S. General Assembly, XV Regular Session (1985).
101 For instance, it may be possible for a State to exercise diplomatic protection on behalf of a person granted political asylum in terms of the 1954 Caracas Convention on Territorial Asylum, United Nations, Treaty Series, vol. 1438, p. 129.

(9) The temporal requirements for the bringing of a claim are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(10) Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To have permitted this would have contradicted the basic approach of the present draft articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.

(11) Both paragraphs 1 and 2 provide that a State of refuge “may exercise diplomatic protection”. This emphasizes the discretionary nature of the right. A State has a discretion under international law whether to exercise diplomatic protection in respect of a national.102 A fortiori it has a discretion whether to extend such protection to a stateless person or refugee.

(12) Draft article 8 is concerned only with the diplomatic protection of stateless persons and refugees. It is not concerned with the conferment of nationality upon such persons. The exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality. Draft article 28 of the 1951 Convention Relating to the Status of Refugees, read with paragraph 15 of its Schedule, makes it clear that the issue of a travel document to a refugee does not affect the nationality of the holder. A fortiori the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.

102 See draft articles 2 and 19 and commentaries thereto.
CHAPTER III
LEGAL PERSONS

Article 9

State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Commentary

(1) Draft article 9 recognizes that diplomatic protection may be extended to corporations. The first part of the article follows the same formula adopted in draft article 4 on the subject of the diplomatic protection of natural persons. The provision makes it clear that in order to qualify as the State of nationality for the purposes of diplomatic protection of a corporation certain conditions must be met, as is the case with the diplomatic protection of natural persons.

(2) State practice is largely concerned with the diplomatic protection of corporations, that is profit-making enterprises with limited liability whose capital is generally represented by shares, and not other legal persons. This explains why the present article, and those that follow, are concerned with the diplomatic protection of corporations and shareholders in corporations. Draft article 13 is devoted to the position of legal persons other than corporations.

(3) As with natural persons, the granting of nationality to a corporation is “within the reserved domain” of a State.\(^{103}\) As the International Court of Justice stated in the Barcelona Traction case:

“... international law has to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.”\(^ {104}\)

Although international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject, it is for international law to determine the circumstances in which a State may exercise diplomatic protection on behalf of a corporation or its shareholders. This matter was addressed by the International Court of Justice in Barcelona Traction when it stated that international law “attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office”.\(^{105}\) Here the Court set two conditions for the acquisition of nationality by a corporation for the purposes of diplomatic protection; incorporation and the presence of the registered office of the company in the State of incorporation. As the laws of most States require a company incorporated under its laws to maintain a registered office in its territory, even if this is a mere fiction, incorporation is the most important criterion for the purposes of diplomatic protection. The Court in Barcelona Traction was not, however, satisfied with incorporation as the sole criterion for the exercise of diplomatic protection. Although it did not reiterate the requirement of a “genuine connection” as applied in the Nottebohm case,\(^ {106}\) and acknowledged that “in the particular field of the diplomatic protection of corporate entities, no absolute test of the ‘genuine connection’ has found general acceptance,”\(^ {107}\) it suggested that in addition to incorporation and a registered office, there was a need for some “permanent and close connection” between the State exercising diplomatic protection and the corporation.\(^ {108}\) On the facts of this case the Court found such a connection in the incorporation of the company in Canada for over 50 years, the maintenance of its registered office, accounts and share register there, the holding of board meetings there for many years, its listing in the records of the Canadian tax authorities and the general recognition by other States.

\(^{103}\) Nationality Decrees issued in Tunis and Morocco case.

\(^{104}\) Barcelona Traction case, at pp. 33-34, para. 38.

\(^{105}\) Ibid., p. 42, para. 70.

\(^{106}\) Ibid., p. 42, para. 70. Nottebohm case.


\(^{108}\) Ibid., p. 42, para. 71.
of the Canadian nationality of the company.\textsuperscript{108} All of this meant, said the Court, that “Barcelona Traction’s links with Canada are thus manifold”.\textsuperscript{109} In \textit{Barcelona Traction} the Court was not confronted with a situation in which a company was incorporated in one State but had a “close and permanent connection” with another State. One can only speculate what the Court might have decided in such a situation. Draft article 9 does, however, provide for such cases.

(4) Draft article 9 accepts the basic premise of \textit{Barcelona Traction} that it is incorporation that confers nationality on a corporation for the purposes of diplomatic protection. However, it provides an exception in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where certain significant connections exist with another State, in which case that other State is to be regarded as the State of nationality for the purpose of diplomatic protection. Policy and fairness dictate such a solution. It is wrong to place the sole and exclusive right to exercise diplomatic protection in a State with which the corporation has the most tenuous connection as in practice such a State will seldom be prepared to protect such a corporation.

(5) Draft article 9 provides that in the first instance the State in which a corporation is incorporated is the State of nationality entitled to exercise diplomatic protection. When, however, the circumstances indicate that the corporation has a closer connection with another State, a State in which the seat of management and financial control are situated, that State shall be regarded as the State of nationality with the right to exercise diplomatic protection. Certain conditions must, however, be fulfilled before this occurs. First, the corporation must be controlled by nationals of another State. Secondly, it must have no substantial business activities in the State of incorporation. Thirdly, both the seat of management and the financial control of the corporation must be located in another State. Only where these conditions are cumulatively fulfilled does the State in which the corporation has its seat of management and in which it is financially controlled qualify as the State of nationality for the purposes of diplomatic protection.

(6) In \textit{Barcelona Traction} the International Court of Justice warned that the granting of the right of diplomatic protection to the States of nationality of shareholders might result in a multiplicity of actions which “could create an atmosphere of confusion and insecurity in international economic relations”.\textsuperscript{111} The same confusion might result from the granting of the right to exercise diplomatic protection to several States with which a corporation enjoys a link or connection. Draft article 9 does not allow such multiple actions. The State of nationality with the right to exercise diplomatic protection is either the State of incorporation or, if the required conditions are met, the State of the seat of management and financial control of the corporation. If the seat of management and the place of financial control are located in different States, the State of incorporation remains the State entitled to exercise diplomatic protection.

\textbf{Article 10}

\textbf{Continuous nationality of a corporation}

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both those dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

\textbf{Commentary}

(1) The general principles relating to the requirement of continuous nationality are discussed in the commentary to draft article 5. In practice problems of continuous nationality arise less in the case of corporations than with natural persons. Whereas natural persons change nationality easily as a result of naturalization, marriage or adoption, and State succession, corporations generally change nationality only by being re-formed or reincorporated in another State, in

\textsuperscript{108} \textit{Ibid.}, pp. 42-43, paras. 71-76.

\textsuperscript{109} \textit{Ibid.}, p. 42, para. 71.

\textsuperscript{111} \textit{Ibid.}, p. 49, para. 96.
which case the corporation assumes a new personality, thereby breaking the continuity of nationality of the corporation. The most frequent instance in which a corporation may change nationality without changing legal personality is in the case of State succession.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a corporation that was its national both at the time of the injury and at the date of the official presentation of the claim. It also requires continuity of nationality between the date of the injury and the date of the official presentation of the claim. These requirements, which apply to natural persons as well, are examined in the commentary to draft article 5. The date of the official presentation of the claim is preferred to that of the date of the award, for reasons explained in the commentary to draft article 5. An exception is, however, made in paragraph 2 to cover cases in which the Corporation acquires the nationality of the State against which the claim is brought after the presentation of the claim.

(3) The requirement of continuity of nationality is met where a corporation undergoes a change of nationality as a result of the succession of States. In effect, this is an exception to the continuity of nationality rule. This matter is covered by the reference to "predecessor State" in paragraph 1.

(4) The word "claim" in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form of reparation should take.

(5) In terms of paragraph 2, a State is not entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim. This paragraph is designed to cater for the type of situation that arose in the Loewen case in which a corporation ceased to exist in the State in which the claim was initiated (Canada) and was reorganized in the respondent State (the United States). This matter is further considered in the commentary to draft article 5.

(6) Difficulties arise in respect of the exercise of diplomatic protection of a corporation that has ceased to exist according to the law of the State in which it was incorporated and of which it was national. If one takes the position that the State of nationality of such a corporation may not bring a claim as the corporation no longer exists at the time of presentation of the claim, then no State may exercise diplomatic protection in respect of an injury to the corporation. A State could not avail itself of the nationality of the shareholders in order to bring such a claim as it could not show that it had the necessary interest at the time the injury occurred to the corporation. This matter troubled several judges in the Barcelona Traction case and it has troubled certain courts and arbitral tribunals and scholars. Paragraph 3 adopts a pragmatic approach and allows the State of nationality of a corporation to exercise diplomatic protection in respect of an injury suffered by the corporation when it was its national and has ceased to exist and therefore ceased to be its national as a result of the injury. In order to qualify, the claimant State must prove that it was because of the injury in respect of which the claim is brought that the corporation has ceased to exist. Paragraph 3 must be read in conjunction with

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112 See Mixed Claims Commission, United States-Venezuela constituted under the Protocol of 17 February 1903, the Orinoco Steamship Company Case, UNR IAA, vol. IX., p. 180. Here a company incorporated in the United Kingdom transferred its claim against the Venezuelan Government to a successor company incorporated in the United States. As the treaty establishing the Commission permitted the United States to bring a claim on behalf of its national in such circumstances, the claim was allowed. However, Umpire Barge made it clear that, but for the treaty, the claim would not have been allowed; ibid., at p. 192. See also Loewen Group Inc v. U.S.A., at paragraph 220.

113 See further on this subject the Pinney v Saldarriaga Railway case, at p. 18. See also Fourth Report on Nationality in relation to the Succession of States, document A/CN 4/489, which highlights the difficulties surrounding the nationality of legal persons in relation to the succession of States.

114 See, further, article 43 of the draft articles on the Responsibility of States for Internationally Wrongful Acts and the commentary thereto.


116 Paragraphs (5) and (13).


118 See the Kühnach and co., case (Opinions in the American-Venezuelan Commission of 1903), UNR IAA, vol. XII, p. 171, and particularly the dissenting opinion of the Venezuelan Commissioner, Mr. Paul, at p. 180; F. W. Flack, on behalf of the Estate of the Late D.L. Flack (Great Britain) v. United Mexican States, decision No. 10 of 6 December 1929, UNR IAA, vol. V, p. 61 at p. 63.

draft article 11, paragraph (a), which makes it clear that the State of nationality of shareholders will not be entitled to exercise diplomatic protection in respect of an injury to a corporation that led to its demise.

Article 11

Protection of shareholders

The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Commentary

(1) The most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders in a corporation. This principle was strongly reaffirmed by the International Court of Justice in the Barcelona Traction case. In this case the Court emphasized at the outset that it was concerned only with the question of the diplomatic protection of shareholders in “a limited liability company whose capital is represented by shares”. Such companies are characterized by a clear distinction between company and shareholders. Whenever a shareholder’s interests are harmed by an injury to the company, it is to the company that the shareholder must look to take action, for “although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed”. Only where the act complained of is aimed at the direct rights of the shareholders does a shareholder have an independent right of action. Such principles governing the distinction between company and shareholders, said the Court, are derived from municipal law and not international law.

(2) In reaching its decision that the State of incorporation of a company and not the State(s) of nationality of the shareholders in the company is the appropriate State to exercise diplomatic protection in the event of injury to a company, the Court in Barcelona Traction was guided by a number of policy considerations. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the State of nationality of the corporation may in the exercise of its discretion decline to exercise diplomatic protection on their behalf. Secondly, if the State of nationality of shareholders is permitted to exercise diplomatic protection, this might lead to a multiplicity of claims by different States, as frequently large corporations comprise shareholders of many nationalities. In this connection the Court indicated that if the shareholder’s State of nationality was empowered to act on his behalf there was no reason why every individual shareholder should not enjoy such a right. Thirdly, the Court was reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the States of nationality of both to exercise diplomatic protection.

(3) The Court in Barcelona Traction accepted that the State(s) of nationality of shareholders might exercise diplomatic protection on their behalf in two situations: first, where the company had ceased to exist in its place of incorporation - which was not the case with the Barcelona Traction; secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders’ sole means of protection on the international level was through their State(s) of nationality - which was not the case with

123 Ibid., p. 36, para. 47.
124 Ibid., p. 37, para. 50.
125 Ibid., p. 35, para. 43; p. 46, paras. 86-87; p. 50, para. 99.
126 Ibid., pp. 48-49, paras. 94-96.
127 Ibid., p. 48, paras. 94-95.
128 Ibid., p. 38, para. 53; p. 50, para. 98.
129 Ibid., pp. 40-41, paras. 65-68.
130 Ibid., p. 48, para. 92.
Barcelona Traction. These two exceptions, which were not thoroughly examined by the Court in Barcelona Traction because they were not relevant to the case, are recognized in paragraphs (a) and (b) of draft article 11. As the shareholders in a company may be nationals of different States, several States of nationality may be able to exercise diplomatic protection in terms of these exceptions. In practice, however, States will, and should, coordinate their claims and make sure that States whose nationals hold the bulk of the share capital are involved as claimants.

Draft article 11 is restricted to the interests of shareholders in a corporation as judicial decisions on this subject, including Barcelona Traction, have mainly addressed the question of shareholders. There is no clear authority on the right of the State of nationality to protect investors other than shareholders, such as debenture holders, nominees and trustees. In principle, however, there would seem to be no good reason why the State of nationality should not protect such persons.\textsuperscript{131}

Draft article 11, paragraph (a) requires that the corporation shall have “ceased to exist” before the State of nationality of the shareholders shall be entitled to intervene on their behalf. Before the Barcelona Traction case the weight of authority favoured a less stringent test, one that permitted intervention on behalf of shareholders when the company was “practically defunct”.\textsuperscript{132} The Court in Barcelona Traction, however, set a higher threshold for determining the demise of a company. The “paralysis” or “precarious financial situation” of a company was dismissed as inadequate.\textsuperscript{133} The test of “practically defunct” was likewise rejected as one “which lacks all legal precision”.\textsuperscript{134} Only the “company’s status in law” was considered relevant. The Court stated: “Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their Government could arise.”\textsuperscript{135} Subsequent support has been given to this test by the European Court of Human Rights.\textsuperscript{136}

The Court in Barcelona Traction did not expressly state that the company must have ceased to exist in the place of incorporation as a precondition to shareholders’ intervention. Nevertheless it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain\textsuperscript{137} but emphasized that this did not affect its continued existence in Canada, the State of incorporation: “In the present case, the Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist.”\textsuperscript{138} A company is “born” in the State of incorporation when it is formed or incorporated there. Conversely, it “dies” when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

The final phrase “for a reason unrelated to the injury” aims to ensure that the State of nationality of the shareholders will not be permitted to bring proceedings in respect of the injury to the corporation that is the cause of the corporation’s demise. This, according to draft article 10, is the continuing right of the State of nationality of the corporation. The State of nationality of the shareholders will therefore only be able to exercise diplomatic protection in respect of shareholders who have suffered as a result of injuries sustained by the corporation.

\textsuperscript{131} This is the approach adopted by the United Kingdom. See United Kingdom of Great Britain and Northern Ireland: “Rules Applying to International Claims” reproduced in document A/CN.4/561/Add.1, Annex.


\textsuperscript{133} I.C.J. Reports 1970, pp. 40-41, paras. 65 and 66.

\textsuperscript{134} Ibid., p. 41, para. 66.

\textsuperscript{135} Ibid., see also, the separate opinions of Judges Nervo, ibid., p. 256 and Ammoun, ibid., pp. 319-320.

\textsuperscript{136} Agbesemem case, ECHR., Series A (1995), No. 330-A, p. 25, para. 68.

\textsuperscript{137} I.C.J. Reports 1970, p. 40, para. 65. See the separate opinions of Judges Fitzmaurice, ibid., p. 75 and Jessup, ibid., p. 194.

\textsuperscript{138} Ibid., p. 41, para. 67.
unrelated to the injury that might have given rise to the demise of the corporation. The purpose of this qualification is to limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation.

Draft article 11, paragraph (b), gives effect to the exception allowing the State of nationality of the shareholders in a corporation to exercise diplomatic protection on their behalf where the State of incorporation is itself responsible for inflicting injury on the corporation. The exception is limited to cases where incorporation was required by the State inflicting the injury on the corporation as a precondition for doing business there.

There is support for such an exception in State practice, arbitral awards and doctrine. Significantly the strongest support for intervention on the part of the State of nationality of the shareholders comes from three claims in which the injured corporation had been compelled to incorporate in the wrongdoing State: Delagoa Bay Railway, Mexican Eagle and El Triunfo. While there is no suggestion in the language of these claims that intervention is to be limited to such circumstances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in Mexican Eagle that a State might not intervene on behalf of its shareholders in a Mexican company:

"If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic

intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad."

In Barcelona Traction, Spain, the respondent State, was not the State of nationality of the injured company. Consequently, the exception under discussion was not before the Court. Nevertheless, the Court did make passing reference to this exception:

"It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction."

Judges Fitzmaurice, Tanaka and Jessup expressed full support in their separate opinions in Barcelona Traction for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation.

While both Fitzmaurice and Jessup conceded that the need for such a rule was particularly strong where incorporation was required as a precondition for doing business in the State of


140 Ibid.

141 Ibid.

142 Ibid.


145 Ibid., pp. 72-75.

146 Ibid., p. 134.

147 Ibid., pp. 191-193.

148 Judge Wellington Koo likewise supported this position in the Case concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections, I.C.J. Reports 1964, p. 58, para. 20.

149 I.C.J. Reports 1970, p. 73, paras. 15 and 16.

150 Ibid., pp. 191-192.
incorporation, neither was prepared to limit the rule to such circumstances. Judges Padilla Nervo,\footnote{Ibid., pp. 257-259.} Morelli\footnote{Ibid., pp. 240-241.} and Ammoun,\footnote{Ibid., p. 318.} on the other hand, were vigorously opposed to the exception.

(11) Developments relating to the proposed exception in the post-	extit{Barcelona Traction} period have occurred mainly in the context of treaties. Nevertheless they do indicate support for the notion that the shareholders of a company may intervene against the State of incorporation of the company when it has been responsible for causing injury to the company.\footnote{See SIDCO Inc. v. National Iranian Oil Company and the Islamic Republic of Iran case No. 129, of 24 October 1985, ILR, vol. 84, pp. 484, 496 (interpreting article VII (2) of the Algiers Claims Settlement Declaration); Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia ICSID Reports, vol. 2 (1994), p. 346 (interpreting art. 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, United Nations, Treaty Series, vol. 575, p. 159).} In the Case Concerning Elettronica Sicula S.p.A. (ELST)\footnote{I.C.J. Reports, 1989, p. 15.} a Chamber of the International Court of Justice allowed the United States to bring a claim against Italy in respect of damages suffered by an Italian company whose shares were wholly owned by two American companies. The Court avoided pronouncing on the compatibility of its finding with that of 	extit{Barcelona Traction} or on the proposed exception left open in 	extit{Barcelona Traction} despite the fact that Italy objected that the company whose rights were alleged to have been violated was incorporated in Italy and that the United States sought to protect the rights of shareholders in the company.\footnote{Ibid., pp. 64 (para. 106), 79 (para. 132).} This silence might be explained on the ground that the Chamber was not concerned with the evaluation of customary international law but with the interpretation of a bilateral Treaty of Friendship, Commerce and Navigation which provided for the protection of United States shareholders abroad. On the other hand, the proposed exception was clearly before the Chamber.\footnote{This is clear from an exchange of opinions between Judges Oda, \textit{ibid.}, pp. 87-88 and Schwebel, \textit{ibid.}, p. 94 on the subject.} It is thus possible to infer support for the exception in favour of the right of the State of shareholders in a corporation to intervene against the State of incorporation when it is responsible for causing injury to the corporation.\footnote{This view is expressed by Yoram Dinstein in “Diplomatic Protection of Companies under International Law”, in K. Wellems (ed.), International Law: Theory and Practice, Essays in Honour of Eric Seg (The Hague: Martinus Nijhoff Publishers, 1998), p. 505 at p. 512.}

(12) Before 	extit{Barcelona Traction} there was support for the proposed exception, but opinions were divided over whether, or to what extent, State practice and arbitral decisions recognized it. Although arbitral decisions affirmed the principle contained in the exception these decisions were often based on special agreements between States granting a right to shareholders to claim compensation and, as a consequence, were not necessarily indicative of a general rule of customary international law.\footnote{See the submission to this effect by the United States in A/CN.4/4561, pp. 34-35.} The obiter dictum in 	extit{Barcelona Traction} and the separate opinions of Judges Fitzmaurice, Jessup and Tanaka have undoubtedly added to the weight of authority in favour of the exception. Subsequent developments, albeit in the context of treaty interpretation, have confirmed this trend.\footnote{According to the United Kingdom’s 1985 Rules Applying to International Claims, “where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty’s Government may intervene to protect the interests of the United Kingdom national” (Rule VI), reprinted in ICLQ, vol. 37 (1988), p. 1007 and reproduced in document A/CN.4/4561/Add.1, Annex.} In these circumstances it would be possible to sustain a general exception on the basis of judicial opinion. However, draft article 11, paragraph (b), does not go this far. Instead it limits the exception to what has been described as a “Calvo corporation”, a corporation whose incorporation, like the Calvo Clause, is designed to protect it from the rules of international law relating to diplomatic protection. It limits the exception to the situation in which the corporation had, at the date of the injury (a further restrictive feature), the nationality of the State alleged to be responsible for causing the injury and incorporation in that State was required by it as a precondition for doing business there. It is not necessary that the law of that State require incorporation. Other forms of compulsion might also result in a corporation being “required” to incorporate in that State.
Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Commentary

(1) That shareholders qualify for diplomatic protection when their own rights are affected was recognized by the Court in Barcelona Traction when it stated:

“... an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected. ... The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”

The Court was not, however, called upon to consider this matter any further because Belgium made it clear that it did not base its claim on an infringement of the direct rights of the shareholders.

(2) The issue of the protection of the direct rights of shareholders came before the Chamber of the International Court of Justice in the ELSI case. However, in that case, the rights in question, such as the rights of the shareholders to organize, control and manage the company, were to be found in the Treaty of Friendship, Commerce and Navigation that the Chamber was called on to interpret and the Chamber failed to expound on the rules of customary international law on this subject. In Agrotexim, the European Court of Human Rights, like the Court in Barcelona Traction, acknowledged the right of shareholders to protection in respect of the direct violation of their rights, but held that in casu no such violation had occurred.

(3) Draft article 12 makes no attempt to provide an exhaustive list of the rights of shareholders as distinct from those of the corporation itself. In Barcelona Traction the International Court mentioned the most obvious rights of shareholders - the right to a declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation - but made it clear that this list is not exhaustive. This means that it is left to courts to determine, on the facts of individual cases, the limits of such rights. Care will, however, have to be taken to draw clear lines between shareholders’ rights and corporate rights, particularly in respect of the right to participate in the management of corporations. That draft article 12 is to be interpreted restrictively is emphasized by the phrases “the rights of the shareholders as such” and rights “as distinct from those of the corporation itself”.

(4) Draft article 12 does not specify the legal order that must determine which rights belong to the shareholder as distinct from the corporation. In most cases this is a matter to be decided by the municipal law of the State of incorporation. Where the company is incorporated in the wrongdoing State, however, there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment.

Article 13

Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

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164 Ibid., p. 23, para. 62.
165 In his separate opinion in ELSI, Judge Oda spoke of “the general principles of law concerning companies” in the context of shareholders’ rights; I.C.J. Reports 1989, at pp. 87-88.
Commentary

(1) The provisions of this Chapter have hitherto focused on a particular species of legal person, the corporation. There are two explanations for this. First, corporations, unlike other legal persons, have certain common, uniform features: they are profit-making enterprises whose capital is generally represented by shares, in which there is a firm distinction between the separate entity of the corporation and the shareholders, with limited liability attaching to the latter. Secondly, it is mainly the corporation, unlike the public enterprise, the university, the municipality, the foundation and other such legal persons, that engages in foreign trade and investment and whose activities fuel not only the engines of international economic life but also the machinery of international dispute settlement. Diplomatic protection in respect of legal persons is mainly about the protection of foreign investment. This is why the corporation is the legal person that occupies centre stage in the field of diplomatic protection and why the present set of draft articles do - and should - concern themselves largely with this entity.

(2) In the ordinary sense of the word, “person” is a human being. In the legal sense, however, a “person” is any being, object, association or institution which the law endows with the capacity of acquiring rights and incurring duties. A legal system may confer legal personality on whatever object or association it pleases. There is no consistency or uniformity among legal systems in the conferment of legal personality.

(3) There is jurisprudential debate about the legal nature of juristic personality and, in particular, about the manner in which a legal person comes into being. The fiction theory maintains that no juristic person can come into being without a formal act of incorporation by the State. This means that a body other than a natural person may obtain the privileges of personality by an act of State, which by a fiction of law equates it to a natural person, subject to such limitations as the law may impose. According to the realist theory, on the other hand, corporate existence is a reality and does not depend on State recognition. If an association or body acts in fact as a separate legal entity, it becomes a juristic person, with all its attributes, without requiring grant of legal personality by the State. Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice\(^\text{166}\) and the International Court of Justice.\(^\text{167}\)

(4) Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public and private international law largely confine their consideration of legal persons in the context of international law to the corporation. Despite this, regard must be had to legal persons other than corporations in the context of diplomatic protection. The case law of the Permanent Court of International Justice shows that a commune\(^\text{168}\) (municipality) or university\(^\text{169}\) may in certain circumstances qualify as legal persons and as nationals of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State.\(^\text{170}\) Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women’s rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is


\(^{167}\) Barcelona Traction Case (Judgment), at pp. 34-35, para. 38.

\(^{168}\) In Certain German Interests in Polish Upper Silesia case (Merits) the Permanent Court held that the commune of Raibhor fell within the category of “German national” within the meaning of the German-Polish Convention concerning Upper Silesia of 1922, P.C.I.J. Reports, Series A, No. 7, pp. 73-75.

\(^{169}\) In Appeal from a Judgment of the Húngaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. The State of Czechoslovakia Judgment) the Permanent Court held that the Peter Pázmány University was a Hungarian national in terms of art. 250 of the Treaty of Trianon and therefore entitled to the restitution of property belonging to it, P.C.I.J. Reports, Series A/B, No. 61, pp. 208, 227-232.

\(^{170}\) As diplomatic protection is a process reserved for the protection of natural or legal persons not forming part of the State, it follows that in most instances the municipality, as a local branch of government, and the university, funded and, in the final resort, controlled by the State, will not qualify for diplomatic protection, although it may be protected by other rules dealing with the problem of State organs. Private universities would, however, qualify for diplomatic protection; as would private schools, if they enjoy legal personality under municipal law.
probable that it would be granted diplomatic protection by the State under whose laws it has been created. Non-governmental organizations engaged in causes abroad would appear to fall into the same category as foundations. \(^{171}\)

(5) The diversity of goals and structures in legal persons other than corporations makes it impossible to draft separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons - subject to the changes necessary to take account of the different features of each legal person. The proposed provision seeks to achieve this. It provides that the principles governing the State of nationality of corporations and the application of the principle of continuous nationality to corporations, contained in the present Chapter, will apply, “as appropriate”, to the diplomatic protection of legal persons other than corporations. This will require the necessary competent authorities or courts to examine the nature and functions of the legal person in question in order to decide whether it would be “appropriate” to apply any of the provisions of the present Chapter to it. Most legal persons other than corporations do not have shareholders so only draft articles 9 and 10 may appropriately be applied to them. If, however, such a legal person does have shareholders draft articles 11 and 12 may also be applied to it. \(^{172}\)

PART THREE
LOCAL REMEDIES

Article 14
Exhaustion of local remedies

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

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

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

Commentary

(1) Draft article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection. This rule was recognized by the International Court of Justice in the Interhandel case as “a well-established rule of customary international law”\(^{173}\) and by a Chamber of the International Court in the Elettronica Sicula (ELS) case as “an important principle of customary international law”.\(^{174}\) The exhaustion of local remedies rule ensures that “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system.”\(^{175}\) The International Law Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a “principle of general international law” supported by judicial decisions, State practice, treaties and the writings of jurists.\(^{176}\)

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

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


\(^{172}\) This would apply to the limited liability company known in civil law countries which is a hybrid between a corporation and a partnership.

\(^{173}\) Interhandel case (Switzerland v. United States of America) Preliminary objections, I.C.J. Reports 1959, p. 6 at p. 27.


\(^{175}\) Interhandel case, at p. 27.

(4) The remedies available to an alien that must be exhausted before diplomatic protection can be exercised will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of legal remedies that must be exhausted. 177 In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has a discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court. 178 Courts in this connection include both ordinary and special courts since “the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress”. 179

(5) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies whose “purpose is to obtain a favour and not to vindicate a right” 180 nor do they include remedies of grace 181 unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Requests for clemency and resort to an ombudsman generally fall into this category. 182

177 In the *Amsteltes Claim* of 6 March 1956 the arbitral tribunal declared that “[i]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test”, UNRIAA, vol. XII, p. 83 at p. 120. See further on this subject, C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 182-192.

178 This would include the *centrovar* process before the United States Supreme Court.


182 See *Avena and Other Mexican Nationals* (*Mexico v. United States of America*), at paras. 135-143.

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case the Chamber of the International Court of Justice stated that:

> “for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.” 183

This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that:

> “all the contentions of fact and propositions of law which are brought forward by the claimant Government … must have been investigated and adjudicated upon by the municipal courts”. 184

(7) The claimant State must therefore produce the evidence available to it to support the essence of its claim in the process of exhausting local remedies. 185 The international remedy afforded by diplomatic protection cannot be used to overcome faulty preparation or presentation of the claim at the municipal level. 186

(8) Draft article 14 does not take cognizance of the “Calvo Clause” 187 a device employed mainly by Latin-American States in the late nineteenth century and early twentieth century, to confine an alien to local remedies by compelling him to waive recourse to international remedies in respect of disputes arising out of a contract entered into with the host State. The validity of such a clause has been vigorously disputed by capital-exporting States 188 on the ground that the alien has no right, in accordance with the rule in *Mavrommatis*, to waive a right that belongs to the State and not its national. Despite this, the “Calvo Clause” was viewed as a regional custom


185 *Amsteltes Claim*, at p. 120.


187 Named after a distinguished Argentine jurist, Carlos Calvo (1824-1906).

in Latin-America and formed part of the national identity of many States. The “Calvo Clause” is difficult to reconcile with international law if it is to be interpreted as a complete waiver of recourse to international protection in respect of an action by the host State constituting an internationally wrongful act (such as denial of justice) or where the injury to the alien was of direct concern to the State of nationality of the alien.\footnote{North American Dredging Company (U.S.A. v. Mexico), UNRIAA, vol. IV, p. 26.} The objection to the validity of the “Calvo Clause” in respect of general international law are certainly less convincing if one accepts that the right protected within the framework of diplomatic protection are those of the individual protected and not those of the protecting State.\footnote{See paragraph (5) of commentary to draft article 1.}

(9) Paragraph 3 provides that the exhaustion of local remedies rule applies only to cases in which the claimant State has been injured “indirectly”, that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.\footnote{See generally on this subject, C.F. Amerasinghe, Local Remedies in International Law, op. cit., pp. 145-168.}

(10) In practice it is difficult to decide whether the claim is “direct” or “indirect” where it is “mixed”, in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before the International Court of Justice have presented the phenomenon of the mixed claim. In the \textit{Hostages} case,\footnote{Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, p. 3.} there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the \textit{Interhandel} case, there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the \textit{Hostages} case the Court treated the claim as a direct violation of international law; and in the \textit{Interhandel} case the Court found that the claim was preponderantly indirect and that \textit{Interhandel} had failed to exhaust local remedies. In the \textit{Arrest Warrant of 11 August 2000} case there was a direct injury to the Democratic Republic of the Congo (DRC) and its national (the Foreign Minister) but the Court held that the claim was not brought within the context of the protection of a national so it was not necessary for the DRC to exhaust local remedies.\footnote{Case concerning the \textit{Arrest Warrant of 11 April 2000} (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3 at p. 18, para. 40.} In the \textit{Avena} case Mexico sought to protect its nationals on death row in the United States through the medium of the Vienna Convention on Consular Relations, arguing that it had “itself suffered, directly and through its nationals” as a result of the United States’ failure to grant consular access to its nationals under article 36 (1) of the Convention. The Court upheld this argument because of the “interdependence of the rights of the State and individual rights”.\footnote{I.C.J. Reports 2004, p. 12, para. 40.}

(11) In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the \textit{ELSI} case a Chamber of the International Court of Justice rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

\begin{quote}
“the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations]”.\footnote{I.C.J. Reports 1989, p. 15 at p. 43, para. 52. See, also, the \textit{Interhandel} case, I.C.J. Reports 1959, at p. 28.}
\end{quote}

Closely related to the preponderance test is the \textit{sine qua non} or “but for” test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the “but for” test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances one test only is provided for in paragraph 3, that of preponderance.

(12) Other “tests” invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment
are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the
subject of the dispute is a Government official,\textsuperscript{196} diplomatic official\textsuperscript{197} or State property\textsuperscript{198} the
claim will normally be direct, and where the State seeks monetary relief on behalf of its national
as a private individual the claim will be indirect.

(13) Paragraph 3 makes it clear that local remedies are to be exhausted not only in respect
of an international claim but also in respect of a request for a declaratory judgment brought
preponderantly on the basis of an injury to a national. Although there is support for the view
that where a State makes no claim for damages for an injured national, but simply requests a
decision on the interpretation and application of a treaty, there is no need for local remedies to be
exhausted,\textsuperscript{199} there are cases in which States have been required to exhaust local remedies where
they have sought a declaratory judgment relating to the interpretation and application of a treaty
alleged to have been violated by the respondent State in the course of, or incidental to, its
unlawful treatment of a national.\textsuperscript{200}

(14) Draft article 14 requires that the injured person must himself have exhausted all local
remedies. This does not preclude the possibility that the exhaustion of local remedies may result
from the fact that another person has submitted the substance of the same claim before a court of
the respondent State.\textsuperscript{201}

\textbf{Article 15}

\textbf{Exceptions to the local remedies rule}

Local remedies do not need to be exhausted where:

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

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

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

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

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

\textbf{Commentary}

(1) Draft article 15 deals with the exceptions to the exhaustion of local remedies rule.
Paragraphs (a) to (b), which cover circumstances in which local courts offer no prospect of
redress, and paragraphs (c) to (d), which deal with circumstances which make it unfair or
unreasonable that an injured alien should be required to exhaust local remedies as a precondition
for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule.
Paragraph (e) deals with a different situation - that which arises where the respondent State has
waived compliance with the local remedies rule.

\textbf{Paragraph (a)}

(2) Paragraph (a) deals with the exception to the exhaustion of local remedies rule sometimes
described, in broad terms, as the “futility” or “ineffectiveness” exception. Three options require
consideration for the formulation of a rule describing the circumstances in which local remedies
need not be exhausted because of failures in the administration of justice:

(i) the local remedies are obviously futile;

(ii) the local remedies offer no reasonable prospect of success;

(iii) the local remedies provide no reasonable possibility of effective redress.

All three of these options enjoy some support among the authorities.

(3) The “obvious futility” test, expounded by Arbitrator Bagge in the \textit{Finnish Ships
Arbitration}, sets too high a threshold. On the other hand, the test of “no reasonable prospect of

\textsuperscript{197} Hostages case, I.C.J. Reports 1980, p. 3.
\textsuperscript{198} The Cofta Channel case (United Kingdom v. Albania) Merits, I.C.J. Reports 1949, p. 4.
\textsuperscript{199} Case concerning the Air Services Agreement of 27 March 1946 between the United States of America and
France, decision of 9 December 1978, UNRIAA, vol. XVIII, p. 415; Applicability of the Obligation to Arbitrate
under Section 21 of the United Nations Headquarters Agreement, of 26 June 1947, Advisory Opinion,
I.C.J. Reports 1988, p. 11 at p. 29, para. 41.
\textsuperscript{200} See The Interhandel, at pp. 28-29; ELSI case, at p. 43.
\textsuperscript{201} See ELSI case, at 46, para. 59.
success”, accepted by the European Commission of Human Rights in several decisions,202 is too generous to the claimant. This leaves the third option which 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 effective redress offered by the local remedies. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the Norwegian Loans case203 and is supported by the writings of jurists.204 The test, however, fails to include the element of availability of local remedies which was endorsed by the Commission in its articles on Responsibility of States for Internationally Wrongful Acts205 and is sometimes considered as a component of this rule by courts206 and writers.207 For this reason the test in paragraph (a) is expanded to require that there are no “reasonably available local remedies” to provide effective redress or that the local remedies provide no reasonable possibility of such redress. In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question;208 the national legislation justifying the acts of which the alien complains will not be reviewed by local courts;209 the local courts are notoriously lacking in independence;210 there is a consistent and well-established line of precedents adverse to the alien;211 the local courts do not have the competence to grant as appropriate and adequate remedy to the alien;212 or the respondent State does not have an adequate system of judicial protection.213

(4) In order to meet the requirements of paragraph (a) it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted. The decision on this matter must be made on the assumption that the claim is meritorious.214

Paragraph (b)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy

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205 Article 44 requires local remedies to be “available and effective”.
206 In Lorenz Group Inc. v. USA, the tribunal stated that the exhaustion of local remedies rule obliges the injured person “to exhaust remedies which are effective and adequate and are reasonably available” to him (at para. 168).
207 C.F. Amerasinghe, Local Remedies in International Law, op. cit., pp. 181-2; 203-4.
210 Robert E. Brown Claim of 23 November 1923, UNRIA, vol. VI, p. 120; Vélezquez Rodriguez case, Inter-American Court of Human Rights, Series C, No. 4, paras. 56-78, p. 291 at pp. 304-309.
214 Finnish Ships Arbitration, at p. 1504; Ambateilos Claim, at pp. 119-120.
to be implemented is confirmed by codification attempts, human rights instruments and practice, judicial decisions and scholarly opinion. It is difficult to give an objective content or meaning to “undue delay”, or to attempt to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claims Commission stated in the El Oro Mining case:

“The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter.”

Paragraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase “remedial process” is preferred to that of “local remedies” as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Paragraph (c)

The exception to the exhaustion of local remedies rule contained in draft article 15, paragraph (a), to the effect that local remedies do not need to be exhausted where they are not reasonably available or “provide no reasonable possibility of effective redress”, does not cover situations where local remedies are available and might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down while in overflight of another State’s territory. In such cases it has been suggested that local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State.

There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State. Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine in 1986, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State’s airspace (as illustrated by the Aerial Incident in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he would be expected to exhaust local remedies.

Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies. While there are tentative dicta in

218 El Oro Mining and Railway Company (Limited) (Great Britain v. United Mexican States), decision No. 55 of 18 June 1931, UNRBA, vol. V, p. 191 at p. 198. See also Case concerning the Administration of the Prince von Pless, Preliminary objections, P.C.I.J. Series A/B, 1933, No. 52, p. 4.
219 Ibid., at p. 198.
support of the existence of such an exception in the Interhandel\textsuperscript{220} and Salem\textsuperscript{221} cases, in other cases\textsuperscript{222} tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the Norwegian Loans case\textsuperscript{223} and the Aerial Incident case (Israel v. Bulgaria)\textsuperscript{224} arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the Trail Smelter case,\textsuperscript{225} involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others\textsuperscript{226} in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained on the basis that they provide examples of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) Paragraph (c) does not use the term “voluntary link” to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. In practice it would be difficult to prove such a subjective criterion. Hence paragraph (c) requires the existence of a “relevant connection” between the injured alien and the host State and not a voluntary link. This connection must be “relevant” in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only whether the

injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word “relevant” best allows a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien. There must be no “relevant connection” between the injured individual and the respondent State at the date of the injury.

\textit{Paragraph (d)}

(11) Paragraph (d) is designed to give a tribunal the power to dispense with the requirement of exhaustion of local remedies where, in all the circumstances of the case, it would be manifestly unreasonable to expect compliance with the rule. This paragraph, which is an exercise in progressive development, must be narrowly construed, with the burden of proof on the injured person to show not merely that there are serious obstacles and difficulties in the way of exhausting local remedies but that he is “manifestly” precluded from pursuing such remedies. No attempt is made to provide a comprehensive list of factors that might qualify for this exception. Circumstances that may manifestly preclude the exhaustion of local remedies possibly include the situation in which the injured person is prevented by the respondent State from entering its territory, either by law or by threats to his or her personal safety, and thereby denying him the opportunity to bring proceedings in local courts. Or where criminal syndicates in the respondent State obstruct him from bringing such proceedings. Although the injured person is expected to bear the costs of legal proceedings before the courts of the respondent State there may be circumstances in which such costs are prohibitively high and “manifestly preclude” compliance with the exhaustion of local remedies rule.\textsuperscript{227}

\textit{Paragraph (e)}

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it

\textsuperscript{220} Here the International Court stated: “it has been considered necessary that the State where the violation occurred should also have an opportunity to redress it by its own means”, I.C.J. Reports 1959, at p. 27. Emphasis is added.

\textsuperscript{221} In the Salem case an arbitral tribunal declared that “[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence”, UNRIAA, vol. II, p. 1165 at p. 1202.

\textsuperscript{222} Finnish Ship Arbitration, at p. 1504; Ambatielos Claim, at p. 99.


\textsuperscript{225} UNRIAA, vol. III, p. 1905.


\textsuperscript{227} On the implications of costs for the exhaustion of local remedies, see Loewen Group Inc. v. United States of America, at para. 166.
follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

“In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly.”228

(13) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estopped or forfeiture.

(14) An express waiver may be included in an ad hoc arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.229

(16) Waiver of local remedies must not be readily implied. In the ELSI case a Chamber of the International Court of Justice stated in this connection that it was:

“unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.”230

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions231 and the writings of jurists232 support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement “does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national”.233 That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the ELSI case.234 A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant.

234 I.C.J. Reports 1989, p. 15. In the Panevezys-Sakalutiskis Railway case, the Permanent Court of International Justice held that acceptance of the Optional Clause under art. 36, para. 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule; P.C.I.J. Series A/B, 1939, No. 76, p.19 (as had been argued by Judge van Eyningen in a dissenting opinion, ibid., pp. 35-36).
State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,238 paragraph (e) does not refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. It is wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

PART FOUR
MISCELLANEOUS PROVISIONS

Article 16

Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Commentary

(1) The customary international law rules on diplomatic protection and the rules governing the protection of human rights are complementary. The present draft articles are therefore not intended to exclude or to trump the rights of States, including both the State of nationality and States other than the State of nationality of an injured individual, to protect the individual under either customary international law or a multilateral or bilateral human rights treaty or other treaty. They are also not intended to interfere with the rights of natural and legal persons or other entities, involved in the protection of human rights, to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.


(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights,239 the International Convention on the Elimination of All Forms of Racial Discrimination,237 the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,238 the European Convention on Human Rights,239 the American Convention on Human Rights,240 and the African Charter on Human and People’s Rights.241 The same conventions allow a State to protect its own nationals in inter-State proceedings.

Moreover, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The view taken by the International Court of Justice in the 1966 South West Africa cases,242 holding that a State may not bring legal proceedings to protect the rights of non-nationals has to be qualified in the light of the articles on Responsibility of States for internationally wrongful acts.243 Article 48 (1) (b) of the articles on Responsibility of States for Internationally Wrongful Acts permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole,244 without complying with the requirements for the exercise of diplomatic protection.245

(3) The individual is also endowed with rights and remedies to protect him or herself against the injuring State, whether the individual’s State of nationality or another State, in terms of

237 Article 11.
239 Article 24.
240 Article 45.
243 Commentary to article 48, footnote 766.
244 See further the separate opinion of Judge Simma in the Case concerning Armed Activities on the Territory of Congo, Democratic Republic of Congo v. Uganda, I.C.J. Reports 2005, paras. 35-41.
245 Article 48 (1) (b) is not subject to article 44 of the articles on Responsibility of States for internationally wrongful acts which requires a State invoking the responsibility of another State to comply with the rules relating to the nationality of claims and to exhaust local remedies. Nor is it subject to the present draft articles (cf. E. Milano “Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition”, Netherlands Yearbook of International Law, vol. 35 (2005), p. 85 at pp. 103-108).
international human rights conventions. This is most frequently achieved by the right to petition an international human rights monitoring body.\textsuperscript{246}

(4) Individual rights under international law may also arise outside the framework of human rights. In the \emph{La Grand} case the International Court of Justice held that article 36 of the Vienna Convention on Consular Relations “creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person”\textsuperscript{247} and in the \emph{Avena} case the Court further observed “that violations of the rights of the individual under article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual”.\textsuperscript{248} A saving clause was inserted in the articles on Responsibility of States for internationally wrongful acts - article 33 - to take account of this development in international law.\textsuperscript{249}

(5) The actions or procedures referred to in draft article 16 include those available under both universal and regional human rights treaties as well as any other relevant treaty. Draft article 16 does not, however, deal with domestic remedies.

(6) The right to assert remedies other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act will normally vest in a State, natural or legal person, with the term “legal person” including both corporations and other legal persons of the kind contemplated in draft article 13. However, there may be “other legal entities” not enjoying legal personality that may be endowed with the right to bring claims for injuries suffered as a result of an internationally wrongful act. Loosely-formed victims’ associations provide an example of such “another entity” which have on occasion been given standing before international bodies charged with the enforcement of human rights. Intergovernmental bodies may also in certain circumstances belong to this category; so too may national liberation movements.

(7) Draft article 16 makes it clear that the present draft articles are without prejudice to the rights that States, natural and legal persons or other entities may have to secure redress for injury suffered as a result of an internationally wrongful act by procedures other than diplomatic protection. Where, however, a State resorts to such procedures it does not necessarily abandon its right to exercise diplomatic protection in respect of a person if that person should be a national or person referred to in draft article 8.

\textbf{Article 17}

\textbf{Special rules of international law}

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

\textbf{Commentary}

(1) Some treaties, particularly those dealing with the protection of foreign investment, contain special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies. Bilateral investment treaties (BITs) and the multilateral Convention on the Settlement of Investment Disputes between States and Nations of Other States are the primary examples of such treaties.

(2) Today foreign investment is largely regulated and protected by BITs.\textsuperscript{250} The number of BITs has grown considerably in recent years and it is today estimated that there are nearly 2,000 such agreements in existence. An important feature of the BIT is its procedure for the settlement of investment disputes. Some BITs provide for the direct settlement of the investment dispute between the investor and the host State, before either an \emph{ad hoc} tribunal or a tribunal established


\textsuperscript{247} \emph{La Grand (Germany v. United States of America)}, at p. 494, para. 77.

\textsuperscript{248} \emph{Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)}, at p. 26, para. 40.

\textsuperscript{249} This article reads: “This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”.

\textsuperscript{250} This was acknowledged by the International Court of Justice in the \emph{Barcelona Traction case}, at p. 47, para. 90.
by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Other BITs provide for the settlement of investment disputes by means of arbitration between the State of nationality of the investor (corporation or shareholder) and the host State over the interpretation or application of the relevant provision of the BIT. The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.251

(3) Draft article 17 makes it clear that the present draft articles do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. The provision is formulated so that the draft articles do not apply “to the extent that” they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply.

(4) Draft article 17 refers to “treaty provisions” rather than to “treaties” as treaties other than those specifically designed for the protection of investments may regulate the protection of investments, such as treaties of Friendship, Commerce and Navigation.

Article 18
Protection of ships’ crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

Commentary

(1) The purpose of draft article 18 is to affirm the right of the State or States of nationality of a ship’s crew to exercise diplomatic protection on their behalf, while at the same time acknowledging that the State of nationality of the ship also has a right to seek redress on their behalf, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act. It has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship’s crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship’s crew. Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship’s crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.

(2) There is support in the practice of States, in judicial decisions and in the writings of publicists,252 for the position that the State of nationality of a ship (the flag State) may seek redress for members of the crew of the ship who do not have its nationality. There are also policy considerations in favour of such an approach.

(3) The early practice of the United States, in particular, lends support to such a custom. Under American law foreign seamen were traditionally entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State.253 This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic

251 Article 27 (1) of the ICSID Convention provides: “No contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”


communications and consular regulations of the United States.\textsuperscript{254} Doubts have, however, been raised, including by the United States,\textsuperscript{255} as to whether this practice provides evidence of a customary rule.\textsuperscript{256}

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In McCready (US) v. Mexico the umpire, Sir Edward Thornton, held that “seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve”.\textsuperscript{257} In the “I’m Alone” case,\textsuperscript{258} which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the Reparation for Injuries advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.\textsuperscript{259}

(5) In 1999, the International Tribunal for the Law of the Sea handed down its decision in The MV “Saiga” (No. 2) case (Saint Vincent and the Grenadines v. Guinea)\textsuperscript{260} which provides support for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the Saiga by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The Saiga was registered in St. Vincent and the Grenadines (“St. Vincent”) and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before the International Tribunal for the Law of the Sea, Guinea objected to the admissibility of St. Vincent’s claim, \textit{inter alia}, on the ground that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the Saiga and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent,\textsuperscript{261} the Tribunal’s reasoning suggests that it also saw the matter as a case involving the protection of the crew something akin to, but different from, diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent.\textsuperscript{262} St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag “irrespective of their nationality”.\textsuperscript{263} In dismissing Guinea’s objection the Tribunal stated that the United Nations Convention on the Law of the Sea\textsuperscript{264} in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State.\textsuperscript{265} It stressed that “the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant”.\textsuperscript{266}

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship’s crew. This was recognized by the Law of the Sea Tribunal in Saiga when it called attention to “the transient and multinational composition of ships’ crews” and stated that large ships “could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue”.\textsuperscript{267} Practical considerations relating to the bringing of claims should not be


\textsuperscript{255} Communication dated 20 May 2003 to the International Law Commission (on file with the Codification Division of the Office of Legal Affairs of the United Nations).


\textsuperscript{257} J.B. Moore, \textit{International Arbitrations}, vol. 3, p. 2536.

\textsuperscript{258} AJIL vol. 29 (1935), 326.

\textsuperscript{259} \textit{L.C.J. Reports} 1949, p. 174 at pp. 202-203, Judge Hackworth and pp. 206-207, Judge Badawi Pasha.

\textsuperscript{260} Judgment, \textit{ITLOS Reports} 1999, para. 10.

\textsuperscript{261} \textit{Ibid.}, para. 98.

\textsuperscript{262} \textit{Ibid.}, para. 103.

\textsuperscript{263} \textit{Ibid.}, para. 104.

\textsuperscript{264} United Nations, \textit{Treaty Series}, vol. 1833, p. 3.

\textsuperscript{265} Judgment, \textit{ITLOS Reports} 1999, para. 105.

\textsuperscript{266} \textit{Ibid.}, para. 106.

\textsuperscript{267} \textit{Ibid.}, para. 107.
overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

(8) Support for the right of the flag State to seek redress for the ship’s crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Nor should it be seen as having replaced diplomatic protection. Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. Ships’ crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer.

(9) The right of the flag State to seek redress for the ship’s crew is not limited to redress for injuries sustained during or in the course of an injury to the vessel but extends also to injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a consequence of the injury to the vessel. Thus such a right would arise where members of the ship’s crew are illegally arrested and detained after the illegal arrest of the ship itself.

**Article 19**

**Recommended practice**

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the preparation to be sought; and

(c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

**Commentary**

(1) There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to transformation into rules of law in the exercise of progressive development of the law. Nevertheless they are desirable practices, constituting necessary features of diplomatic protection, that add strength to diplomatic protection as a means for the protection of human rights and foreign investment. These practices are recommended to States for their consideration in the exercise of diplomatic protection in draft article 19, which recommends that States “should” follow certain practices. The use of recommendatory, and not prescriptive, language of this kind is not unknown to treaties, although it cannot be described as a common feature of treaties.268

(2) Subparagraph (a), recommends to States that they should give consideration to the possibility of exercising diplomatic protection on behalf of a national who suffers significant injury. The protection of human beings by means of international law is today one of the principal goals of the international legal order, as was reaffirmed by the 2005 World Summit Outcome resolution adopted by the General Assembly on 24 October 2005.269 This protection may be achieved by many means, including consular protection, resort to international human rights treaties mechanisms, criminal prosecution or action by the Security Council or other international bodies - and diplomatic protection. Which procedure or remedy is most likely to achieve the goal of effective protection will, inevitably, depend on the circumstances of each case. When the protection of foreign nationals is in issue, diplomatic protection is an obvious remedy to which States should give serious consideration. After all it is the remedy with the longest history and has a proven record of effectiveness. Draft article 19, subparagraph (a), serves as a reminder to States that they should consider the possibility of resorting to this remedial procedure.

(3) A State is not under international law obliged to exercise diplomatic protection on behalf of a national who has been injured as a result of an internationally wrongful act attributable to

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268 Article 36 (3) of the Charter of the United Nations, for instance, provides that in recommending appropriate procedures for the settlement of disputes, “the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court” (emphasis added). Conventions on the law of the sea also employ the term “should” rather than “shall”. Article 3 of the 1982 Geneva Convention on the High Seas, United Nations, Treaty Series, vol. 450, p. 11, provides that “in order to enjoy freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea” (emphasis added). See, too, articles 27, 28, 43 and 123 of the 1982 United Nations Convention on the Law of the Sea.

269 A/RES/60/1, paras. 119-120, 138-140.
another State. The discretionary nature of the State’s right to exercise diplomatic protection is affirmed by draft article 2 of the present draft articles and has been asserted by the International Court of Justice and national courts, as shown in the commentary to draft article 2. Despite this there is growing support for the view that there is some obligation, however imperfect, on States, either under international law or national law, to protect their nationals abroad when they are subjected to significant human rights violations. The Constitutions of many States recognize the right of the individual to receive diplomatic protection for injuries suffered abroad, which must carry with it the corresponding duty of the State to exercise protection. Moreover, a number of national court decisions indicate that although a State has a discretion whether to exercise diplomatic protection or not, there is an obligation on that State, subject to judicial review, to do something to assist its nationals, which may include an obligation to give due consideration to the possibility of exercising diplomatic protection. In Kaunda and Others v. President of the Republic of South Africa the South Africa Constitutional Court stated that:

“There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.”

In these circumstances it is possible to seriously suggest that international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising diplomatic protection on behalf of a national who has suffered a significant injury abroad. If customary international law has not yet reached this stage of development then draft article 19, subparagraph (a), must be seen as an exercise in progressive development.

(4) Subparagraph (b), provides that a State “should”, in the exercise of diplomatic protection, “take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought”. In practice States exercising diplomatic protection do have regard to the moral and material consequences of an injury to an alien in assessing the damages to be claimed. In order to do this it is obviously necessary to consult with the injured person. So, too, with the decision whether to demand satisfaction, restitution or compensation by way of reparation. This has led some scholars to contend that the admonition contained in draft article 19, subparagraph (b), is already a rule of customary international law. If it is not, draft article 19, subparagraph (b), must also be seen as an exercise in progressive development.

(5) Subparagraph (c) provides that States should transfer any compensation received from the responsible State in respect of an injury to a national to the injured national. This recommendation is designed to encourage the widespread perception that States have an absolute discretion in such matters and are under no obligation to transfer moneys received for a claim based on diplomatic protection to the injured national. This perception has its roots in the Mavrommatis rule and a number of judicial pronouncements. In terms of the Mavrommatis Palestine Concessions dictum a State asserts its own right in exercising diplomatic protection and becomes “the sole claimant”. Consequently, logic dictates that no restraints are placed on the State, in the interests of the individual, in the settlement of the claim or the payment of any compensation received. That the State has “complete freedom of action” in its exercise of diplomatic protection is confirmed by the Barcelona Traction case. Despite the fact that the logic of Mavrommatis is undermined by the practice of calculating the amount of damages

270 Barcelona Traction case, at p. 44.
278 I.C.J. Reports 1970, p. 3 at p. 44.
individual claimants. Moreover, there is clear evidence in practice that States do pay money to injured nationals. In *Administrative Decision V*

... But where a demand is made on behalf of a designated national, and an award is made in that demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to the private owner thereof... B.W. M. Nye, *Diplomatic Protection*, p. 52

That this is the practice of States is confirmed by scholars. Further evidence of the crookedness of the State's discretion is to be found in the decisions of arbitral tribunals which prescribe how the award is to be divided. Moreover in 1944 the European Court of Human Rights decided in *Rehman v. France* that an international agreement making provision for compensation in such cases could give rise to an enforceable right on the part of the injured person to compensation.

That the award is to be divided...
(7) Subparagraph (c) acknowledges that it would not be inappropriate for a State to make reasonable deductions from the compensation transferred to injured persons. The most obvious justification for such deductions would be to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the cost of goods or services provided by the State to them.

(8) Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received by the injured national in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice. Nor is there any sense of obligation on the part of States to limit their freedom of disposal of compensation awards. On the other hand, public policy, equity and respect for human rights support the curtailment of the States' discretion in the disbursement of compensation. It is against this background that draft article 19, subparagraph (c), has been adopted. While it is an exercise in progressive development it is supported by State practice and equity.
International Court of Justice

Nottebohm Case (Liechtenstein v. Guatemala) (second phase)
Judgment

I.C.J. Reports 1955
Le présent arrêt doit être cité comme suit :
« Affaire Nottebohm (deuxième phase), Arrêt du 6 avril 1955: C. I. J. Recueil 1955, p. 4. »

This Judgment should be cited as follows:
NOTTEBOHM CASE
(LIECHTENSTEIN v. GUATEMALA)
SECOND PHASE

Proceedings instituted by Application.—Objection to admissibility.—
Final Conclusions of the Parties.—Nationality as a condition for the
exercise of diplomatic protection and for international judicial pro-
cedings.—Liechtenstein Nationality Law of January 4th, 1934.—
Naturalization in Liechtenstein.—Domestic jurisdiction with regard to
nationality.—Refusal by Guatemala to recognize nationality acquired
by naturalization in Liechtenstein.—Conditions to be satisfied in order
that nationality conferred upon an individual by a State may be relied
upon as against another State and give a title to the exercise of protection
against that State.—Real and effective character of nationality.—
Real link between the naturalized person and the naturalizing State.

JUDGMENT

Present: President Hackworth; Vice-President Badawi; Judges
Basdevant, Zorčić, Klaestad, Read, Hsu Mo, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla
Khan, Moreno Quintana, Cordova; M. Guggenheim and M. García Bauer, Judges ad hoc; Registrar López
Oliván.

In the Nottebohm Case,

between

the Principality of Liechtenstein,

represented by:

Dr. Erwin H. Loewenfeld, LL.B., Solicitor of the Supreme Court,
as Agent,

assisted by:

Professor Georges Sauser-Hall, Honorary Professor at the
Universities of Geneva and of Neuchâtel,
Mr. James E. S. Fawcett, D.S.C., of the English Bar,
Mr. Kurt Lipstein, Ph.D., of the English Bar,
as Counsel,

and

the Republic of Guatemala,

represented by:

M. V. S. Pinto J., Minister Plenipotentiary,
as Agent,

assisted by:

Me. Henri Rolin, Professor of Law at the Free University of
Brussels,
M. Adolfo Molina Orantes, Dean of the Faculty of Jurisprudence
of the University of Guatemala,
as Counsel,

and by

Me. A. Dupont-Willemin, of the Geneva Bar,
as Secretary,

The Court,

composed as above,

delivers the following Judgment:

By its Judgment of November 18th, 1953, the Court rejected the
Preliminary Objection raised by the Government of the Repub-
lic of Guatemala to the Application of the Government of the
Principality of Liechtenstein. At the same time it fixed time-limits
for the further pleadings on the merits. These time-limits were
subsequently extended by Orders of January 15th, May 8th and
September 13th, 1954. The second phase of the case was ready
for hearing on November 2nd, 1954, when the Rejoinder of the Government of Guatemala was filed.

Public hearings were held on February 10th, 11th, 14th to 16th, 21st to 24th and on March 2nd, 3rd, 4th, 7th and 8th, 1955. The Court included on the Bench M. Paul Guggenheim, Professor at the Graduate Institute of International Studies of Geneva and a Member of the Permanent Court of Arbitration, chosen as Judge ad hoc by the Government of Liechtenstein, and M. Carlos Garcia Bauer, Professor of the University of San Carlos, Former Chairman of the Guatemalan Delegation to the General Assembly of the United Nations, chosen as Judge ad hoc by the Government of Guatemala.

The Agent for the Government of Guatemala having filed a number of new documents, after the closure of the written proceedings, without the consent of the other Party, the Court, in accordance with the provisions of Article 48, paragraph 2, of its Rules, had, after hearing the Parties, to give its decision. Dr. Loewenfeld and Mr. Fawcett, on behalf of the Government of Liechtenstein, and M. Rolin, on behalf of the Government of Guatemala, addressed the Court on this question at the hearings on February 10th and 11th, 1955. The decision of the Court was given at the opening of the hearing on February 14th, 1955. Having taken note of the fact that during the course of the hearings the Agent of the Government of Liechtenstein had given his consent to the production of certain of the new documents; taking into account the special circumstances in connection with the search for, and classification and presentation of, the documents in respect of which consent had been refused, the Court permitted the production of all the documents and reserved to the Agent of the Government of Liechtenstein the right, if he so desired, to avail himself of the opportunity provided for in the second paragraph of Article 48 of the Rules of Court, after having heard the contentions of the Agent of the Government of Guatemala based on these documents, and after such lapse of time as the Court might, on his request, deem just. The Agent of the Government of Liechtenstein, availing himself of this right, filed a number of documents on February 26th, 1955.

At the hearings on February 14th, 1955, and at the subsequent hearings, the Court heard the oral arguments and replies of Dr. Loewenfeld, Professor Sauser-Hall, Mr. Fawcett and Mr. Lipstein, on behalf of the Government of Liechtenstein, and of M. Pinto, M. Rolin and M. Molina, on behalf of the Government of Guatemala.

The following Submissions were presented by the Parties:

On behalf of the Government of Liechtenstein:

in the Memorial:

"The Government of Liechtenstein submit that the Court should adjudge and declare:

1. The Government of Guatemala in arresting, detaining, expelling and refusing to readmit Mr. Nottebohm and in seizing and retaining his property without compensation acted in breach of their obligations under international law and consequently in a manner requiring the payment of reparation.

2. In respect of the wrongful arrest, detention, expulsion and refusal to readmit Mr. Nottebohm the Government of Guatemala should pay to the Government of Liechtenstein:

(i) special damages amounting, according to the data received so far, to not less than 20,000 Swiss francs;

(ii) general damages to the amount of 645,000 Swiss francs.

3. In respect of the seizure and retention of the property of Mr. Nottebohm, the Government of Guatemala should submit an account of the profits accruing in respect of the various parts of the property since the dates on which they were seized and should pay the equivalent in Swiss francs (with interest at 6% from the date of accrual) of such sum as may be found in that account to be owing by them. Further, the Government of Guatemala should pay damages (at present estimated at 300,000 Swiss francs per annum) representing the additional income which in the opinion of the Court would have been earned by the property if it had remained under the control of its lawful owner.

4. Further, the Government of Guatemala should restore to Mr. Nottebohm all his property which they have seized and retained together with damages for the deterioration of that property. Alternatively, they should pay to the Government of Liechtenstein the sum of 6,510,590 Swiss francs representing the estimated present market value of the seized property had it been maintained in its original condition."

in the Reply:

"May it please the Court to hold and declare,

As to the pleas of non-admissibility of the claim of Liechtenstein in respect of Mr. Nottebohm:

(1) that there is a dispute between Liechtenstein and Guatemala which is the subject-matter of the application to the Court by the Government of Liechtenstein and that it is admissible for adjudication by the Court without further diplomatic exchanges or negotiations between the Parties;

(2) that the naturalization of Mr. Nottebohm in Liechtenstein on October 20th, 1939, was granted in accordance with the municipal law of Liechtenstein and was not contrary to international law; that in consequence Mr. Nottebohm was from that date divested of his German nationality; and that Liechtenstein's claim on behalf of Mr. Nottebohm as a national of Liechtenstein is admissible before the Court;

(3) that the plea by Guatemala of the non-exhaustion of local remedies by Mr. Nottebohm is excluded by the prorogation in this case of the jurisdiction of the Court; or alternatively that
NOTTEBOHM CASE (JUDGMENT OF 6 IV 55) 8

the plea goes properly not to the admissibility of Liechtenstein's claim on his behalf but to the merits of that claim:

(4) that in any event Mr. Nottebohm exhausted all the local remedies in Guatemala which he was able or required to exhaust under the municipal law of Guatemala and under international law.

As to the merits of its claim, the Government of Liechtenstein repeats the Final Conclusions set out in its Memorial at p. 51 and with reference to paragraphs 2, 3 and 4 of those Final Conclusions, will further ask the Court to order, under Article 50 of the Statute, such inquiry as may be necessary into the account of profits and quantification of damages.'

as final Submissions presented at the hearing of March 4th, 1955:

'May it please the Court,

I. as to the pleas of non-admissibility of the claim of Liechtenstein in respect of Mr. Frederic Nottebohm:

(1) to hold and declare that there is a dispute between Liechtenstein and Guatemala, that it forms the subject-matter of the present application to the Court by the Government of Liechtenstein and that it is admissible for adjudication by the Court without further diplomatic communication or negotiations between the parties;

(2) to find and declare that the naturalization of Mr. Frederic Nottebohm in Liechtenstein on October 13th, 1939, was not contrary to international law; and that Liechtenstein's claim on behalf of Mr. Nottebohm as a national of Liechtenstein is admissible before the Court;

(3) to hold and declare:

(a) that in regard to the person of Mr. Frederic Nottebohm he was prevented from exhausting the local remedies and that in any case such remedies would have been ineffective;

(b) (aa) that in regard to the properties in respect to which no decision was given by the Minister upon the application for exoneration, lodged by Mr. Frederic Nottebohm, Mr. Frederic Nottebohm has exhausted the remedies which were available to him in Guatemala and which he was required to exhaust under the municipal law of Guatemala and under international law;

(bb) that in regard to the properties in which a decision was given by the Minister, Mr. Frederic Nottebohm was not required to exhaust the local remedies under international law;

(4) if the Court should not hold and declare in favour of conclusion (3) above

to declare nevertheless

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that the claim is admissible since the facts disclose a breach of international law by Guatemala in the treatment of the person and property of Mr. Frederic Nottebohm.

II. As to the Merits of its claim:

(5) to adjourn the oral pleadings for not less than three months in order that the Government of Liechtenstein may obtain and assemble documents in support of comments on the new documents produced by the Government of Guatemala;

(6) to request the Government of Guatemala to produce the original or certified copy of the original of the 1922 agreements referred to in the agreements of 8th January, 1924 (Document numbered VIII) and of 15th March, 1938 (Document numbered XI);

(7) to fix in due course a date for the completion of the oral hearings on the merits;

(8) if the Court should not make any Order as requested in (5)-(7), the Government of Liechtenstein repeats the final conclusions set out in its Memorial at page 51, and with reference to the paragraphs 2, 3 and 4 of those final conclusions further asks the Court to order under Article 50 of the Statute such enquiry as may be necessary into the account of profits and quantification of damages.'

On behalf of the Government of Guatemala:

in the Counter-Memorial:

'May it please the Court,

subject to all reservations and without prejudice,

As to admissibility:

(ii) by reason of the absence of any prior diplomatic negotiations;

(ii) because the Principality of Liechtenstein has failed to prove that M. Nottebohm, for whose protection it is acting, properly acquired Liechtenstein nationality in accordance with the law of the Principality;

because, even if such proof were provided, the legal provisions which would have been applied cannot be regarded as in conformity with international law;

and because M. Nottebohm appears in any event not to have lost, or not validly to have lost, his German nationality;

(iii) on the ground of M. Nottebohm's failure to exhaust local remedies;

In the alternative, on the Merits:

(i) to hold that neither in the legislative measures of Guatemala applied in the case of M. Nottebohm, nor in the administrative or
judicial measures taken with regard to him in pursuance of the said laws, there has been proved any fault such as to involve the responsibility of the Respondent State to the Principality of Liechtenstein;

Consequently, to dismiss the claim of the Principality of Liechtenstein;

In the further alternative, as to the question of the amount claimed:

To hold that there is no case for damages, except in relation to the property personally owned by Friedrich Nottebohm, and excluding the shares which he possessed in the firm of Nottebohm Hermanos, and

further to declare that the Government of Guatemala shall be discharged from all responsibility on its acting in accordance with the provisions of Decree No. 900, which contains the law relating to Agrarian reform."

in the Rejoinder:

"May it please the Court,

subject to all reservations and without prejudice as to admissibility:

to declare that the claim of the Principality of Liechtenstein is inadmissible

(1) on the ground of the absence of any prior diplomatic negotiations.

In the alternative, on this point:

to declare it inadmissible on this ground at least in so far as it relates to reparation for injury allegedly caused to the person of Friedrich Nottebohm

(2) on the ground that Nottebohm is not of Liechtenstein nationality.

In the alternative on this point:

to order the production by Liechtenstein of the original documents in the archives of the central administration and the communal administration of Mauren, together with the records of the Diet relating to the naturalization of Nottebohm

(3) on the ground of the failure previously to exhaust the local remedies.

In the alternative on this point:

to declare that this contention is well founded at least in respect of reparation for injury allegedly caused to the person of Nottebohm and for the expropriation of property other than his immovable property and his interests in the immovable property held in the name of the firm of Nottebohm Hermanos.

In the alternative, on the Merits:

to hold that the laws of Guatemala applied to M. Nottebohm have violated no rule of international law and that no fault has been established on the part of the Guatemalan authorities in

their conduct in relation to him such as to involve the responsibility of the Respondent State;

consequently, to dismiss the claim of Liechtenstein.

In the further alternative, in the event of the ordering of an expert opinion to determine the quantum of damages:

to hold that the amount of damages to be awarded should be calculated in accordance with the Guatemalan law, namely, Decree 530 and, in respect of certain immovable property, the Agrarian Reform Law;"

as final Submissions presented at the hearing of March 7th, 1955:

"May it please the Court,

subject to all reservations and without prejudice,

as to admissibility:

to declare that the claim of the Principality of Liechtenstein is inadmissible

(1) on the ground of the absence of any prior diplomatic negotiations between the Principality of Liechtenstein and Guatemala such as would disclose the existence of a dispute between the two States before the filing of the Application instituting proceedings;

in the alternative on this point:

to declare that the claim of the Principality on this ground is inadmissible, at least in so far as it relates to reparation for injury allegedly caused to the person of Friedrich Nottebohm;

(2) (a) on the ground that Mr. Nottebohm, for whose protection the Principality of Liechtenstein is acting before the Court, has not properly acquired Liechtenstein nationality in accordance with the law of the Principality;

(b) on the ground that naturalization was not granted to Mr. Nottebohm in accordance with the generally recognized principles in regard to nationality;

(c) in any case, on the ground that Mr. Nottebohm appears to have solicited Liechtenstein nationality fraudulently, that is to say, with the sole object of acquiring the status of a neutral national before returning to Guatemala, and without any genuine intention to establish a durable link, excluding German nationality, between the Principality and himself;

in the alternative on this point:

to invite Liechtenstein to produce to the Court, within a time-limit to be fixed by the latter, all original documents in the archives relating to the naturalization of Nottebohm and, in particular, the convocations of members of the Diet to the sitting on October 14th, 1939, and those of the Assembly of Mauren citizens on October 15th, 1939, the agenda and minutes of the aforesaid sittings, together with the instrument conferring naturalization allegedly signed by His Highness the Prince Regnant;

(3) on the ground of the non-exhaustion by Friedrich Nottebohm of the local remedies available to him under the Guatemalan legislation, whether in regard to his person or his property, even if
it should appear that the complaints against Guatemala were concerned with an alleged original breach of international law;

in the alternative on this point:

to declare that this contention is well founded, at least in respect of reparation for injury allegedly caused to the person of Nottebohm, and to the property, other than immovable property, or shares that he may have owned in immovable property registered as belonging to the Nottebohm Hermanos Company;

in the further alternative on the Merits:

to declare that there is no occasion to order the supplementary enquiry proposed, since it was incumbent on the Principality, on its own initiative, to discover the nature of Friedrich Nottebohm's interests in the Nottebohm Hermanos Company and the successive changes effected in the status of that Company and in its direct or indirect relations with the Nottebohm Company of Hamburg;

to hold that no violation of international law has been shown to have been committed by Guatemala in regard to Mr. Nottebohm, either in respect of his property or his person;

more especially in regard to the liquidation of his property, to declare that Guatemala was not obliged to regard the naturalization of Friedrich Nottebohm in the Principality of Liechtenstein as binding upon her, or as a bar to his treatment as an enemy national in the circumstances of the case;

consequently, to dismiss the claim of Liechtenstein together with her conclusions;

as a final alternative in regard to the amount of the damages claimed:


to record a finding on behalf of Guatemala that she expressly disputes the proposed valuations, which have no valid justification."

* * *

By the Application filed on December 17th, 1951, the Government of Liechtenstein instituted proceedings before the Court in which it claimed restitution and compensation on the ground that the Government of Guatemala had "acted towards the person and property of Mr. Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law". In its Counter-Memorial, the Government of Guatemala contended that this claim was inadmissible on a number of grounds, and one of its objections to the admissibility of the claim related to the nationality of the person for whose protection Liechtenstein had seised the Court.

It appears to the Court that this plea in bar is of fundamental importance and that it is therefore desirable to consider it at the outset.

Guatemala has referred to a well-established principle of international law, which it expressed in Counter-Memorial, where it is stated that "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection". This sentence is taken from a Judgment of the Permanent Court of International Justice (Series A/B, No. 76, p. 16), which relates to the form of diplomatic protection constituted by international judicial proceedings.

Liechtenstein considers itself to be acting in conformity with this principle and contends that Nottebohm is its national by virtue of the naturalization conferred upon him.

* * *

Nottebohm was born at Hamburg on September 16th, 1881. He was German by birth, and still possessed German nationality when, in October 1939, he applied for naturalization in Liechtenstein.

In 1905 he went to Guatemala. He took up residence there and made that country the headquarters of his business activities, which increased and prospered; these activities developed in the field of commerce, banking and plantations. Having been an employee in the firm of Nottebohm Hermanos, which had been founded by his brothers Juan and Arturo, he became their partner in 1912 and later, in 1937, he was made head of the firm. After 1905 he sometimes went to Germany on business and to other countries for holidays. He continued to have business connections in Germany. He paid a few visits to a brother who had lived in Liechtenstein since 1931. Some of his other brothers, relatives and friends were in Germany, others in Guatemala. He himself continued to have his fixed abode in Guatemala until 1943, that is to say, until the occurrence of the events which constitute the basis of the present dispute.

In 1939, after having provided for the safeguarding of his interests in Guatemala by a power of attorney given to the firm of Nottebohm Hermanos on March 22nd, he left that country at a date fixed by Counsel for Liechtenstein as at approximately the end of March or the beginning of April, when he seems to have gone to Hamburg, and later to have paid a few brief visits to Vaduz where he was at the beginning of October 1939. It was then, on October 9th, a little more than a month after the opening of the second World War marked by Germany's attack on Poland, that his attorney, Dr. Marxer, submitted an application for naturalization on behalf of Nottebohm.

The Liechtenstein Law of January 4th, 1934, lays down the conditions for the naturalization of foreigners, specifies the supporting documents to be submitted and the undertakings to be given and defines the competent organs for giving a decision and the procedure to be followed. The Law specifies certain mandatory requirements, namely, that the applicant for naturalization should prove: (1)
“that the acceptance into the Home Corporation (Heimatverband) of a Liechtenstein commune has been promised to him in case of acquisition of the nationality of the State”; (2) that he will lose his former nationality as a result of naturalization, although this requirement may be waived under stated conditions. It further makes naturalization conditional upon compliance with the requirement of residence for at least three years in the territory of the Principality, although it is provided that “this requirement can be dispensed with in circumstances deserving special consideration and by way of exception”. In addition, the applicant for naturalization is required to submit a number of documents, such as evidence of his residence in the territory of the Principality, a certificate of good conduct issued by the competent authority of the place of residence, documents relating to his property and income and, if he is not a resident in the Principality, proof that he has concluded an agreement with the Revenue authorities, “subsequent to the revenue commission of the presumptive home commune having been heard”. The Law further provides for the payment by the applicant of a naturalization fee, which is fixed by the Princely Government and amounts to at least one half of the sum payable by the applicant for reception into the Home Corporation of a Liechtenstein commune, the promise of such reception constituting a condition under the Law for the grant of naturalization.

The Law reveals concern that naturalization should only be granted with knowledge of all the pertinent facts, in that it expressly provides for an inquiry into the relations of the applicant with the country of his former nationality, as well as into all other personal and family circumstances, and adds that “the grant of nationality is barred where these relations and circumstances are such as to cause apprehension that prejudice of any kind may ensue to the State by reason of the admission to nationality”.

As to the consideration of the application by the competent organs and the procedure to be followed by them, the Law provides that the Government, after having examined the application and the documents pertaining thereto, and after having obtained satisfactory information concerning the applicant, shall submit the application to the Diet. If the latter approves the application, the Government shall submit the requisite request to the Prince, who alone is entitled to confer nationality of the Principality.

Finally, the Law empowers the Princely Government, within a period of five years from the date of naturalization, to withdraw Liechtenstein nationality from any person who may have acquired it if it appears that the requirements laid down in the Law were not satisfied; it likewise provides that the Government may at any time deprive a person of his nationality if the naturalization was fraudulently obtained.

This was the legal position with regard to applications for naturalization at the time when Nottebohm’s application was submitted.

On October 9th, 1939, Nottebohm, “resident in Guatemala since 1905 (at present residing as a visitor with his brother, Hermann Nottebohm, in Vaduz)”, applied for admission as a national of Liechtenstein and, at the same time, for the previous conferment of citizenship in the Commune of Mauren. He sought dispensation from the condition of three years’ residence as prescribed by law, without indicating the special circumstances warranting such waiver. He submitted a statement of the Credit Suisse in Zürich concerning his assets, and undertook to pay 25,000 Swiss francs to the Commune of Mauren, 12,500 Swiss francs to the State, to which was to be added the payment of dues in connection with the proceedings. He further stated that he had made “arrangements with the Revenue Authorities of the Government of Liechtenstein for the conclusion of a formal agreement to the effect that he will pay an annual tax of naturalization amounting to Swiss francs 1,000, of which Swiss francs 600 are payable to the Commune of Mauren and Swiss francs 400 are payable to the Principality of Liechtenstein, subject to the proviso that the payments of these taxes will be set off against ordinary taxes which will fall due if the applicant takes up residence in one of the Communes of the Principality”. He further undertook to deposit as security a sum of 30,000 Swiss francs. He also gave certain general information as to his financial position and indicated that he would never become a burden to the Commune whose citizenship he was seeking.

Lastly, he requested “that naturalization proceedings be initiated and concluded before the Government of the Principality and before the Commune of Mauren without delay, that the application be then placed before the Diet with a favourable recommendation and, finally, that it be submitted with all necessary expedition to His Highness the Reigning Prince”.

On the original typewritten application which has been produced in a photostatic copy, it can be seen that the name of the Commune of Mauren and the amounts to be paid were added by hand, a fact which gave rise to some argument on the part of Counsel for the Parties. There is also a reference to the “Vorausverständnis” of the Reigning Prince obtained on October 13th, 1939, which Liechtenstein interprets as showing the decision to grant naturalization, which interpretation has, however, been questioned. Finally, there is annexed to the application an otherwise blank sheet bearing the signature of the Reigning Prince, “Franz Josef”, but without any date or other explanation.

A document dated October 15th, 1939, certifies that on that date the Commune of Mauren conferred the privilege of its citizenship upon Mr. Nottebohm and requested the Government to transmit it to the Diet for approval. A certificate of October 17th, 1939,
evidences the payment of the taxes required to be paid by Mr. Nottebohm. On October 20th, 1939, Mr. Nottebohm took the oath of allegiance and a final arrangement concerning liability to taxation was concluded on October 23rd.

This was the procedure followed in the case of the naturalization of Nottebohm.

A certificate of nationality has also been produced, signed on behalf of the Government of the Principality and dated October 20th, 1939, to the effect that Nottebohm was naturalized by Supreme Resolution of the Reigning Prince dated October 13th, 1939.

Having obtained a Liechtenstein passport, Nottebohm had it visa-ed by the Consul General of Guatemala in Zurich on December 1st, 1939, and returned to Guatemala at the beginning of 1940, where he resumed his former business activities and in particular the management of the firm of Nottebohm Hermanos.

* * *

Relying on the nationality thus conferred on Nottebohm, Liechtenstein considers itself entitled to seise the Court of its claim on his behalf, and its Final Conclusions contain two submissions in this connection. Liechtenstein requests the Court to find and declare, first, “that the naturalization of Mr. Frederic Nottebohm in Liechtenstein on October 13th, 1939, was not contrary to international law”, and, secondly, “that Liechtenstein’s claim on behalf of Mr. Nottebohm as a national of Liechtenstein is admissible before the Court”.

The Final Conclusions of Guatemala, on the other hand, request the Court “to declare that the claim of the Principality of Liechtenstein is inadmissible”, and set forth a number of grounds relating to the nationality of Liechtenstein granted to Nottebohm by naturalization.

Thus, the real issue before the Court is the admissibility of the claim of Liechtenstein in respect of Nottebohm. Liechtenstein’s first submission referred to above is a reason advanced for a decision by the Court in favour of Liechtenstein, while the several grounds given by Guatemala on the question of nationality are intended as reasons for the inadmissibility of Liechtenstein’s claim. The present task of the Court is limited to adjudicating upon the admissibility of the claim of Liechtenstein in respect of Nottebohm on the basis of such reasons as it may itself consider relevant and proper.

In order to decide upon the admissibility of the Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalization which took place in the circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala and therefore entitled to seise the Court of a claim relating to him. In this connection, Counsel for Liechtenstein said: “the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States”. This formulation is accurate, subject to the twofold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.

The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. It must decide this question on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Court’s own function.

* * *

In order to establish that the Application must be held to be admissible, Liechtenstein has argued that Guatemala formerly recognized the naturalization which it now challenges and cannot therefore be heard to put forward a contention which is inconsistent with its former attitude.

Various documents, facts and actions have been relied upon in this connection.

Reliance has been placed on the fact that, on December 1st, 1939, the Consul General of Guatemala in Zurich entered a visa in the Liechtenstein passport of Mr. Nottebohm for his return to Guatemala; that on January 29th, 1940, Nottebohm informed the Ministry of External Affairs in Guatemala that he had adopted the nationality of Liechtenstein and therefore requested that the entry relating to him in the Register of Aliens should be altered accordingly, a request which was granted on January 31st; that on February 9th, 1940, a similar amendment was made to his identity document, and lastly, that a certificate to the same effect was issued to him by the Civil Registry of Guatemala on July 1st, 1940.

The acts of the Guatemalan authorities just referred to proceeded on the basis of the statements made to them by the person concerned. The one led to the other. The only purpose of the first, as appears from Article 9 of the Guatemalan law relating to pass-
ports, was to make possible or facilitate entry into Guatemala, and nothing more. According to the Aliens Act of January 25th, 1936, Article 49, entry in the Register “constitutes a legal presumption that the alien possesses the nationality there attributed to him, but evidence to the contrary is admissible”. All of these acts have reference to the control of aliens in Guatemala and not to the exercise of diplomatic protection. When Nottebohm thus presented himself before the Guatemalan authorities, the latter had before them a private individual: there did not thus come into being any relationship between governments. There was nothing in all this to show that Guatemala then recognized that the naturalization conferred upon Nottebohm gave Liechtenstein any title to the exercise of protection.

Although the request sent by Nottebohm Hermanos to the Minister of Finance and Public Credit on September 13th, 1940, with reference to the inclusion of the firm on the British Statutory List, referred to the fact that only one of the partners was “a national of Liechtenstein/Switzerland”, this point was only made incidentally, and the whole request was based on the consideration that the firm “is a wholly Guatemalan business” and on the interests of the “national economy”. It was on this basis that the matter was discussed, and no reference whatsoever was made to any intervention by the Government of Liechtenstein at that time.

Similarly unconnected with the exercise of protection was the Note addressed on October 18th, 1943, by the Minister of External Affairs to the Swiss Consul who, having understood that the registration documents indicated that Nottebohm was a Swiss citizen of Liechtenstein, requested, in a Note of September 25th, 1943, that this matter might be clarified. He received the reply that there was no such indication of Swiss nationality in the documents and, although the Consul had referred to the representation of the interests of the Principality abroad by the representatives of the Swiss Government, the reply sent to him made no allusion to the exercise, by or on behalf of Liechtenstein, of protection in favour of Nottebohm.

When, on October 20th, 1943, the Swiss Consul asked that “Mr. Walter Schellenberg of Swiss nationality and Mr. Federico Nottebohm of Liechtenstein”, who had been transferred to the United States Military Base for the purpose of being deported, should, “as citizens of neutral countries”, be returned home, the Minister of External Affairs of Guatemala replied, on October 22nd, that the action taken was attributable to the authorities of the United States, and made no reference to the nationality of Nottebohm.

In a letter of the Swiss Consul of December 15th, 1944, to the Minister of External Affairs, reference is made to the entry on the Black Lists of “Frederick Nottebohm, a national of Liechtenstein”. Neither the text of these lists nor any extract therefrom has been produced, but this is not germane to the present discussion. The important fact is that Guatemala, in its reply dated December 20th, 1944, expressly stated that it could not “recognize that Mr. Nottebohm, a German subject habitually resident in Guatemala, has acquired the nationality of Liechtenstein without changing his habitual residence”. The Court has not at present to consider the validity of the ground put forward for disputing Nottebohm’s nationality, which was subsequently put forward to justify the cancellation of his registration as a citizen of the “Condado” of Liechtenstein. It is sufficient for it to note that there is here an express denial by Guatemala of Nottebohm’s Liechtenstein nationality.

Nottebohm’s name having been removed from the Register of Resident Aliens, his relative Karl Heinz Nottebohm Stoltz, on July 24th, 1946, requested the cancellation of the decision and the restoration of Nottebohm’s name to the Register as a citizen of Liechtenstein, putting forward a number of considerations, essentially based on the exclusive right of Liechtenstein to decide as to the nationality in question and the duty of Guatemala to conform to such decision. Far from accepting the considerations thus put forward, the Minister of External Affairs rejected the request, on August 16th, 1946, merely saying that it was pointless, since Nottebohm was no longer a resident of Guatemala.

There is nothing here to show that before the institution of proceedings Guatemala had recognized Liechtenstein’s title to exercise protection in favour of Nottebohm and that it is thus precluded from denying such a title.

Nor can the Court find any recognition of such title in the communication signed by the Minister of External Affairs of Guatemala, addressed to the President of the Court, on September 9th, 1952. In this communication reference is made to measures taken against Nottebohm “who claims to be a national of the claimant State” (“quien se alega ser ciudadano del Estado reclamante”). Then, reference having been made to the claim presented by the Government of the Principality of Liechtenstein with regard to these measures, it is stated that the Government of Guatemala “is quite willing to begin negotiations with the Government of the said Principality with a view to arriving at an amicable solution, either in the sense of a direct settlement, an arbitration or judicial settlement”. It would constitute an obstacle to the opening of negotiations for the purpose of reaching a settlement of an international dispute or of concluding a special agreement for arbitration and would hamper the use of the means of settlement recommended by Article 33 of the Charter of the United Nations, to interpret an offer to have recourse
to such negotiations or such means, consent to participate in them or actual participation, as implying the abandonment of any defence which a party may consider it is entitled to raise or as implying acceptance of any claim by the other party, when no such abandonment or acceptance has been expressed and where it does not indisputably follow from the attitude adopted. The Court cannot see in the communication of September 9th, 1952, any admission by Guatemala of the possession by Nottebohm of a nationality which it clearly disputed in its last official communication on this subject, namely, the letter of December 20th, 1944, to the Swiss Consul, still less can it find any recognition of Liechtenstein’s title, based on such nationality, to exercise its protection and to seise the Court in the present case.

* * *

Since no proof has been adduced that Guatemala has recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization which it granted to Nottebohm, the Court must consider whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein’s right to exercise its protection. In other words, it must be determined whether that unilateral act by Liechtenstein is one which can be relied upon against Guatemala in regard to the exercise of protection. The Court will deal with this question without considering that of the validity of Nottebohm’s naturalization according to the law of Liechtenstein.

It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.

The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.

International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State.

In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favour of Nottebohm against Guatemala.

When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction. This situation may arise on the international plane and fall to be considered by international arbitrators or by the courts of a third State. If the arbitrators or the courts of such a State should confine themselves to the view that nationality is exclusively within the domestic jurisdiction of the State, it would be necessary for them to find that they were confronted by two contradictory assertions made by two sovereign States, assertions which they would consequently have to regard as of equal weight, which would oblige them to allow the contradiction to subsist and thus fail to resolve the conflict submitted to them.

In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States, but rather to determine whether the nationality invoked by the applicant State was one which could be relied upon as against the respondent State, that is to say, whether it entitled the applicant State to exercise protection. International arbitrators, having before them allegations of nationality by the applicant State which were contested by the respondent State, have sought to ascertain whether nationality had been conferred by the applicant State in circumstances such as to give rise to an obligation on the part
of the respondent State to recognize the effect of that nationality. In order to decide this question arbitrators have evolved certain principles for determining whether full international effect was to be attributed to the nationality invoked. The same issue is now before the Court: it must be resolved by applying the same principles.

The courts of third States, when confronted by a similar situation, have dealt with it in the same way. They have done so not in connection with the exercise of protection, which did not arise before them, but where two different nationalities have been invoked before them they have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize.

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors may be taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.

The same tendency prevails in the writings of publicists and in practice. This notion is inherent in the provisions of Article 3, paragraph 2, of the Statute of the Court. National laws reflect this tendency when, inter alia, they make naturalization dependent on conditions indicating the existence of a link, which may vary in their purpose or in their nature but which are essentially concerned with this idea. The Liechtenstein Law of January 4th, 1934, is a good example.

The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation. A similar view is manifested in the relevant provisions of the bilateral nationality treaties concluded between the United States of America and other States since 1868, such as those sometimes referred to as the Bancroft Treaties, and in the Pan-American Convention, signed at Rio de Janeiro on August 13th, 1906, on the status of naturalized citizens who resume residence in their country of origin.

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

The requirement that such a concordance must exist is to be found in the studies carried on in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations. It explains the provision which the Conference for the Codification of International Law, held at The Hague in 1930, inserted in Article 1 of the Convention relating to the Conflict of Nationality Laws, laying down that the law enacted by a State for the purpose of determining who are its nationals “shall be recognized by other States in so far as it is consistent with ..., international custom, and the principles of law generally recognized with regard to nationality”. In the same spirit, Article 5 of the Convention refers to criteria of the individual’s genuine connections for the purpose of resolving questions of dual nationality which arise in third States.

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national.
Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International Justice has said and has repeated, “by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law” (P.C.I.J., Series A, No. 2, p. 12, and Series A/B, Nos. 20-21, p. 17).

* * *

Since this is the character which nationality must present when it is invoked to furnish the State which has granted it with a title to the exercise of protection and to the institution of international judicial proceedings, the Court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.

Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have farreaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.

At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?

The essential facts appear with sufficient clarity from the record. The Court considers it unnecessary to have regard to the documents purporting to show that Nottebohm had or had not retained his interests in Germany, or to have regard to the alternative submission of Guatemala relating to a request to Liechtenstein to produce further documents. It would further point out that the Government of Liechtenstein, in asking in its Final Conclusions for an adjournment of the oral proceedings and an opportunity to present further documents, did so only for the 'eventuality of the Application being held to be admissible and not for the purpose of throwing further light upon the question of the admissibility of the Application.

The essential facts are as follows:

At the date when he applied for naturalization Nottebohm had been a German national from the time of his birth. He had always retained his connections with members of his family who had remained in Germany and he had always had business connections with that country. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country.

He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusal to admit him. There, too, were several members of his family who sought to safeguard his interests.

In contrast, his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization; the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years—on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there. If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him. No indication is given of the grounds warranting the waiver of the condition of residence, required by the 1934 Nationality Law, which waiver was implicitly granted to him. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein. It is unnecessary in this connection to attribute much importance to the promise to pay the taxes levied at the time of his naturalization. The only links to be discovered between the Principality and Nottebohm are the short sojourns already referred to and the presence in Vaduz of one of his brothers; but his brother's presence is referred
to in his application for naturalization only as a reference to his
good conduct. Furthermore, other members of his family have
asserted Nottebohm's desire to spend his old age in Guatemala.

These facts clearly establish, on the one hand, the absence of
any bond of attachment between Nottebohm and Liechtenstein
and, on the other hand, the existence of a long-standing and close
connection between him and Guatemala, a link which his naturali-
zation in no way weakened. That naturalization was not based on
any real prior connection with Liechtenstein, nor did it in any
way alter the manner of life of the person upon whom it was
conferred in exceptional circumstances of speed and accommoda-
tion. In both respects, it was lacking in the genuineness requisite
to an act of such importance, if it is to be entitled to be respected
by a State in the position of Guatemala. It was granted without
regard to the concept of nationality adopted in international
relations.

Naturalization was asked for not so much for the purpose of
obtaining a legal recognition of Nottebohm's membership in fact
in the population of Liechtenstein, as it was to enable him to
substitute for his status as a national of a belligerent State that of
a national of a neutral State, with the sole aim of thus coming
within the protection of Liechtenstein but not of becoming wedded
to its traditions, its interests, its way of life or of assuming the
obligations—other than fiscal obligations—and exercising the rights
pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality
granted in such circumstances. Liechtenstein consequently is not
entitled to extend its protection to Nottebohm vis-à-vis Guatemala
and its claim must, for this reason, be held to be inadmissible.

The Court is not therefore called upon to deal with the other
pleas in bar put forward by Guatemala or the Conclusions of the
Parties other than those on which it is adjudicating in accordance
with the reasons indicated above.

For these reasons,

THE COURT,

by eleven votes to three,

Holds that the claim submitted by the Government of the
Principality of Liechtenstein is inadmissible.

Done in French and English, the French text being authoritative,
at the Peace Palace, The Hague, this sixth day of April, one
thousand nine hundred and fifty-five, in three copies, one of which
will be placed in the archives of the Court and the others will
be transmitted to the Government of the Principality of Liech-
tenstein and to the Government of the Republic of Guatemala,
respectively.

(Signed) Green H. HACKWORTH,
President.

(Signed) J. LÓPEZ OLIVÁN,
Registrar.

Judges KLAESTAD and READ, and M. GUGGENHEIM, Judge ad hoc,
have availed themselves of the right conferred on them by Article 57
of the Statute and have appended to the Judgment statements of
their dissenting opinion.

(Initialled) G. H. H.
(Initialled) J. L. O.
International Court of Justice

Interhandel Case (Switzerland v. United States of America), Preliminary Objections Judgment

I.C.J. Reports 1959
AFFAIRE DE L'INTERHANDEL
(SUISSE c. ÉTATS-UNIS D'AMÉRIQUE)
(EXCEPTIONS PRÉLIMINAIRES)
ARRÊT DU 21 MARS 1959

1959

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

INTERHANDEL CASE
(SWITZERLAND v. UNITED STATES OF AMERICA)
(PRELIMINARY OBJECTIONS)
JUDGMENT OF MARCH 21st, 1959

Le présent arrêt doit être cité comme suit:
« Affaire de l'Interhandel,

This Judgment should be cited as follows:
"Interhandel Case,
International Court of Justice

Year 1959

March 21st, 1959

Interhandel Case (Switzerland v. United States of America) (Preliminary Objections)

Declarations of acceptance of compulsory jurisdiction of Court.—Reservation ratione temporis with regard to date on which dispute arose.—Operation of principle of reciprocity.—Domestic jurisdiction of United States and scope of reservation (b) of its declaration of acceptance of compulsory jurisdiction of Court.—Application of rule of exhaustion of local remedies.

Judgment

Present: President Klæstad; Vice-President Zafrulla Khan; Judges Basdevant, Hackworth, Winarski, Badawi, Armand-Ugon, Kojevnikov, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Siroopoulos, Sir Percy Spender; Judge ad hoc Carry; Deputy-Registrar Garnier-Coignet.

In the Interhandel case,

between
the Swiss Confederation,
represented by
M. Georges Sauser-Hall, Professor emeritus of the Universities of Geneva and Neuchâtel,
as Agent,
and by
M. Paul Guggenheim, Professor at the Law Faculty of the University of Geneva and at the Graduate Institute of International Studies,
as Co-Agent,
assisted by
M. Henri Thévenaz, Professor of International Law at the University of Neuchâtel,
as Counsel and Expert,
and
M. Michael Gelzer, Doctor of Laws,
M. Hans Miesch, Doctor of Laws, First Secretary of Embassy,
as Experts,

and
the United States of America,
represented by
the Honorable Loftus Becker, Legal Adviser of the Department of State,
as Agent,
assisted by
Mr. Stanley D. Metzger, Assistant Legal Adviser for Economic Affairs, Department of State,
Mr. Sidney B. Jacoby, Professor of Law, Georgetown University,
as Counsel,

The Court,
composed as above,
delivers the following Judgment:

On October 2nd, 1957, the Ambassador of the Swiss Confederation to the Netherlands filed with the Registrar an Application dated October 1st instituting proceedings in the Court relating to a dispute which had arisen between the Swiss Confederation and the United...
States of America with regard to the claim by Switzerland to the restitution by the United States of the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel).

The Application, which invoked Article 36, paragraph 2, of the Statute and the acceptance of the compulsory jurisdiction of the Court by the United States of America on August 26th, 1946, and by Switzerland on July 28th, 1948, was, in accordance with Article 40, paragraph 2, of the Statute, communicated to the Government of the United States of America. In accordance with paragraph 3 of the same Article, the other Members of the United Nations and the non-Member States entitled to appear before the Court were notified.

Time-limits for the filing of the Memorial and the Counter-Memorial were fixed by an Order of the Court on October 24th, 1957, and subsequently extended at the request of the Parties by an Order of January 15th, 1958. The Memorial of the Swiss Government was filed within the time-limit fixed by that Order. Within the time-limit fixed for the filing of the Counter-Memorial, the Government of the United States of America filed preliminary objections to the jurisdiction of the Court. On June 26th, 1958, an Order recording that the proceedings on the merits were suspended under the provisions of Article 62 of the Rules of Court, granted the Swiss Government a time-limit expiring on September 22nd, 1958, for the submission of a written statement of its observations and submissions on the preliminary objections. The written statement was filed on that date and the case became ready for hearing in respect of the preliminary objections.

The Court not including upon the Bench a judge of Swiss nationality, the Swiss Government, pursuant to Article 31, paragraph 2, of the Statute, chose M. Paul Carry, Professor of Commercial Law at the University of Geneva, to sit as Judge ad hoc in the present case.

Hearings were held on November 5th, 6th, 8th, 10th, 11th, 12th, 14th and 17th, 1958, in the course of which the Court heard the oral arguments and replies of the Honourable Loftus Becker, on behalf of the Government of the United States of America, and of M. Sauser-Hall and M. Guggenheim, on behalf of the Swiss Government.

In the course of the written and oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Swiss Confederation, in the Application:

"May it please the Court:

To communicate the present Application instituting proceedings to the Government of the United States of America, in accordance with Article 40, paragraph 2, of the Statute of the Court;

To adjudge and declare, whether the Government of the United States of America appears or not, after considering the contents of the Parties,

1. that the Government of the United States of America is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) to that company;

2. in the alternative, that the dispute is one which is fit for submission for judicial settlement, arbitration or conciliation under the conditions which it will be for the Court to determine.

The Swiss Federal Council further reserves the right to supplement and to modify its submissions."

On behalf of the same Government, in the Memorial:

"May it please the Court to adjudge and declare:

A. Principal Submissions

1. that the Government of the United States of America is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel);

2. in the alternative, that in case the Court should not consider that proof of the non-enemy character of the property of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) has been furnished, an expert selected by the Court should be designated, in accordance with Article 50 of the Statute of the Court, with the task of

(a) examining the documents put at the disposal of the American Courts by Interhandel,

(b) examining the files and accounting records of the Sturzenegger Bank the seizure of which was ordered by the public authorities (Ministère public) of the Swiss Confederation on June 15th, 1950, subject to the reservation, however, that the expert in his expert opinion shall refer only to such documents as relate to the Interhandel case and shall be instructed to observe absolute secrecy concerning the documents of the Sturzenegger Bank, its clients and all other individuals and legal persons if such documents are not relevant to the case pending before the Court,

for the purpose of enabling the Court to determine the enemy or non-enemy character of the Interhandel assets in the General Aniline and Film Corporation.

B. Alternative Submissions in case the Court should not sustain the Swiss request to examine the merits of the dispute

1. (a) that the Court has jurisdiction to decide whether the dispute is one which is fit for submission either to the arbitral tribunal provided for in Article VI of the
Washington Accord of 1946, or to the arbitral tribunal provided for by the Treaty of Arbitration and Conciliation between Switzerland and the United States of February 16th, 1931;

(b) that in case of an affirmative reply to submission (a) the said tribunal has jurisdiction to examine the dispute; and that the choice of one or the other tribunal belongs to the applicant State;

2. in the alternative:

(a) that the Court has jurisdiction to decide whether the dispute is fit to be submitted to the arbitral tribunal provided for by Article VI of the Washington Accord of 1946;

(b) that in case of an affirmative reply to submission (a) the said tribunal has jurisdiction to examine the dispute;

3. in the further alternative:

(a) that the Court has jurisdiction to decide whether the dispute is fit to be submitted to the arbitral tribunal provided for by the Treaty of Arbitration and Conciliation of 1931 between the Swiss Confederation and the United States of America;

(b) that in case of an affirmative reply to submission (a) the said tribunal has jurisdiction to examine the dispute;

4. in the final alternative:

that the dispute between the Swiss Confederation and the United States of America should be submitted to the examination of the Permanent Commission of Conciliation provided for in Articles II-IV of the Treaty of Arbitration and Conciliation of 1931.

The Swiss Federal Council furthermore reserves the right to supplement and to amend the preceding submissions."

On behalf of the Government of the United States of America, in its Preliminary Objections:

"May it please the Court to judge and decide:

(i) First Preliminary Objection

that there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before August 26th, 1946, the date on which the acceptance of the Court’s compulsory jurisdiction by this country became effective;

(ii) Second Preliminary Objection

that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before July 28th, 1948, or the date on which the acceptance of the Court’s compulsory jurisdiction by this country became effective;

(iii) Third Preliminary Objection

that there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts;

(iv) Fourth Preliminary Objection

(a) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the sale or disposition of the vested shares of General Aniline and Film Corporation (including the passing of good and clear title to any person or entity), for the reason that such sale or disposition has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country’s acceptance of this Court’s jurisdiction, to be a matter essentially within the domestic jurisdiction of this country; and

(b) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States.

The United States of America reserves the right to supplement or to amend the preceding submissions, and, generally, to submit any further legal argument."

On behalf of the Swiss Government, in its Observations and Submissions:

"May it please the Court to adjudge and declare:

1. to dismiss the first preliminary objection of the United States of America;

2. to dismiss the second preliminary objection of the United States of America;

3. either to dismiss, or to join to the merits, the third preliminary objection of the United States of America;

4. either to dismiss, or to join to the merits, preliminary objection 4 (a) of the United States of America;

5. either to dismiss, or to join to the merits, preliminary objection 4 (b) of the United States of America."
The Swiss Federal Council maintains and confirms its main and alternative submissions as set out on pages 67 and 68 of the Memorial of the Swiss Confederation of March 3rd, 1958.

The Swiss Federal Council supplements its main submissions by the following alternative submission:

The Swiss Federal Council requests the Court to declare that the property, rights and interests which the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) possesses in the General Aniline and Film Corporation have the character of non-enemy (Swiss) property, and consequently to declare that by refusing to return the said property the Government of the United States of America is in breach of Article IV, paragraph 1, of the Washington Accord of May 25th, 1946, and of the obligations binding upon it under the general rules of international law.

The Swiss Federal Council further reserves the right to supplement and to modify the preceding submissions."

On behalf of the same Government, Submissions deposited in the Registry on November 3rd, 1958:

"A. Principal Submissions

1. that the Government of the United States of America is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel);

2. in the alternative, that in case the Court should not consider that proof of the non-enemy character of the property of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) has been furnished, an expert selected by the Court should be designated, in accordance with Article 50 of its Statute, with the task of:

(a) examining the documents put at the disposal of the American courts by Interhandel,

(b) examining the files and accounting records of the Sturzenegger Bank, the seizure of which was ordered by the public authorities (Ministère public) of the Swiss Confederation on June 15th, 1950, subject to the reservation, however, that the expert in his expert opinion shall refer only to such documents as relate to the Interhandel case, and shall be instructed to observe absolute secrecy concerning the documents of the Sturzenegger Bank, its clients and all other individuals and legal persons, if such documents are not relevant to the case pending before the Court,

for the purpose of enabling the Court to determine the enemy or non-enemy character of the Interhandel assets in the General Aniline and Film Corporation.

B. Alternative Principal Submission

The Swiss Federal Council requests the Court to declare that the property, rights and interests which the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) possesses in General Aniline and Film Corporation have the character of non-enemy (Swiss) property, and consequently to declare that by refusing to return the said property, the Government of the United States is acting contrary to the decision of January 5th, 1948, of the Swiss Authority of Review based on the Washington Accord, and is in breach of Article IV, paragraph 1, of the Washington Accord of May 25th, 1946, and of the obligations binding upon it under the general rules of the law of nations.

C. Submissions regarding the Submissions of the Government of the United States following its Preliminary Objections

1. To dismiss the first preliminary objection of the United States of America;

2. To dismiss the second preliminary objection of the United States;

3. Either to dismiss, or to join to the merits, the third preliminary objection of the United States of America;

4. Either to dismiss, or to join to the merits, the preliminary objection 4(a) of the United States of America;

(b) of the United States of America;

In the alternative

should the Court uphold one or the other of the preliminary objections of the United States of America, to declare its competence in any case to decide whether the United States of America is under an obligation to submit the dispute regarding the validity of the Swiss Government’s claim either to the arbitral procedure provided for in Article VI of the Washington Accord of 1946, or to the Arbitral Tribunal provided for in the 1932 Treaty of Arbitration and Conciliation, or to the Conciliation Commission provided for in the same Treaty, and to fix the subsequent procedure.

D. Submissions on the merits in the event of the Court accepting one or other of the preliminary objections of the United States of America and accepting jurisdiction in conformity with the alternative submission as under C

1. To declare that the United States of America is under an obligation to submit the dispute for examination either to the arbitral procedure of the Washington Accord or to the Tribunal provided for in the Arbitration and Conciliation Treaty of 1931, and that the choice of one or the other Tribunal belongs to the Applicant State.

2. In the alternative:

that the United States of America is under an obligation to submit the dispute to the arbitral procedure provided for in Article VI of the Washington Accord of 1946.
3. In the further alternative:

that the United States of America is under an obligation to submit the dispute to the Arbitral Tribunal provided for in the Arbitration and Conciliation Treaty of 1931 between the Swiss Confederation and the United States of America.

4. In the final alternative:

that the United States of America is under an obligation to submit the dispute for examination by the Permanent Conciliation Commission provided for in Articles II-IV of the Arbitration and Conciliation Treaty of 1931.

At the hearing on November 6th, 1958, the Agent for the Government of the United States of America reaffirmed the submissions set forth in the Preliminary Objections.

For his part, the Agent for the Swiss Government repeated, at the hearing on November 12th, 1958, the submission he had filed on November 3rd, whilst reserving his right to modify them after hearing any explanations that might be put forward on behalf of the Government of the United States of America.

At the hearing on November 14th, 1958, the Agent for the Government of the United States of America reaffirmed and maintained his earlier submissions whilst emphasizing that the preliminary objections were directed against all of the alternative as well as the principal submissions made on behalf of the Swiss Government.

Finally, at the hearing on November 17th, 1958, the Agent for the Swiss Government maintained the submissions he had filed in the Registry on November 3rd, 1958, which thus acquired the character of final submissions.

* * *

The declarations by which the Parties accepted the compulsory jurisdiction of the Court are as follows:

Declaration of the United States of America of August 14th, 1946 (in force since August 26th, 1946):

"I, Harry S. Truman, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes as compulsory jure factum and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning

(a) The interpretation of a treaty;

(b) Any question of international law;

(c) The existence of any fact which, if established, would constitute a breach of an international obligation;

(d) The nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to

(a) Disputes the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

(c) Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America especially agrees to jurisdiction; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."

Declaration of Switzerland of July 6th, 1948 (in force since July 28th, 1948):

"The Swiss Federal Council, duly authorized for that purpose by a Federal decree which was adopted on 12 March 1948 by the Federal Assembly of the Swiss Confederation and became operative on 27 June 1948,

Hereby declares that the Swiss Confederation recognizes as compulsory jure factum and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:

(a) The interpretation of a treaty;

(b) Any question of international law;

(c) The existence of any fact which, if established, would constitute a breach of an international obligation;

(d) The nature or extent of the reparation to be made for the breach of an international obligation.

This declaration, which is made under Article 36 of the Statute of the International Court of Justice, shall take effect from the date on which the Swiss Confederation becomes a party to that Statute and shall have effect as long as it has not been abrogated subject to one year's notice."

* * *

The present proceedings are concerned only with the preliminary objections raised by the Government of the United States of
America. It is nevertheless convenient to set out briefly the facts and circumstances as submitted by the Parties which constitute the origin of the present dispute.

The Agreements of February 10th and April 24th, 1942, based on the Trading with the Enemy Act of October 6th, 1917, as amended, the Government of the United States vested almost all of the shares of General Aniline and Film Corporation (briefly referred to as the GAF), a company incorporated in the United States, on the ground that these shares in reality belonged to the I.G. Farbenindustrie company of Frankfurt or that the GAF was in one way or another controlled by that enemy company.

It is not disputed that until 1940 I.G. Farben controlled the GAF through the Société internationale pour entreprises chimiques S.A. (I.G. Chemie), entered in the Commercial Register of the Canton of Bâle-Ville in 1928. However, according to the contention of the Swiss Government, the links between the German company I.G. Farben and the Swiss company I.G. Chemie were finally severed by the cancellation of the contract for an option and for the guarantee of dividends, a cancellation which was effected in June 1940, that is, well before the entry of the United States into the war. The Swiss company adopted the name of Société internationale pour participations industrielles et commerciales S.A. (briefly referred to as Interhandel); Article 2 of its Statute as modified in 1940 defines it as follows: "The enterprise is a holding company. Its object is participation in industrial and commercial undertakings of every kind, especially in the chemical field, in Switzerland and abroad, but excluding banking and the professional purchase and sale of securities." The largest item in the assets of Interhandel is its participation in the GAF. Approximately 75% of the GAF "A" shares and all its issued "B" shares are said to belong to Interhandel. A considerable part, approximately 90%, of these shares and a sum of approximately 1,800,000 dollars, have been vested by the Government of the United States.

Towards the end of the war, under a provisional agreement between Switzerland, the United States of America, France and the United Kingdom, property in Switzerland belonging to Germans in Germany was blocked (Decree of the Federal Council of February 16th, 1945). The Swiss Compensation Office was entrusted with the task of uncovering property in Switzerland belonging to Germans or controlled by them. In the course of these investigations, the question of the character of Interhandel was raised, but as a result of investigations carried out in June and July, 1945, the Office, considering it to have been proved that Interhandel had severed its ties with the German company, did not regard it as necessary to undertake the blocking of its assets.

For its part, the Government of the United States, considering that Interhandel was still controlled by I.G. Farben, continued to seek evidence of such control. In these circumstances the Federal Department of Public Economy and the Federal Political Department ordered the Swiss Compensation Office provisionally to block the assets of Interhandel; this was done on October 30th, 1945. The Office then carried out a second investigation (November 1945-February 1946) which led it to the same conclusion as had the first.

On May 25th, 1946, an agreement was concluded between the three Allied Powers and Switzerland (the Washington Accord). Under one of the provisions of the Accord, Switzerland undertook to pursue its investigations and to liquidate German property in Switzerland. It was the Compensation Office which was "empowered to uncover, take into possession, and liquidate German property" (Accord, Annex, II, A), in collaboration with a Joint Commission "composed of representatives of each of the four Governments" (Annex, II, B). The Accord lays down the details of that collaboration (Annex, II, C, D, E, F) and provides that, in the event of disagreement between the Joint Commission and the Compensation Office or if the party in interest so desires, the matter may within a period of one month be submitted to a Swiss Authority of Review composed of three members and presided over by a Judge. "The decisions of the Compensation Office, or of the Authority of Review, should the matter be referred to it, shall be final" (Annex, III). In the event, however, of disagreement with the Swiss Authority of Review on certain given matters, "the three Allied Governments may, within one month, require the difference to be submitted to arbitration" (Annex, III).

The Washington Accord further provides:

"Article IV, paragraph 1.

The Government of the United States will unblock Swiss assets in the United States. The necessary procedure will be determined without delay.

Article VI.

In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration."

After the conclusion of the Washington Accord, discussions with regard to Interhandel between the Swiss Compensation Office and the Joint Commission as well as between representatives of Switzerland and the United States were continued without reaching any conclusion accepted by the two parties. The Office, while declaring itself ready to examine any evidence as to the German character of Interhandel which might be submitted to it, continued to accept the results of its two investigations; the Joint Commission challenged
these results and continued its investigations. By its decision of January 5th, 1948, given on appeal by Interhandel, the Swiss Authority of Review annulled the blocking with retroactive effect. It had invited the Joint Commission to participate in the procedure, but the latter had declined the invitation. This question was not referred to the arbitration provided for in the Washington Accord.

In these circumstances, the Swiss Government considered itself entitled to regard the decision of the Swiss Authority of Review as a final one, having the force of res judicata vis-à-vis the Powers parties to the Washington Accord. Consequently, in a Note of May 4th, 1948, to the Department of State, the Swiss Legation at Washington invoked this decision and the Washington Accord to request the Government of the United States to restore to Interhandel the property which had been vested in the United States. On July 26th, 1948, the Department of State rejected this request, contending that the decision of the Swiss Authority of Review did not affect the assets vested in the United States and claimed by I.G. Chemie. On September 7th, 1948, in a Note to the Department of State, the Swiss Legation in Washington, still relying on its interpretation of the Washington Accord, maintained that the decision of the Swiss Authority of Review recognizing Interhandel as a Swiss company was legally binding upon the signatories of that Accord. It expressed the hope that the United States Government would accordingly release the assets of Interhandel in the United States, failing which the Swiss Government would have to submit the question to the arbitral procedure laid down in Article VI of the Washington Accord. On October 12th, 1948, the Department of State replied to that communication, maintaining its previous view that the decision of the Swiss Authority of Review was inapplicable to property vested in the United States. It added that United States law in regard to the seizure and disposal of enemy property authorized non-enemy foreigners to demand the restitution of vested property and to apply for it to the courts. On October 21st, 1948, Interhandel, relying upon the provisions of the Trading with the Enemy Act, instituted proceedings in the United States District Court for the District of Columbia. Direct discussion between the two Governments was then interrupted until April 9th, 1953, on which day the Swiss Government sent to the Government of the United States a Note questioning the procedure applied in the United States in the Interhandel case, stating that this procedure had led to a deadlock, and suggesting negotiations for a satisfactory settlement.

Up to 1957 the proceedings in the United States courts had made little progress on the merits. Interhandel, though it had produced a considerable number of the documents called for, did not produce all of them; it contended that the production of certain documents was prohibited by the Swiss authorities as constituting an offence under Article 273 of the Swiss Criminal Code and as violating banking secrecy (Article 47 of the Federal Law of November 8th, 1934). The action brought by Interhandel was the subject of a number of appeals in the United States courts and in a Memorandum appended to the Note addressed by the Department of State to the Swiss Minister on January 11th, 1957, it was said that Interhandel had finally failed in its suit. It was then that the Swiss Government, on October 2nd, 1957, addressed to the Court the Application instituting the present proceedings. The assertion in the Note of January 11th, 1957, that Interhandel’s claim was finally rejected, proved, however, to be premature, as the Court will have occasion to point out in considering the Third Objection of the United States.

As stated, the exchange of notes with regard to Interhandel which had taken place in 1948, was resumed in 1953. In its Note of April 9th, 1953, the Swiss Legation at Washington suggested negotiations between the two Governments with a view to arriving amicably at a just and practical solution of the problem of Interhandel; these suggestions were repeated in the Notes of December 1st, 1954, and March 1st, 1955; they were not accepted by the Department of State. Finally, the Swiss Note of August 9th, 1956, formulated proposals for the settlement of the dispute either by means of arbitration or conciliation as provided for in the Treaty between Switzerland and the United States of February 16th, 1931, or by means of arbitration as provided for in the Washington Accord. This approach did not meet with the approval of the Government of the United States, which rejected its Note, already referred to, of January 11th, 1957.

* * *

The subject of the claim as set forth in the final submissions presented on behalf of the Swiss Government, and disregarding certain items of a subsidiary character which can be left aside for the moment, is expressed essentially in two propositions:

(1) as a principal submission, the Court is asked to adjudge and declare that the Government of the United States is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel);

(2) as an alternative submission, the Court is asked to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or to a conciliation procedure in accordance with certain conditions set forth first in the principal submissions and then in the alternative submissions.

The Government of the United States has put forward four preliminary objections to the Court’s dealing with the claims of the Swiss Government. Before proceeding to examine these objections, the Court must direct its attention to the claim, formulated for the
first time in the Observations and Submissions of the Swiss Government, which is in the following terms:

"The Swiss Federal Council requests the Court to declare that the property, rights and interests which the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) possesses in General Aniline and Film Corporation have the character of non-enemy (Swiss) property, and consequently to declare that by refusing to return the said property the Government of the United States of America is in breach of Article IV, paragraph 1, of the Washington Accord of May 25th, 1949, and of the obligations binding upon it under the general rules of international law."

In its final Submissions, deposited in the Registry on November 3rd, 1958, the Swiss Government gives the following explanation with regard to this claim:

"The Swiss Government, after examining the Preliminary Objections of the United States of America, has come to the conclusion that these involve the modification of the Swiss Government’s principal and alternative Submissions, which are as follows."

The claim in question, however, which is described as “alternative principal Submission”, does not constitute a mere modification; it constitutes a new claim involving the merits of the dispute. Article 62, paragraph 3, of the Rules of Court, however, is categorical:

"Upon receipt by the Registrar of a preliminary objection filed by a party, the proceedings on the merits shall be suspended."

Consequently, the new Swiss submission relating to a request for a declaratory judgment, presented after the suspension of the proceedings on the merits, cannot be considered by the Court at the present stage of the proceedings.

* * *

First Preliminary Objection

The First Objection of the Government of the United States seeks a declaration that the Court is without jurisdiction on the ground that the present dispute arose before August 26th, 1946, the date on which the acceptance of the compulsory jurisdiction of the Court by the United States came into force. The declaration of the United States does indeed relate to legal disputes “hereafter arising”. The Government of the United States maintains that the dispute goes back at least to the middle of the year 1945, and that divergent opinions as to the character of Interhandel were exchanged between the American and Swiss authorities on a number of occasions before August 26th, 1946.

The Court would recall that the subject of the present dispute is indicated in the Application and in the Principal Final Submission of the Swiss Government which seeks the return to Interhandel of the assets vested in the United States. An examination of the documents reveals that a request to this effect was formulated by Switzerland for the first time in the Note of the Swiss Legation at Washington dated May 4th, 1948. The negative reply, which the Department of State describes as its final and considered view, is dated July 26th, 1948. Two other Notes exchanged shortly afterwards (on September 7th and October 12th of that same year) confirm that the divergent views of the two Governments were concerned with a clearly-defined legal question, namely, the restitution of Interhandel’s assets in the United States, and that the negotiations to this end rapidly reached a deadlock. Thus the dispute now submitted to the Court can clearly be placed at July 26th, 1948, the date of the first negative reply which the Government of the United States described as its final and considered view rejecting the demand for the restitution of the assets. Consequently the dispute arose subsequently to the date of the entry into force of the Declaration of the United States.

During the period indicated by the Government of the United States (the years 1945 and 1946), the exchanges of views between the Swiss authorities on the one hand the Allied and, in the first place, the American authorities, on the other, related to the search for, and the blocking and liquidation of, German property and interests in Switzerland; the question of the German character of Interhandel was the subject of investigations and exchanges of views for the purpose of reaching a decision as to the fate of the assets in Switzerland of that company. It was only after the decision of the Swiss Authority of Review of January 5th, 1948, definitely recognizing the non-enemy character of the assets of Interhandel and, in consequence, putting an end to the provisional blocking of these assets in Switzerland, had, in the opinion of the Federal Government, acquired the authority of res judicata, that the Government for the first time addressed to the United States its claim for the restitution of Interhandel’s assets in the United States.

The discussions regarding Interhandel between the Swiss and American authorities in 1945, 1946 and 1947 took place within the framework of the collaboration established between them prior to the Washington Accord and defined in that Accord. The representatives of the Joint Commission and those of the Swiss Compensation Office communicated to each other the results of their enquiries and investigations, and discussed their opinions with regard to Interhandel, without arriving at any final conclusions. Thus, for instance, the minute of the meeting of the Joint Commission on September 8th, 1947, records:

"The representatives of the Swiss Compensation Office stated that their investigations had yielded only negative results and
that they were still waiting for the Allies to furnish their documents which the Swiss Compensation Office was ready to discuss with the Allied experts.

The Court cannot see in these discussions between the Allied and Swiss officials a dispute between Governments which had already arisen with regard to the restitution of the assets claimed by Interhandel in the United States; the facts and situations which have led to a dispute must not be confused with the dispute itself; the documents relating to this collaboration between the Allied and Swiss authorities for the purpose of liquidating German property in Switzerland are not relevant to the solution of the question raised by the first objection of the United States.

The First Preliminary Objection must therefore be rejected so far as the principal submission of Switzerland is concerned.

In the Alternative Submission, Switzerland asks the Court to adjudge and declare that the United States is under an obligation to submit to arbitration or conciliation.

In raising its objection _ratione tempore_ to the Application of the Swiss Government, the Government of the United States has not distinguished between the principal claim and the alternative claim in the Application. It is, however, clear that the alternative claim, in spite of its close connection with the principal claim, is nevertheless a separate and distinct claim relating not to the substance of the dispute, but to the procedure for its settlement.

The point here in dispute is the obligation of the Government of the United States to submit to arbitration or to conciliation an obligation the existence of which is asserted by Switzerland and denied by the United States. This part of the dispute can only have arisen subsequently to that relating to the restitution of Interhandel's assets in the United States, since the procedure proposed by Switzerland and rejected by the United States was conceived as a means of settling the first dispute. In fact, the Swiss Government put forward this proposal for the first time in its Note of August 9th, 1956, and the Government of the United States rejected it by its Note of January 11th, 1957.

With regard to the Alternative Submission of Switzerland, the First Preliminary Objection cannot therefore be upheld.

* * *

Second Preliminary Objection

According to this Objection, the present dispute, even if it is subsequent to the date of the Declaration of the United States, arose before July 28th, 1948, the date of the entry into force of the Swiss Declaration. The argument set out in the Preliminary Objections is as follows:

The United States Declaration, which was effective August 26th, 1946, contained the clause limiting the Court's jurisdiction to disputes 'hereafter arising', while no such qualifying clause is contained in the Swiss Declaration which was effective July 28th, 1948. But the reciprocity principle ... requires that as between the United States and Switzerland the Court's jurisdiction be limited to disputes arising after July 28th, 1948. Otherwise, retroactive effect would be given to the compulsory jurisdiction of the Court.

In particular, it was contended with regard to disputes arising after August 26th, 1946, but before July 28th, 1948, that 'Switzerland, as a Respondent, could have invoked the principle of reciprocity and claimed that, in the same way as the United States is not bound to accept the Court's jurisdiction with respect to disputes arising before its acceptance, Switzerland, too, could not be required to accept the Court's jurisdiction in relation to disputes arising before its acceptance.'

Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. For example, Switzerland, which has not expressed in its Declaration any reservation _ratione tempore_, while the United States has accepted the compulsory jurisdiction of the Court only in respect of disputes subsequent to August 26th, 1946, might, if in the position of Respondent, invoke by virtue of reciprocity against the United States the American reservation if the United States attempted to refer to the Court a dispute with Switzerland which had arisen before August 26th, 1946. This is the effect of reciprocity in this connection. Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a reservation which the other Party, Switzerland, has not included in its own Declaration.

The Second Preliminary Objection must therefore be rejected so far as the Principal Submission of Switzerland is concerned.

Since it has already been found that the dispute concerning the obligation of the United States to agree to arbitration or conciliation did not arise until 1957, the Second Preliminary Objection must also be rejected so far as the Alternative Submission of Switzerland is concerned.

* * *

Fourth Preliminary Objection

Since the Fourth Preliminary Objection of the United States relates to the jurisdiction of the Court in the present case, the Court will proceed to consider it before the Third Objection which
is an objection to admissibility. This Fourth Objection really consists of two objections which are of different character and of unequal scope. The Court will deal in the first place with part (b) of this Objection.

The Government of the United States submits “that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States’.

In challenging before the Court the seizure and retention of these shares by the authorities of the United States, the Swiss Government invokes the Washington Accord and general international law.

In order to determine whether the examination of the grounds thus invoked is excluded from the jurisdiction of the Court for the reason alleged by the United States, the Court will base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning Nationality Decrees Issued in Tunis and Morocco (Series B, No. 4), when dealing with a similar divergence of view. Accordingly, the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will confine itself to considering whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.

With regard to its principal Submission that the Government of the United States is under an obligation to restore the assets of Interhandel in the United States, the Swiss Government invokes Article IV of the Washington Accord. The Government of the United States contends that this Accord relates only to German property in Switzerland, and that Article IV “is of no relevance whatever in the present dispute”.

By Article IV of this international agreement, the United States has assumed the obligation to unblock Swiss assets in the United States. The Parties are in disagreement with regard to the meaning of the term “unblock” and the term “Swiss assets”. The interpretation of these terms is a question of international law which affects the merits of the dispute. At the present stage of the proceedings it is sufficient for the Court to note that Article IV of the Washington Accord may be of relevance for the solution of the present dispute and that its interpretation relates to international law.

The Government of the United States submits that according to international law the seizure and retention of enemy property in time of war are matters within the domestic jurisdiction of the United States and are not subject to any international supervision. All the authorities and judicial decisions cited by the United States refer to enemy property; the whole question is whether the assets of Interhandel are enemy or neutral property. There having been a formal challenge based on principles of international law by a neutral State which has adopted the cause of its national, it is not open to the United States to say that their decision is final and not open to challenge; despite the American character of the Company, the shares of which are held by Interhandel, this is a matter which must be decided in the light of the principles and rules of international law governing the relations between belligerents and neutrals in time of war.

In its alternative Submission, the Swiss Government requests the Court to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or conciliation. The Swiss Government invokes Article VI of the Washington Accord, which provides: “In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration.” It also invokes the Treaty of Arbitration and Conciliation between Switzerland and the United States, dated February 16th, 1931. Article I of this Treaty provides: “Every dispute arising between the Contracting Parties, of whatever nature it may be, shall, unless ordinary diplomatic proceedings have failed, be submitted to arbitration or to conciliation, as the Contracting Parties may at the time decide.” The interpretation and application of these provisions relating to arbitration and conciliation involve questions of international law.

Part (b) of the Fourth Preliminary Objection must therefore be rejected.

Part (a) of the Fourth Objection seeks a finding from the Court that it is without jurisdiction to entertain the Application of the Swiss Government, for the reason that the sale or disposition by the Government of the United States of the shares of the GAF which have been vested as enemy property “has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country’s acceptance of this Court’s jurisdiction, to be a matter essentially within the domestic jurisdiction of this country”. The Preliminary Objections state that: “Such declination encompasses all issues raised in the Swiss Application and Memorial (including issues raised by the Swiss-United States Treaty of 1931 and the Washington Accord of 1946)”, but they add: “in so far as the determination of the issues would affect the sale or disposition of the shares”. And they immediately go on to say: “However, the determination pursuant to paragraph (b) of the Conditions attached to this country’s acceptance of the Court’s
compulsory jurisdiction is made only as regards the sale or disposition of the assets.

During the oral arguments, the Agent for the United States continued to maintain that the scope of part (a) of the Fourth Objection was limited to the sale and disposition of the shares. At the same time, while insisting that local remedies were once more available to Interhandel and that, pending the final decision of the Courts of the United States, the disputed shares could not be sold, he declared on several occasions that part (a) of the Fourth Objection has lost practical significance, that “it has become somewhat academic”, and that it is “somewhat moot”.

Although the Agent for the United States maintained the Objection throughout the oral arguments, it appears to the Court that, thus presented, part (a) of the Fourth Objection only applies to the claim of the Swiss Government regarding the restitution of the assets of Interhandel which have been vested in the United States. Having regard to the decision of the Court set out below in respect of the Third Preliminary Objection of the United States, it appears to the Court that part (a) of the Fourth Preliminary Objection is without object at the present stage of the proceedings.

* * *

Third Preliminary Objection

The Third Preliminary Objection seeks a finding that “there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts”.

Although framed as an objection to the jurisdiction of the Court, this Objection must be regarded as directed against the admissibility of the Application of the Swiss Government. Indeed, by its nature it is to be regarded as a plea which would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled.

The Court has indicated in what conditions the Swiss Government, basing itself on the idea that Interhandel’s suit had been finally rejected in the United States courts, considered itself entitled to institute proceedings by its Application of October 2nd, 1957. However, the decision given by the Supreme Court of the United States on October 14th, 1957, on the application of Interhandel made on August 6th, 1957, granted a writ of certiorari and readmitted Interhandel into the suit. The judgment of that Court on June 16th, 1958, reversed the judgment of the Court of Appeals dismissing Interhandel’s suit and remanded the case to the District Court. It was thenceforth open to Interhandel to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States courts. Its suit is still pending in the United States courts. The Court must have regard to the situation thus created.

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. A fortiori the rule must be observed when domestic proceedings are pending, as in the case of Interhandel, and when the two actions, that of the Swiss company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the United States.

The Swiss Government does not challenge the rule which requires that international judicial proceedings may only be instituted following the exhaustion of local remedies, but contends that the present case is one in which an exception to this rule is authorized by the rule itself.

The Court does not consider it necessary to dwell upon the assertion of the Swiss Government that “the United States itself has admitted that Interhandel had exhausted the remedies available in the United States courts”. It is true that the representatives of the Government of the United States expressed this opinion on several occasions, in particular in the memorandum annexed to the Note of the Secretary of State of January 11th, 1957. This opinion was based upon a view which has proved unfounded. In fact, the proceedings which Interhandel had instituted before the courts of the United States were then in progress.

However, the Swiss Government has raised against the Third Objection other considerations which require examination.

In the first place, it is contended that the rule is not applicable for the reason that the measure taken against Interhandel and regarded as contrary to international law is a measure which was taken, not by a subordinate authority but by the Government of the United States. However, the Court must attach decisive importance to the fact that the laws of the United States make available to interested persons who consider that they have been deprived of their rights by measures taken in pursuance of the Trading with the Enemy Act, adequate remedies for the defence of their rights against the Executive.
restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to
the application of the rule of the exhaustion of local remedies.
For all these reasons, the Court upholds the Third Preliminary
Objection so far as the principal Submission of Switzerland is
concerned.
In its alternative claim, the Swiss Government asks the Court to
declare its competence to decide whether the United States is under
an obligation to submit the dispute to arbitration or conciliation.
The Government of the United States contends that this claim,
while not identical with the principal claim, is designed to secure
the same object, namely, the restitution of the assets of Interhandel
in the United States, and that for this reason the Third Objection
applies equally to it. It maintains that the rule of the exhaustion
of local remedies applies to each of the principal and alternative
Submissions which seek "a ruling by this Court to the effect that
some other international tribunal now has jurisdiction to determine
that very same issue, even though that issue is at the same time
being actively litigated in the United States courts."
The Court considers that one interest, and one alone, that of
Interhandel, which has led the latter to institute and to resume
proceedings before the United States courts, has induced the Swiss
Government to institute international proceedings. This interest is
the basis for the present claim and should determine the scope of the
action brought before the Court by the Swiss Government in its
alternative form as well as in its principal form. On the other hand,
the grounds on which the rule of the exhaustion of local remedies
is based are the same, whether in the case of an international court,
arbitral tribunal, or conciliation commission. In these circumstances,
the Court considers that any distinction so far as the rule of the
exhaustion of local remedies is concerned between the various
claims or between the various tribunals is unfounded.

It accordingly upholds the Third Preliminary Objection also as
regards the alternative Submission of Switzerland.

For these reasons,

THE COURT,

by ten votes to five,
rejects the First Preliminary Objection of the Government of the
United States of America;

unanimously,
rejects the Second Preliminary Objection;

by ten votes to five,
finds that it is not necessary to adjudicate on part (a) of the Fourth
Preliminary Objection;
by fourteen votes to one,
rejects part (b) of the Fourth Preliminary Objection; and
by nine votes to six,
upholds the Third Preliminary Objection and holds that the Application of the Government of the Swiss Confederation is inadmissible.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-first day of March, one thousand nine hundred and fifty-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Swiss Confederation and the Government of the United States of America, respectively.

(Signed) Helge Klaestad,
President.

(Signed) Garnier-Coignet,
Deputy-Registrar.

Judge Basdevant states that he concurs in the decision that the Application is inadmissible as that decision is set forth in the operative part of the Judgment, but he adds that his opinion on this point was reached in a way which, in certain respects, differs from that followed by the Court. Basing himself on the provisions of the Statute and of the Rules of Court, he considered that, in order to assess the validity of the objections advanced, he should direct his attention to the subject of the dispute and not to any particular claim put forward in connection with the dispute. The subject of the dispute and the subject of the claim are explicitly differentiated in Article 32, paragraph 2, of the Rules of Court. Accordingly, he has directed his attention to the statement in the Application to the effect that the latter submits to the Court the dispute relating to “the restitution by the United States of the assets” of Interhandel. This indication of the subject of the dispute, which is confirmed by an examination of the correspondence, reveals the scope of the dispute, shows that it is not limited to whatever may have been discussed at any particular moment between the two Governments and consequently throws a light upon the date at which the dispute between them arose. He was thus led to the conclusion that the dispute to which the Application relates did not arise until after July 28th, 1948, and this factual finding is sufficient to justify the rejection of the first two preliminary objections.

In his view, the subject of the dispute justifies, in this case, the requirement of the preliminary exhaustion of local remedies on the ground that if, through them, Interhandel obtains satisfaction, the subject of the dispute will disappear. He refrained from complicating the problem by considering any particular claim that might be put forward in connection with the dispute indicated in the Application. In considering the question whether in fact the local remedies have been exhausted, he based himself largely on the factual data mentioned in the Judgment. He took account also of certain other facts—the fact that, at the date of the memoranda of January 11th, 1957, an appeal by Interhandel was pending in the American courts, the mention by the Swiss Co-Agent (at the hearing on October 12th, 1957) of the application made to the Supreme Court, with the comment that that application also would end in a negative decision and, finally, the mention in the preamble of the Order of the Court of October 24th, 1957, of a judicial proceeding then pending in the United States.

As the anticipated effect of a judgment on a preliminary objection is to determine whether the proceedings on the merits will or will not be resumed, he might have agreed that the Court should confine itself to adjudicating on the Third Objection which it has upheld. As the Application is declared to be inadmissible, this puts an end to the proceedings and all the other questions that were connected with them no longer arise. He considered, nevertheless, that it was his duty to follow the Court in the examination of the other points with which it dealt and, on those points, he concurs in the operative part of the Judgment.

Judge Kojevinikov states that he concurs in the Judgment of the Court so far as the First, Second, Third and part (a) of the Fourth Preliminary Objections of the Government of the United States are concerned. He is, however, unable to concur in the reasoning of the Judgment relating to the Second Preliminary Objection since, in his opinion, the Judgment should have been based not on the question of reciprocity, which is of very great importance, but upon the factual circumstances which show that the legal character of the dispute between the Swiss Government and the Government of the United States was clearly defined only after July 28th, 1948, the date of the entry into force of the Swiss Declaration.

Judge Kojevinikov is further of the opinion that the Third Objection should have been upheld by the Court, not only as a contention relating to the admissibility of the Application, but also with regard to the jurisdiction of the Court.

Finally, he considers that part (b) of the Fourth Preliminary Objection, having regard to its subject-matter, ought not to have
been rejected but, in the present case, should have been joined to the merits if the Court had not upheld the Third Objection.

M. CARRY, Judge ad hoc, states that he regrets that he cannot subscribe to the decisions taken by the Court on the Third and part (a) of the Fourth Objections of the Government of the United States. He agrees generally with the dissenting opinion of President Klaestad.

He considers that in any event the Third Objection should not have been upheld so far as it was directed against the alternative claim of the Swiss Government relating to arbitration or conciliation. He regards that claim as separate and distinct from the principal claim, since it did not relate to the merits of the dispute but only to the procedure for its settlement. By this claim the Court was invited to pass only upon the arbitrability of the dispute, not upon the obligation of the United States to return the assets of Interhandel. That latter question was within the exclusive jurisdiction of the tribunal to be seised. It follows, in his opinion, that the rule relating to the exhaustion of local remedies was not applicable to the alternative claim of the Swiss Government, inasmuch as, by that claim, the applicant State sought to secure from the international tribunal a result different from that which Interhandel is seeking to obtain in the American courts. The question of exhaustion of local remedies is one which could arise only before the arbitral tribunal seised of the case: the Court should not, in his opinion, encroach upon the jurisdiction of that tribunal.

Judges HACKWORTH, CORDOVA, WELLINGTON KOO and Sir Percy SPENDER, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their separate opinions.

Vice-President ZAFRULLA KHAN states that he agrees with Judge Hackworth.

President KLAESTAD and Judges WINIARSKI, ARMAND-UGON, Sir Hersch LAUTERPACHT and SPIROPULOS, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their dissenting opinions.

(Initialled) H. K.

(Initialled) G.-C.
International Court of Justice

Judgment

*I.C.J. Reports 1970*
1970

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE BARCELONA TRACTION, LIGHT
AND POWER COMPANY, LIMITED

(NEW APPLICATION: 1962)
(BELGIUM v. SPAIN)
SECOND PHASE

JUDGMENT OF 5 FEBRUARY 1970
CASE CONCERNING
THE BARCELONA TRACTION, LIGHT
AND POWER COMPANY, LIMITED

(NEW APPLICATION: 1962)
(BELGIUM v. SPAIN)
SECOND PHASE

In the case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962),

between
the Kingdom of Belgium,
represented by
Chevalier Y. Devadder, Legal Adviser to the Ministry of Foreign Affairs and External Trade,
as Agent,
Mr. H. Rolin, Professor emeritus of the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
as Co-Agent and Counsel,
assisted by
Mrs. S. Bastid, Professor in the Faculty of Law of the University of Paris
Mr. J. Van Ryn, Professor in the Faculty of Law of the Free University of Brussels and Advocate at the Belgian Court of Cassation,
Mr. M. Grégoire, Advocate at the Brussels Court of Appeal,
Mr. F. A. Mann, Honorary Professor in the Faculty of Law of the University of Bonn, Solicitor of the Supreme Court, England,
Mr. M. Virally, Professor in the Faculties of Law of the Universities of Geneva and Strasbourg and at the Graduate Institute of International Studies in Geneva,
Mr. E. Lauterpacht, Lecturer in the University of Cambridge, Member of the English Bar,
Mr. A. S. Pattillo, Q.C., Member of the Ontario Bar (Canada),
Mr. M. Slusny, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
Mr. P. Van Ommeslaghe, Professeur extraordinaire in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
Mr. M. Waelbroeck, Professeur extraordinaire in the Faculty of Law of the Free University of Brussels,
Mr. J. Kirkpatrick, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
as Counsel,
Mr. H. Bachrach, Member of the New York State and Federal Bars,
as Assistant Counsel and Secretary,
and by
Mr. L. Prieto-Castro, Professor in the Faculty of Law of the University of Madrid,
Mr. M. Olivencia Ruiz, Professor in the Faculty of Law of the University of Seville,
Mr. J. Girón Tena, Professor in the Faculty of Law of the University of Valladolid,
as Expert-Counsel in Spanish Law,
and
the Spanish State,
represented by
Mr. J. M. Castro-Rial, Professor, Legal Adviser to the Ministry of Foreign Affairs,
as Agent,
assisted by
Mr. R. Ago, Professor of International Law in the Faculty of Law of the University of Rome,
Mr. M. Bos, Professor of International Law in the Faculty of Law of the University of Utrecht,
Mr. P. Cahier, Professor of International Law at the Graduate Institute of International Studies in Geneva,
Mr. J. Carreras Llansana, Professor in the Faculty of Law of the University of Navarre,
Mr. F. de Castro y Bravo, Professor, Legal Adviser to the Ministry of Foreign Affairs,
Mr. J. M. Gil-Robles Quiñones, Professor in the Faculty of Law of the University of Oviedo,
Mr. M. Gimeno Fernández, Judge of the Supreme Court, Madrid,
Mr. P. Guggenheim, Professor of International Law at the Graduate Institute of International Studies in Geneva,
Mr. E. Jiménez de Aréchaga, Professor of International Law in the Faculty of Law of the University of Montevideo,
Mr. A. Malintoppi, Professor of International Law in the Faculty of Political Science of the University of Florence,
Mr. F. Ramírez, Secretary-General of the Spanish Institute of Foreign Exchange, Madrid,
Mr. P. Reuter, Professor in the Faculty of Law of the University of Paris,
Mr. J. M. Rivas Fresnedo, Inspector and Expert, Ministry of Finance, Madrid,
Mr. J. L. Sureda Carrión, Professor in the Faculty of Law of the University of Barcelona,
Mr. D. Triay Moll, Inspector and Expert, Ministry of Finance, Madrid,
Mr. R. Uria González, Professor in the Faculty of Law of the University of Madrid,
Sir Humphrey Waldock, C.M.G., O.B.E., O.C., Chichele Professor of Public International Law in the University of Oxford,
Mr. P. Well, Professor in the Faculty of Law of the University of Paris,
as Counsel or Advocates,

and by
Mr. J. M. Lacletta y Muñoz, Secretary of Embassy,
Mr. L. Martínez-Agulló, Secretary of Embassy,
as Secretaries,

THE COURT,
composed as above,

delivers the following Judgment:

1. In 1958 the Belgian Government filed with the International Court of Justice an Application against the Spanish Government seeking reparation for damage allegedly caused to the Barcelona Traction, Light and Power Company, Limited, on account of acts said to be contrary to international law committed by organs of the Spanish State. After the filing of the Belgian Memorial and the submission of preliminary objections by the Spanish Government, the Belgian Government gave notice of discontinuance of the proceedings, with a view to negotiations between the representatives of the private interests concerned. The case was removed from the Court's General List on 10 April 1961.

2. On 19 June 1962, the negotiations having failed, the Belgian Government submitted to the Court a new Application, claiming reparation for the damage allegedly sustained by Belgian nationals, shareholders in the Barcelona Traction company, on account of acts said to be contrary to international law committed in respect of the company by organs of the Spanish State. On 15 March 1963 the Spanish Government raised four preliminary objections to the Belgian Application.

3. By its Judgment of 24 July 1964, the Court rejected the first two preliminary objections. The first was to the effect that the discontinuance, under Article 69, paragraph 2, of the Court's Rules, of previous proceedings relative to the same events in Spain, disentitled the Belgian Government from bringing the present proceedings. The second was to the effect that even if this was not the case, the Court was not competent, because the necessary jurisdictional basis requiring Spain to submit to the jurisdiction of the Court did not exist. The Court joined the third and fourth objections to the merits. The third was to the effect that the claim is inadmissible because the Belgian Government lacks any jus standi to intervene or make a judicial claim on behalf of Belgian interests in a Canadian company, assuming that the Belgian character of such interests were established, which is denied by the Spanish Government. The fourth was to the effect that even if the Belgian Government has the necessary jus standi, the claim still remains inadmissible because local remedies in respect of the acts complained of were not exhausted.

4. Time-limits for the filing of the further pleadings were fixed or, at the request of the Parties, extended by Orders of 28 July 1964, 11 June 1965, 12 January 1966, 23 November 1966, 12 April 1967, 15 September 1967 and 24 May 1968, in the last-mentioned of which the Court noted with regret that the time-limits originally fixed by the Court for the filing of the pleadings had not been observed, whereby the written proceedings had been considerably prolonged. The written proceedings finally came to an end on 1 July 1968 with the filing of the Rejoinder of the Spanish Government.
5. Pursuant to Article 31, paragraph 3, of the Statute, Mr. Willem Riphagen, Professor of International Law at the Rotterdam School of Economics, and Mr. Enrique C. Armand-Ugon, former President of the Supreme Court of Justice of Uruguay and a former Member of the International Court of Justice, were chosen by the Belgian and Spanish Governments respectively to sit as judges ad hoc.

6. Pursuant to Article 44, paragraph 2, of the Rules of Court, the pleadings and annexed documents were, after consultation of the Parties, made available to the Governments of Chile, Peru and the United States of America. Pursuant to paragraph 3 of the same Article, the pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from 10 April 1969.

7. At 64 public sittings held between 15 April and 22 July 1969 the Court heard oral arguments and replies by Chevalier Devadder, Agent, Mr. Rolin, co-Agent and Counsel, Mrs. Bastid, Mr. Van Ryn, Mr. Grégoire, Mr. Mann, Mr. Virally, Mr. Lauterpacht, and Mr. Pattillo, Counsel, on behalf of the Belgian Government and by Mr. Castro-Rial, Agent, Mr. Ago, Mr. Carreras Mr. Gil-Robles, Mr. Guggenheim, Mr. Jiménez de Aréchaga, Mr. Malintoppi, Mr. Reuter, Mr. Sureda, Mr. Uria, Sir Humphrey Waldock and Mr. Weil, Counsel or Advocates, on behalf of the Spanish Government.

* * *

8. The Barcelona Traction, Light and Power Company, Limited, is a holding company incorporated in 1911 in Toronto (Canada), where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain), it formed a number of operating, financing and concession-holding subsidiary companies. Three of these companies, whose shares it owned wholly or almost wholly, were incorporated under Canadian law and had their registered offices in Canada (Ebro Irrigation and Power Company, Limited, Catalanian Land Company, Limited and International Utilities Finance Corporation, Limited); the others were incorporated under Spanish law and had their registered offices in Spain. At the time of the outbreak of the Spanish Civil War the group, through its operating subsidiaries, supplied the major part of Catalonia’s electricity requirements.

9. According to the Belgian Government, some years after the First World War Barcelona Traction’s share capital came to be very largely held by Belgian nationals—natural or juristic persons—and a very high percentage of the shares has since then continuously belonged to Belgian nationals, particularly the Société Internationale d’Energie hydro-électrique (Sidro), whose principal shareholder, the Société Financière de Transports et d’Entreprises Industrielles (Sofina), is itself a company in which Belgian interests are preponderant. The fact that large blocks of shares were for certain periods transferred to American nominees, to protect these securities in the event of invasion of Belgian territory during the Second World War, is not, according to the Belgian contention, of any relevance in this connection, as it was Belgian nationals, particularly Sidro, who continued to be the real owners. For a time the shares were vested in a trustee, but the Belgian Government maintains that the trust terminated in 1946. The Spanish Government contends, on the contrary, that the Belgian nationality of the shareholders is not proven and that the trustee or the nominees must be regarded as the true shareholders in the case of the shares concerned.

10. Barcelona Traction issued several series of bonds, some in pesetas but principally in sterling. The issues were secured by trust deeds, with the National Trust Company, Limited, of Toronto as trustee of the sterling bonds, the security consisting essentially of a charge on bonds and shares of Ebro and other subsidiaries and of a mortgage executed by Ebro in favour of National Trust. The sterling bonds were serviced out of transfers to Barcelona Traction effected by the subsidiary companies operating in Spain.

11. In 1936 the servicing of the Barcelona Traction bonds was suspended on account of the Spanish civil war. In 1940 payment of interest on the peseta bonds was resumed with the authorization of the Spanish exchange control authorities (required because the debt was owed by a foreign company), but authorization for the transfer of the foreign currency necessary for the servicing of the sterling bonds was refused and those interest payments were never resumed.

12. In 1945 Barcelona Traction proposed a plan of compromise which provided for the reimbursement of the sterling debt. When the Spanish authorities refused to authorize the transfer of the necessary foreign currency, this plan was twice modified. In its final form, the plan provided, inter alia, for an advance redemption by Ebro of Barcelona Traction peseta bonds, for which authorization was likewise required. Such authorization was refused by the Spanish authorities. Later, when the Belgian Government complained of the refusal to authorize foreign currency transfers, without which the debt on the bonds could not be honoured, the Spanish Government stated that the transfers could not be authorized unless it was shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain, and that this had not been established.

13. On 9 February 1948 three Spanish holders of recently acquired Barcelona Traction sterling bonds petitioned the court of Reus (Province of Tarragona) for a declaration adjudging the company bankrupt, on account of failure to pay the interest on the bonds. The petition was admitted by an order of 10 February 1948 and a judgment declaring the company bankrupt was given on 12 February. This judgment included provisions appointing a commissioner in bankruptcy and an interim
receiver and ordering the seizure of the assets of Barcelona Traction, Ebro and Compañía Barcelonesa de Electricidad, another subsidiary company.

14. The shares of Ebro and Barcelonesa had been deposited by Barcelona Traction and Ebro with the National Trust company of Toronto as security for their bond issues. All the Ebro and the Barcelonesa ordinary shares were held outside Spain, and the possession taken of them was characterized as “mediate and constructive civil possession”, that is to say was not accompanied by physical possession. Pursuant to the bankruptcy judgment the commissioner in bankruptcy at once dismissed the principal management personnel of the two companies and during the ensuing weeks the interim receiver appointed Spanish directors and declared that the companies were thus “normalized”. Shortly after the bankruptcy judgment the petitioners brought about the extension of the taking of possession and related measures to the other subsidiary companies.

15. Proceedings in Spain to contest the bankruptcy judgment and the related decisions were instituted by Barcelona Traction, National Trust, the subsidiary companies and their directors or management personnel. However, Barcelona Traction, which had not received a judicial notice of the bankruptcy proceedings, and was not represented before the Reus court in February, took no proceedings in the courts until 18 June 1948. In particular it did not enter a plea of opposition against the bankruptcy judgment within the time-limit of eight days from the date of publication of the judgment laid down in Spanish legislation. On the grounds that the notification and publication did not comply with the relevant legal requirements, the Belgian Government contends that the eight-day time-limit had never begun to run.

16. Motions contesting the jurisdiction of the Reus court and of the Spanish courts as a whole, in particular by certain bondholders, had a suspensive effect on the actions for redress; a decision on the question of jurisdiction was in turn delayed by lengthy proceedings brought by the Genora company, a creditor of Barcelona Traction, disputing Barcelona Traction’s right to be a party to the proceedings on the jurisdictional issue. One of the motions contesting jurisdiction was not finally dismissed by the Barcelona court of appeal until 1963, after the Belgian Application had been filed with the International Court of Justice.

17. In June 1949, on an application by the Namel company, with the intervention of the Genora company, the Barcelona court of appeal gave a judgment making it possible for the meeting of creditors to be convened for the election of the trustees in bankruptcy, by excluding the necessary procedure from the suspensive effect of the motion contesting jurisdiction. Trustees were then elected, and procured decisions that new shares of the subsidiary companies should be created, cancelling the shares located outside Spain (December 1949), and that the head offices of Ebro and Catalonian Land should henceforth be at Barcelona and not Toronto. Finally in August 1951 the trustees obtained court authorization to sell “the totality of the shares, with all the rights attaching to them, representing the corporate capital” of the subsidiary companies, in the form of the newly created share certificates. The sale took place by public auction on 4 January 1952 on the basis of a set of General Conditions and became effective on 17 June 1952. The purchaser was a newly formed company, Fuerzas Eléctricas de Cataluña, S.A. (Fecsa), which thereupon acquired complete control of the undertaking in Spain.

18. Proceedings before the court of Reus, various courts of Barcelona and the Spanish Supreme Court, to contest the sale and the operations which preceded or followed it, were taken by, among others, Barcelona Traction, National Trust and the Belgian company Sidro as a shareholder in Barcelona Traction, but without success. According to the Spanish Government, up to the filing of the Belgian Application 2,736 orders had been made in the case and 494 judgments given by lower and 37 by higher courts. For the purposes of this Judgment it is not necessary to go into these orders and judgments.

19. After the bankruptcy declaration, representations were made to the Spanish Government by the British, Canadian, United States and Belgian Governments.

20. The British Government made representations to the Spanish Government on 23 February 1948 concerning the bankruptcy of Barcelona Traction and the seizure of its assets as well as those of Ebro and Barcelonesa, stating its interest in the situation of the bondholders resident in the United Kingdom. It subsequently supported the representations made by the Canadian Government.

21. The Canadian Government made representations to the Spanish Government in a series of diplomatic notes, the first being dated 27 March 1948 and the last 21 April 1952; in addition, approaches were made on a less official level in July 1954 and March 1955. The Canadian Government first complained of the denial of justice said to have been committed in Spain towards Barcelona Traction, Ebro and National Trust, but it subsequently based its complaints more particularly on conduct towards the Ebro company said to be in breach of certain treaty provisions applicable between Spain and Canada. The Spanish Government did not respond to a Canadian proposal for the submission of the dispute to arbitration and the Canadian Government subsequently confined itself, until the time when its interposition entirely ceased, to endeavouring to promote a settlement by agreement between the private groups concerned.

22. The United States Government made representations to the Spanish Government on behalf of Barcelona Traction in a note of 22 July 1949, in support of a note submitted by the Canadian Government the previous day. It subsequently continued its interposition through the diplomatic channel and by other means. Since references were made by the United States Government in these representations to the presence of
American interests in Barcelona Traction, the Spanish Government draws the conclusion that, in the light of the customary practice of the United States Government to protect only substantial American investments abroad, the existence must be presumed of such large American interests as to rule out a preponderance of Belgian interests. The Belgian Government considers that the United States Government was motivated by a more general concern to secure equitable treatment of foreign investments in Spain, and in this context cites, *inter alia*, a note of 5 June 1967 from the United States Government.

23. The Spanish Government having stated in a note of 26 September 1949 that Ebro had not furnished proof as to the origin and genuineness of the bond debts, which justified the refusal of foreign currency transfers, the Belgian and Canadian Governments considered proposing to the Spanish Government the establishment of a tripartite committee to study the question. Before this proposal was made, the Spanish Government suggested in March 1950 the creation of a committee on which, in addition to Spain, only Canada and the United Kingdom would be represented. This proposal was accepted by the United Kingdom and Canadian Governments. The work of the committee led to a joint statement of 11 June 1951 by the three Governments to the effect, *inter alia*, that the attitude of the Spanish administration in not authorizing the transfers of foreign currency was fully justified. The Belgian Government protested against the fact that it had not been invited to nominate an expert to take part in the enquiry, and reserved its rights; in the proceedings before the Court it contended that the joint statement of 1951, which was based on the work of the committee, could not be set up against it, being *res inter alios acta*.

24. The Belgian Government made representations to the Spanish Government on the same day as the Canadian Government, in a note of 27 March 1948. It continued its diplomatic intervention until the rejection by the Spanish Government of a Belgian proposal for submission to arbitration (end of 1951). After the admission of Spain to membership in the United Nations (1955), which, as found by the Court in 1964, rendered operative again the clause of compulsory jurisdiction contained in the 1927 Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, the Belgian Government attempted further representations. After the rejection of a proposal for a special agreement, it decided to refer the dispute unilaterally to this Court.

* * *

25. In the course of the written proceedings, the following submissions were presented by the Parties:
III. to adjudge and declare, in the event of the annulment of the consequences of the acts complained of proving impossible, that the Spanish State shall be under an obligation to pay to the Belgian State, by way of compensation, a sum equivalent to 88 per cent. of the sum of $88,600,000 arrived at in paragraph 379 of the present Memorial, this compensation to be increased by an amount corresponding to all the incidental damage suffered by the said Belgian nationals as the result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent in capital and interest of the amount of Barcelona Traction bonds held by Belgian nationals and of their other claims on the companies in the group which it was not possible to recover owing to the acts complained of; in the Reply:

“May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect, to adjudge and declare

(1) that the Application of the Belgian Government is admissible;
(2) that the Spanish State is responsible for the damage sustained by the Belgian State in the person of its nationals, shareholders in Barcelona Traction, as the result of the acts contrary to international law committed by its organs, which led to the total spoliation of the Barcelona Traction group;
(3) that the Spanish State is under an obligation to ensure reparation of the said damage;
(4) that this damage can be assessed at U.S. $78,000,000, representing 88 per cent. of the net value on 12 February 1948, of the property of which the Barcelona Traction group was deprived;
(5) that the Spanish State is, in addition, under an obligation to pay, as an all-embracing payment to cover loss of enjoyment, compensatory interest at the rate of 6 per cent. on the said sum of U.S. $78,000,000, from 12 February 1948 to the date of judgment;
(6) that the Spanish State must, in addition, pay a sum provisionally assessed at U.S. $3,800,000 to cover the expenses incurred by the Belgian nationals in defending their rights since 12 February 1948;
(7) that the Spanish State is also liable in the sum of £4,333,821 representing the amount, in principal and interest, on 4 January 1952, of the Barcelona Traction sterling bonds held by the said nationals, as well as in the sum of U.S. $1,623,127, representing a debit owed to one of the said nationals by a subsidiary company of Barcelona Traction, this sum including lump-sum compensation for loss of profits resulting from the premature termination of a contract;

that there will be due on those sums interest at the rate of 6 per cent. per annum, as from 4 January 1952 so far as concerns the sum of £4,333,821, and as from 12 February 1948 so far as concerns the sum of U.S. $1,623,127; both up to the date of judgment;
(8) that the Spanish State is also liable to pay interest, by way of interest on a sum due and outstanding, at a rate to be determined by reference to the rates generally prevailing, on the amount of compensation awarded, from the date of the Court’s decision fixing such compensation up to the date of payment;
(9) in the alternative to submissions (4) to (6) above, that the amount of the compensation due to the Belgian State shall be established by means of an expert enquiry to be ordered by the Court; and to place on record that the Belgian Government reserves its right to submit in the course of the proceedings such observations as it may deem advisable concerning the object and methods of such measure of investigation;
(10) and, should the Court consider that it cannot, without an expert enquiry, decide the final amount of the compensation due to the Belgian State, have regard to the considerable magnitude of the damage caused and make an immediate award of provisional compensation, on account of the compensation to be determined after receiving the expert opinion, the amount of such provisional compensation being left to the discretion of the Court.”

On behalf of the Spanish Government,
in the Counter-Memorial:

“May it please the Court to adjudge and declare

I. that the Belgian claim which, throughout the diplomatic correspondence and in the first Application submitted to the Court, has always been a claim with a view to the protection of the Barcelona Traction company, has not changed its character in the second Application, whatever the apparent modifications introduced into it;
that even if the true subject of the Belgian claim were, not the Barcelona Traction company, but those whom the Belgian Government characterizes on some occasions as ‘Belgian shareholders’ and on other occasions as ‘Belgian interests’ in that company, and the damage allegedly sustained by those ‘shareholders’ or ‘interests’, it would still remain true that the Belgian Government has not validity proved either that the shares of the company in question belonged on the material dates to ‘Belgian shareholders’, or, moreover, that there is in the end, in the case submitted to the Court, a preponderance of genuine ‘Belgian interests’;
that even if the Belgian claim effectively had as its beneficiaries alleged ‘shareholders’ of Barcelona Traction who were ‘Belgian’, or yet again alleged genuine ‘Belgian interests’ of the magnitude which is attributed to them, the general principles of international law governing this matter, confirmed by practice which knows of no exception, do not recognize that the National State of shareholders or ‘interests’, whatever their number or magnitude, may make a claim on their behalf in reliance on allegedly unlawful damage sustained by the company, which possesses the nationality of a third State;
that the Belgian Government therefore lacks jus standi in the present case;
II. that a rule of general international law, confirmed both by judicial prececdents and the teachings of publicists, and reiterated in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 between Spain and Belgium, requires that private persons
allegedly injured by a measure contrary to international law should have used and exhausted the remedies and means of redress provided by the internal legal order before diplomatic, and above all judicial, protection may be exercised on their behalf;

that the applicability of this rule to the present case has not been disputed and that the prior requirement which it lays down has not been satisfied;

III. that the organic machinery for financing the Barcelona Traction undertaking, as conceived from its creation and constantly applied thereafter, placed it in a permanent state of latent bankruptcy, and that the constitutional structure of the group and the relationship between its members were used as the instrument for manifold and ceaseless operations to the detriment both of the interests of the creditors and of the economy and law of Spain, the country in which the undertaking was to carry on all its business;

that these same facts led, on the part of the undertaking, to an attitude towards the Spanish authorities which could not but provoke a fully justified refusal to give effect to the currency applications made to the Spanish Government;

that the bankruptcy declaration of 12 February 1948, the natural outcome of the conduct of the undertaking, and the bankruptcy proceedings which ensued, were in all respects in conformity with the provisions of Spanish legislation on the matter; and that moreover these provisions are comparable with those of other statutory systems, in particular Belgian legislation itself;

that the complaint of usurpation of jurisdiction is not well founded where the bankruptcy of a foreign company is connected in any way with the territorial jurisdiction of the State, that being certainly so in the present case;

that the Spanish judicial authorities cannot be accused of either one or more denials of justice in the proper sense of the term, Barcelona Traction never having been denied access to the Spanish courts and the judicial decisions on its applications and appeals never having suffered unjustified or unreasonable delays; nor is it possible to detect in the conduct of the Spanish authorities the elements of some breach of international law other than a denial of justice;

that the claim for reparation, the very principle of which is disputed by the Spanish Government, is moreover, having regard to the circumstances of the case, an abuse of the right of diplomatic protection in connection with which the Spanish Government waives none of its possible rights;

IV. that, therefore, the Belgian claim is dismissed as inadmissible or, if not, as unfounded";

in the rejoinder:

"May it please the Court to adjudge and declare

that the claim of the Belgian Government is declared inadmissible or, if not, unfounded."

In the course of the oral proceedings, the following text was presented as final submissions

on behalf of the Belgian Government,

after the hearing of 9 July 1969:

"1. Whereas the Court stated on page 9 of its Judgment of 24 July 1964 that "The Application of the Belgian Government of 19 June 1962 seeks reparation for damage claimed to have been caused to a number of Belgian nationals, said to be shareholders in the Barcelona Traction, Light and Power Company, Limited, a company under Canadian law, by the conduct, alleged to have been contrary to international law, of various organs of the Spanish State in relation to that company and to other companies of its group";

whereas it was therefore manifestly wrong of the Spanish Government, in the submissions in the Counter-Memorial and in the oral arguments of its counsel, to persist in the contention that the object of the Belgian claim is to protect the Barcelona Traction company;

2. Whereas Barcelona Traction was adjudicated bankrupt in a judgment rendered by the court of Reus, in Spain, on 12 February 1948;

3. Whereas that holding company was on that date in a perfectly sound financial situation, as were its subsidiaries, Canadian or Spanish companies having their business in Spain;

4. Whereas, however, the Spanish Civil War and the Second World War had, from 1936 to 1944, prevented Barcelona Traction from being able to receive, from its subsidiaries operating in Spain, the foreign currency necessary for the service of the sterling loans issued by it for the financing of the group’s investments in Spain;

5. Whereas, in order to remedy this situation, those in control of Barcelona Traction agreed with the bondholders in 1945, despite the opposition of the March group, to a plan of compromise, which was approved by the trustee and by the competent Canadian court; and whereas its implementation was rendered impossible as a result of the opposition of the Spanish exchange authorities, even though the method of financing finally proposed no longer involved any sacrifice of foreign currency whatever for the Spanish economy;

6. Whereas, using this situation as a pretext, the March group, which in the meantime had made further considerable purchases of bonds, sought and obtained the judgment adjudicating Barcelona Traction bankrupt;

7. Whereas the bankruptcy proceedings were conducted in such a manner as to lead to the sale to the March group, which took place on 4 January 1952, of all the assets of the bankrupt company, far exceeding in value its liabilities, in consideration of the assumption by the purchaser itself of solely the bonded debt, which, by new purchases, it had concentrated into its own hands to the extent of approximately 85 per cent., while the cash price paid to the trustees in bankruptcy, 10,000,000 pesetas—approximately $250,000,—was insufficient to cover the bankruptcy costs, did not allow them to pass anything to the bankrupt company or its shareholders, or even to pay its unsecured creditors;

8. Whereas the accusations of fraud made by the Spanish Government against the Barcelona Traction company and the allegation that that company was in a permanent state of latent bankruptcy are devoid of all
relevance to the case and, furthermore, are entirely unfounded;

9. Whereas the acts and omissions giving rise to the responsibility of the Spanish Government are attributed by the Belgian Government to certain administrative authorities, on the one hand, and to certain judicial authorities, on the other hand;

Whereas it is apparent when those acts and omissions are examined as a whole that, apart from the defects proper to each, they converged towards one common result, namely the diversion of the bankruptcy procedure from its statutory purposes to the forced transfer, without compensation, of the undertakings of the Barcelona Traction group to the benefit of a private Spanish group, the March group;

I
ABUSE OF RIGHTS, ARBITRARY AND DISCRIMINATORY ATTITUDE OF CERTAIN ADMINISTRATIVE AUTHORITIES

Considering that the Spanish administrative authorities behaved in an improper, arbitrary and discriminatory manner towards Barcelona Traction and its shareholders, in that, with the purpose of facilitating the transfer of control over the property of the Barcelona Traction group from Belgian hands into the hands of a private Spanish group, they in particular—

(a) frustrated, in October and December 1946, the implementation of the third method for financing the plan of compromise, by refusing to authorize Ebro, a Canadian company with residence in Spain, to pay 64,000,000 pesetas in the national currency to Spanish residents on behalf of Barcelona Traction, a non-resident company, so that the latter might redeem its peseta bonds circulating in Spain, despite the fact that Ebro continued uninterruptedly to be granted periodical authorization to pay the interest on those same bonds up to the time of the bankruptcy;

(b) on the other hand, accepted that Juan March, a Spanish citizen manifestly resident in Spain, should purchase considerable quantities of Barcelona Traction sterling bonds abroad;

(c) made improper use of an international enquiry, from which the Belgian Government was excluded, by gravely distorting the purport of the conclusions of the Committee of Experts, to whom they attributed the finding of irregularities of all kinds such as to entail severe penalties for the Barcelona Traction group, which enabled the trustees in bankruptcy, at March’s instigation, to bring about the premature sale at a ridiculously low price of the assets of the Barcelona Traction group and their purchase by the March group thanks to the granting of all the necessary exchange authorizations;

II
USURPATION OF JURISDICTION

Considering that the Spanish courts, in agreeing to entertain the bankruptcy of Barcelona Traction, a company under Canadian law with its registered office in Toronto, having neither registered office nor commercial establishment in Spain, nor possessing any property or carrying on any business there, usurped a power of jurisdiction which was not theirs in international law;

Considering that the territorial limits of acts of sovereignty were patently disregarded in the measures of enforcement taken in respect of property situated outside Spanish territory without the concurrence of the competent foreign authorities;

Considering that there was, namely, conferred upon the bankruptcy authorities, through the artificial device of mediate and constructive civil possession, the power to exercise in Spain the rights attaching to the shares located in Canada of several subsidiary and sub-subsidiary companies on which, with the approval of the Spanish judicial authorities, they relied for the purpose of replacing the directors of those companies, modifying their terms of association, and cancelling their regularly issued shares and replacing them with others which they had printed in Spain and delivered to Fecsa at the time of the sale of the bankrupt company’s property, without there having been any effort to obtain possession of the real shares in a regular way;

Considering that that disregard is the more flagrant in that three of the subsidiaries were companies under Canadian law with their registered offices in Canada and that the bankruptcy authorities purported, with the approval of the Spanish judicial authorities, to transform two of them into Spanish companies, whereas such alteration is not permitted by the law governing the status of those companies;

III
DENIALS OF JUSTICE LATO SENSU

Considering that a large number of decisions of the Spanish courts are vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice lato sensu;

Considering that in particular—

(1) The Spanish courts agreed to entertain the bankruptcy of Barcelona Traction in flagrant breach of the applicable provisions of Spanish law, which do not permit that a foreign debtor should be adjudged bankrupt if that debtor does not have his domicile, or at least an establishment, in Spanish territory;

(2) Those same courts adjudged Barcelona Traction bankrupt whereas that company was neither in a state of insolvency nor in a state of final, general and complete cessation of payments and had not ceased its payments in Spain, this being a manifest breach of the applicable statutory provisions of Spanish law, in particular Article 876 of the 1885 Commercial Code;

(3) The judgment of 12 February 1948 failed to order the publication of the bankruptcy by announcement in the place of domicile of the bankrupt, which constitutes a flagrant breach of Article 1044 (5) of the 1829 Commercial Code;

(4) The decisions failing to respect the separate estates of Barcelona Traction’s subsidiaries and sub-subsidiaries, in that they extended to their property the attachment arising out of the bankruptcy of the parent
company, and thus disregarded their distinct legal personalities, on the.

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1461 and 1462 of the Spanish Civil Code, which require delivery of the thing sold, seeing that the certificates delivered to the successful bidder had not been properly issued and were consequently without legal value; if the authorization to sell and the sale had applied, as the respondent Government wrongly maintains, to the rights attaching to the shares and bonds or to the bankrupt company's power of domination over its subsidiaries, those rights ought to have been the subject of a joint valuation, on pain of flagrant violation of Articles 1084 to 1089 of the 1829 Commercial Code and Article 1388 of the Civil Procedure Code: in any event, it was in flagrant violation of these last-named provisions that the commissioner fixed an exaggeratedly low reserve price on the basis of a unilateral expert opinion which, through the effect of the General Conditions of Sale, allowed the March group to acquire the auctioned property at that reserve price;

(13) By approving the General Conditions of Sale on the very day on which they were submitted to them and then dismissing the proceedings instituted to contest those conditions, the judicial authorities committed a flagrant violation of numerous orden public provisions of Spanish law; thus, in particular, the General Conditions of Sale—

(a) provided for the payment of the bondholder creditors, an operation which, under Article 1322 of the Civil Procedure Code, falls under the fourth section of the bankruptcy, whereas that section was suspended as a result of the effects attributed to the Boter motion contesting jurisdiction, no exemption from that suspension having been applied for or obtained in pursuance of the second paragraph of Article 114 of the Civil Procedure Code;

(b) provided for the payment of the debts owing on the bonds before they had been approved and ranked by a general meeting of the creditors on the recommendation of the trustees, contrary to Articles 1101 to 1109 of the 1829 Commercial Code and to Articles 1266 to 1274, 1286 and 1378 of the Civil Procedure Code;

(c) in disregard of Articles 1236, 1240, 1512 and 1513 of the Civil Procedure Code, did not require the price to be lodged or deposited at the Court's disposal;

(d) conferred on the trustees power to recognize, determine and declare effective the rights attaching to the bonds, in disregard, on the one hand, of Articles 1101 to 1109 of the 1829 Commercial Code and of Articles 1266 to 1274 of the Civil Procedure Code, which reserve such rights for the general meeting of creditors under the supervision of the judge, and, on the other, of Articles 1445 and 1449 of the Civil Code, which lay down that the purchase price must be a definite sum and may not be left to the arbitrary decision of one of the contracting parties;

(e) in disregard of Articles 1291 to 1294 of the Civil Procedure Code, substituted the successful bidder for the trustees in respect of the payment of the debts owing on the bonds, whilst, in violation of the general principles applicable to novation, replacing the security for those debts, consisting, pursuant to the trust deeds, of shares and bonds issued by the subsidiary and sub-subsidiary companies, with the deposit of a certain sum with a bank or with a mere banker's guarantee limited to three years;

(f) delegated to a third party the function of paying certain debts, in disregard of Articles 1291 and 1292 of the Civil Procedure Code, which define the functions of the trustees in this field and do not allow of any delegation;

(g) ordered the payment of the debts owing on the bonds in sterling, whereas a forced execution may only be carried out in local currency and in the case of bankruptcy the various operations which it includes require the conversion of the debts into local currency on the day of the judgment adjudicating bankruptcy, as is to be inferred from Articles 883 and 884 of the 1885 Commercial Code;

IV
DENIALS OF JUSTICE STRICTO SENSO

Considering that in the course of the bankruptcy proceedings the rights of the defence were seriously disregarded; that in particular—

(a) the Reus court, in adjudicating Barcelona Traction bankrupt on an ex parte petition, inserted in its judgment provisions which went far beyond finding the purported insolvency of or a general cessation of payments by the bankrupt company, the only finding, in addition to one on the capacity of the petitioners, that it was open to it to make in such proceedings;

This disregard of the rights of the defence was particularly flagrant in respect of the subsidiary companies, whose property was ordered by the court to be attached without their having been summoned and without their having been adjudicated bankrupt;

(b) the subsidiary companies that were thus directly affected by the judgment of 12 February 1948 nevertheless had their applications to set aside the order for attachment which concerned them rejected as inadmissible on the grounds of lack of capacity;

(c) the pursuit of those remedies and the introduction of any other such proceedings were also made impossible for the subsidiary companies by the discontinuances effected each time by the solicitors appointed to replace the original solicitors by the new boards of directors directly or indirectly involved; these changes of solicitors and discontinuances were effected by the new boards of directors by virtue of authority conferred upon them by the interim receiver simultaneously with their appointment;

(d) the proceedings for relief brought by those in control of the subsidiary companies who had been dismissed by the commissioner were likewise held inadmissible by the Reus court when they sought to avail themselves of the specific provisions of Article 1363 of the Civil Procedure Code, which provide for proceedings to reverse decisions taken by the commissioner in bankruptcy;

(e) there was discrimination on the part of the first special judge when he refused to admit as a party to the bankruptcy the Canadian National Trust Company, Limited, trustee for the bankrupt company's two sterling loans, even though it relied upon the security of the mortgage which had been given to it by Ebro, whereas at the same time he admitted to the proceedings the Bondholders' Committee
appointed by Juan March, although National Trust and the Committee derived their powers from the same trust deed.

The complaints against the General Conditions of Sale could be neither amplified nor heard because the order which had approved the General Conditions of Sale was deemed to be one of mere routine;

Considering that many years elapsed after the bankruptcy judgment and even after the ruinous sale of the property of the Barcelona Traction group without either the bankrupt company or those co-interested with it having had an opportunity to be heard on the numerous complaints put forward against the bankruptcy judgment and related decisions in the opposition of 18 June 1948 and in various other applications for relief;

Considering that those delays were caused by the motion contesting jurisdiction fraudulently lodged by a confederate of the petitioners in bankruptcy and by incidental proceedings instituted by other men of straw of the March group, which were, like the motion contesting jurisdiction, regularly admitted by the various courts;

Considering that both general international law and the Spanish-Belgian Treaty of 1927 regard such delays as equivalent to the denial of a hearing;

Considering that the manifest injustice resulting from the movement of the proceedings towards the sale, whilst the actions contesting the bankruptcy judgment and even the jurisdiction of the Spanish courts remained suspended, was brought about by two judgments delivered by the same chamber of the Barcelona court of appeal on the same day, 7 June 1949: in one of them it confirmed the admission, with two effects, of the Boter appeal from the judgment of the special judge rejecting his motion contesting jurisdiction, whereas in the other it reduced the suspensive effect granted to that same appeal by excluding from the suspension the calling of the general meeting of creditors for the purpose of appointing the trustees in bankruptcy;

V

Damage and Reparation

Considering that the acts and omissions contrary to international law attributed to the organs of the Spanish State had the effect of despoiling the Barcelona Traction company of the whole of its property and of depriving it of the very objects of its activity, and thus rendered it practically defunct;

Considering that Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction, in which they occupied a majority and controlling position, and in particular the Sidro company, the owner of more than 1 per cent. of the registered capital, on this account suffered direct and immediate injury to their interests and rights, which were voided of all value and effectiveness;

Considering that the reparation due to the Belgian State from the Spanish State, as a result of the internationally unlawful acts for which the latter State is responsible, must be complete and must, so far as possible, reflect the damage suffered by its nationals whose case the Belgian State has taken up; and that, since resitutio in integrum is, in the circumstances of the case, practically and legally impossible, the reparation of the damage suffered can only take place in the form of an all-embracing pecuniary indemnity, in accordance with the provisions of the Spanish-Belgian Treaty of 1927 and with the rules of general international law;

Considering that in the instant case the amount of the indemnity must be fixed by taking as a basis the net value of the Barcelona Traction company's property at the time of its adjudication in bankruptcy, expressed in a currency which has remained stable, namely the United States dollar;

Considering that the value of that property must be determined by the replacement cost of the subsidiary and sub-subsidiary companies' plant for the production and distribution of electricity at 12 February 1948, as that cost was calculated by the Ebro company's engineers in 1946;

Considering that, according to those calculations, and after deduction for depreciation through wear and tear, the value of the plant was at that date U.S. $116,220,000; from this amount there must be deducted the principal of Barcelona Traction's bonded debt and the interest that had fallen due thereon, that is to say, U.S. $27,619,018, which leaves a net value of about U.S. $88,600,000, this result being confirmed—

(1) by the study submitted on 5 February 1949 and on behalf of Ebro to the Special Technical Office for the Regulation and Distribution of Electricity (Catalanian region) (Belgian New Document No. 50);

(2) by capitalization of the 1947 profits;

(3) by the profits made by Fecsa in 1956—the first year after 1948 in which the position of electricity companies was fully stabilized and the last year before the changes made in the undertaking by Fecsa constituted an obstacle to any useful comparison;

(4) by the reports of the experts consulted by the Belgian Government;

Considering that the compensation due to the Belgian Government must be estimated, in the first place, at the percentage of such net value corresponding to the participation of Belgian nationals in the capital of the Barcelona Traction company, namely 88 per cent.;

Considering that on the critical dates of the bankruptcy judgment and the filing of the Application, the capital of Barcelona Traction was represented by 1,798,848 shares, partly bearer and partly registered; that on 12 February 1948 Sidro owned 1,012,688 registered shares and 349,905 bearer shares; that other Belgian nationals owned 420 registered shares and at least 244,832 bearer shares; that 1,607,845 shares, constituting 89.3 per cent. of the company's capital, were thus on that date in Belgian hands; that on 14 June 1962 Sidro owned 1,334,514 registered shares and 31,228 bearer shares; that other Belgian nationals owned 2,388 registered shares and at least 200,000 bearer shares; and that 1,588,130 shares, constituting 88 per cent. of the company's capital, were thus on that date in Belgian hands;

Considering that the compensation claimed must in addition cover all incidental damage suffered by the said Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent, in capital and interest, of the amount of the Barcelona Traction bonds held by Belgian nationals, and of their other claims on the companies in the
group which it was not possible to recover owing to the acts complained of;

Considering that the amount of such compensation, due to the Belgian State on account of acts contrary to international law attributable to the Spanish State, cannot be affected by the latter's purported charges against the private persons involved, those charges furthermore not having formed the subject of any counterclaim before the Court;

VI

OBJECTION DERIVED FROM THE ALLEGED LACK OF JUS STANDI OF THE BELGIAN GOVERNMENT

Considering that in its Judgment of 24 July 1964 the Court decided to join to the merits the third preliminary objection raised by the Spanish Government;

Considering that the respondent Government wrongly denies to the Belgian Government jus standi in the present proceedings;

Considering that the object of the Belgian Government's Application of 14 June 1962 is reparation for the damage caused to a certain number of its nationals, natural and juristic persons, in their capacity as shareholders in the Barcelona Traction, Light and Power Company, Limited, by the conduct contrary to international law of various organs of the Spanish State towards that company and various other companies in its group;

Considering that the Belgian Government has established that 88 per cent. of Barcelona Traction's capital was in Belgian hands on the critical dates of 12 February 1948 and 14 June 1962 and so remained continuously between those dates, that a single Belgian company, Sidro, possessed more than 75 per cent. of the shares; that the Belgian nationality of that company and the effectiveness of its nationality have not been challenged by the Spanish Government;

Considering that the fact that the Barcelona Traction registered shares possessed by Sidro were registered in Canada in the name of American nominees does not affect their Belgian character; that in this case, under the applicable systems of statutory law, the nominee could exercise the rights attaching to the shares entered in its name only as Sidro's agent;

Considering that the preponderance of Belgian interests in the Barcelona Traction company was well known to the Spanish authorities at the different periods in which the conduct complained of against them occurred, and has been explicitly admitted by them on more than one occasion;

Considering that the diplomatic protection from which the company benefited for a certain time on the part of its national Government ceased in 1952, well before the filing of the Belgian Application, and has never subsequently been resumed;

Considering that by depriving the organs appointed by the Barcelona Traction shareholders under the company's terms of association of their power of control in respect of its subsidiaries, which removed from the company the very objects of its activities, and by depriving it of the whole of its property, the acts and omissions contrary to international law attributable to the Spanish authorities rendered the company practically defunct and directly and immediately injured the rights and interests attaching to the legal situation of shareholder as it is recognized by international law; that they thus caused serious damage to the company's Belgian shareholders and voided the rights which they possessed in that capacity of all useful content;

Considering that in the absence of reparation to the company for the damage inflicted on it, from which they would have benefited at the same time as itself, the Belgian shareholders of Barcelona Traction thus have separate and independent rights and interests to assert; that they did in fact have to take the initiative for and bear the cost of all the proceedings brought through the company's organs to seek relief in the Spanish courts; that Sidro and other Belgian shareholders, after the sale of Barcelona Traction's property, themselves brought actions the dismissal of which is complained of by the Belgian Government as constituting a denial of Justice;

Considering that under the general principles of international law in this field the Belgian Government has jus standi to claim through international judicial proceedings reparation for the damage thus caused to its nationals by the internationally unlawful acts and omissions attributed to the Spanish State;

VII

OBJECTION OF NON-EXHAUSTION OF LOCAL REMEDIES

Considering that no real difference has emerged between the Parties as to the scope and significance of the rule of international law embodied in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration concluded between Spain and Belgium on 19 July 1927, which makes resort to the procedures provided for in that Treaty dependant on the prior use, until a judgment with final effect has been pronounced, of the normal means of redress which are available and which offer genuine possibilities of effectiveness within the limitation of a reasonable time;

Considering that in this case the Respondent itself estimates at 2,736 the number of orders alone made in the case by the Spanish courts as of the date of the Belgian Application;

Considering that in addition the pleadings refer to more than 30 decisions by the Supreme Court;

Considering that it is not contended that the remedies as a whole of which Barcelona Traction and its co-interested parties availed themselves and which gave rise to those decisions were inadequate or were not pursued to the point of exhaustion;

Considering that this circumstance suffices as a bar to the possibility of the fourth objection being upheld as setting aside the Belgian claim;

Considering that the only complaints which could be set aside are those in respect of which the Spanish Government proved failure to make use of means of redress or the insufficiency of those used;

Considering that such proof has not been supplied;

1. With Respect to the Complaints Against the Acts of the Administrative Authorities

Considering that the Spanish Government is wrong in contending that the Belgian complaint concerning the decisions of October and
December 1946 referred to under I (a) above is not admissible on account of Barcelona Traction's failure to exercise against them the remedies of appeal to higher authority and contentious administrative proceedings;

Considering that the remedy of appeal to higher authority was inconceivable in this case, being by definition an appeal which may be made from a decision by one administrative authority to another hierarchically superior authority namely the Minister, whereas the decisions complained of were taken with the co-operation and approval of the Minister himself, and even brought to the knowledge of those concerned by the Minister at the same time as by the competent administrative authority;

Considering that it was likewise not possible to envisage contentious administrative proceedings against a decision which patently did not fall within the ambit of Article 1 of the Act of 22 June 1894, which recognizes such a remedy only against administrative decisions emanating from administrative authorities in the exercise of their regulated powers and "infringing a right of an administrative character previously established in favour of the applicants by an Act, a regulation or some other administrative provision", which requirements were patently not satisfied in this case;

2. With Respect to the Complaint concerning the Reus Court's Lack of Jurisdiction to Declare the Bankruptcy of Barcelona Traction

Considering that the Spanish Government is wrong in seeking to derive an argument from the fact that Barcelona Traction and its co-interested parties supposedly failed to challenge the jurisdiction of the Reus court by means of a motion contesting its competence, and allowed the time-limit for entering opposition to expire without having challenged that jurisdiction;

Considering that in fact a motion contesting jurisdiction is not at all the same thing as a motion contesting competence ratione materiae and may properly be presented cumulatively with the case on the merits;

Considering that the bankruptcy court contested jurisdiction at the head of the complaints set out in its opposition plea of 18 June 1948;

Considering that it complained again of lack of jurisdiction in its application of 5 July 1948 for a declaration of nullity and in its pleading of 3 September 1948 in which it confirmed its opposition to the bankruptcy judgment;

Considering that National Trust submitted a formal motion contesting jurisdiction in its application of 27 November 1948 for admission to the bankruptcy proceedings;

Considering that Barcelona Traction, after having as early as 23 April 1949 entered an appearance in the proceedings concerning the Reus motion contesting jurisdiction, formally declared its adherence to that motion by a procedural document of 11 April 1953;

Considering that the question of jurisdiction being a matter of ordre public, as is the question of competence ratione materiae, the complaint of belatedness could not be upheld, even in the event of the expiry of the allegedly applicable time-limit for entering a plea of opposition;

3. With Respect to the Complaints concerning the Bankruptcy Judgment and Related Decisions

Considering that the Spanish Government is wrong in contending that the said decisions were not attacked by adequate remedies pursued to the point of exhaustion or for a reasonable length of time;

Considering that in fact, as early as 16 February 1948, the bankruptcy judgment was attacked by an application for its setting aside on the part of the subsidiary companies, Ebro and Barcelonenses;

Considering that while those companies admittedly confined their applications for redress to the parts of the judgment which gave them grounds for complaint, the said remedies were nonetheless adequate and they were brought to nought in circumstances which are themselves the subject of a complaint which has been set out above;

Considering that, contrary to what is asserted by the Spanish Government, the bankruptcy court itself entered a plea of opposition to the judgment by a procedural document of 18 June 1948, confirmed on 3 September 1948;

Considering that it is idle for the Spanish Government to criticize the summary character of this procedural document, while the suspension decreed by the special judge on account of the Reus motion contesting jurisdiction prevented the party entering opposition from filing, pursuant to Article 326 of the Civil Procedure Code, the additional pleading developing its case;

Considering that likewise there can be no question of belatedness, since only publication of the bankruptcy at the domicile of the bankrupt company could have caused the time-limit for entering opposition to begin to run, and no such publication took place;

Considering that the bankruptcy judgment and the related decisions were moreover also attacked in the incidental application for a declaration of nullity submitted by Barcelona Traction on 5 July 1948 and amplified on 31 July 1948;

4. With Respect to the Complaints concerning the Blocking of the Remedies

Considering that the various decisions which instituted and prolonged the suspension of the first section of the bankruptcy proceedings were attacked on various occasions by numerous proceedings taken by Barcelona Traction, beginning with the incidental application for a declaration of nullity which it submitted on 5 July 1948;

5. With Respect to the Complaint concerning the Dissolution of the Officers of the Subsidiary Companies by Order of the Commissioner

Considering that this measure was also attacked by applications for its setting aside on the part of the persons concerned, which were quite improperly declared inadmissible; and that the proceedings seeking redress against those decisions were adjourned until 1963;

6. With Respect to the Failure to Observe the No-Action Clause

Considering that this clause was explicitly referred to by National Trust in its application of 27 November 1948 for admission to the proceedings;

7. With Respect to the Measures Preparatory to the Sale and the Sale

Considering that the other side, while implicitly admitting that adequate proceedings were taken to attack the appointment of the trustees and the authorization to sell, is wrong in contending that this was supposedly not so in respect of—
(1) The failure to draw up a list of creditors prior to the convening of the meeting of creditors for the appointment of the trustees, whereas this defect was complained of in the procedural document attacking the appointment of the trustees and in the application that the sale be declared null and void;
(2) Certain acts and omissions on the part of the trustees, whereas they were referred to in the proceedings taken to attack the authorization to sell and the decision approving the method of unilateral valuation of the assets;
(3) The conditions of sale, whereas they were attacked by Barcelona Traction in an application to set aside and on appeal, in the application of 27 December 1951 for a declaration of nullity containing a formal prayer that the order approving the conditions of sale be declared null and void, and in an application of 28 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 30); the same challenge was expressed by Sidro in its action of 7 February 1953 (New Documents submitted by the Spanish Government, 1969) and by two other Belgian shareholders of Barcelona Traction, Mrs. Mathiot and Mr. Duvivier, in their application of 26 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 29);

8. With Respect to the Exceptional Remedies

Considering that the Spanish Government is wrong in raising as an objection to the Belgian claim the allegation that Barcelona Traction did not make use of certain exceptional remedies against the bankruptcy judgment, such as application for revision, action for civil liability and criminal proceedings against the judges, and application for a hearing by a party in default;

Considering that the first of these remedies could patently not be contemplated, not only on account of the nature of the bankruptcy judgment, but also because until 1963 there was an opposition outstanding against that judgment and, superabundantly, because Barcelona Traction, its subsidiaries and co-interested parties would not have been in a position to prove the facts of subornation, violence or fraudulent machination which alone could have entitled such proceedings to be taken;

Considering that the remedies of an action for civil liability and criminal proceedings against the judges were not adequate, since they were not capable of bringing about the annulment or setting aside of the decisions constituting denials of justice;

Considering that similarly the remedy of application for a hearing accorded by Spanish law to a party in default was patently in this case neither available to Barcelona Traction nor adequate;

FOR THESE REASONS, and any others which have been adduced by the Belgian Government in the course of the proceedings,

May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect,

To uphold the claims of the Belgian Government expressed in the submissions [in] the Reply."

The following final submissions were presented on behalf of the Spanish Government,
at the hearing of 22 July 1969:

"Considering that the Belgian Government has no jus standi in the present case, either for the protection of the Canadian Barcelona Traction company or for the protection of alleged Belgian 'shareholders' of that company;

Considering that the requirements of the exhaustion of local remedies rule have not been satisfied either by the Barcelona Traction company or by its alleged 'shareholders';

Considering that as no violation of an international rule binding on Spain has been established, Spain has not incurred any responsibility vis-à-vis the applicant State on any account; and that, in particular—
(a) Spain is not responsible for any usurpation of jurisdiction on account of the action of its judicial organs;
(b) the Spanish judicial organs have not violated the rules of international law requiring that foreigners be given access to the courts, that a decision be given on their claims and that their proceedings for redress should not be subjected to unjustified delays;
(c) there have been no acts of the Spanish judiciary capable of giving rise to international responsibility on the part of Spain on account of the content of judicial decisions; and
(d) there has been no violation of an international obligation on account of abuse of rights or discriminatory acts;

Considering that for these reasons, and any others expounded in the written and oral proceedings, the Belgian claims must be deemed to be inadmissible or unfounded;

The Spanish Government presents to the Court its final submissions:

May it please the Court to adjudge and declare that the Belgian Government's claims are dismissed."

* * *

26. As has been indicated earlier, in opposition to the Belgian Application the Spanish Government advanced four objections of a preliminary nature. In its Judgment of 24 July 1964 the Court rejected the first and second of these (see paragraph 3 above), and decided to join the third and fourth to the merits. The latter were, briefly, to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company, even if the shareholders were Belgian, and that local remedies available in Spain had not been exhausted.

27. In the subsequent written and oral proceedings the Parties supplied the Court with abundant material and information bearing both on the preliminary objections not decided in 1964 and on the merits of the case. In this connection the Court considers that reference should be made to the unusual length of the present proceedings, which has been due to the
very long time-limits requested by the Parties for the preparation of their written pleadings and in addition to their repeated requests for an extension of these limits. The Court did not find that it should refuse these requests and thus impose limitations on the Parties in the preparation and presentation of the arguments and evidence which they considered necessary. It nonetheless remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.

28. For the sake of clarity, the Court will briefly recapitulate the claim and identify the entities concerned in it. The claim is presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in the Barcelona Traction, Light and Power Company Limited. The submissions of the Belgian Government make it clear that the object of its Application is reparations for damage allegedly caused to these persons by the conduct, said to be contrary to international law, of various organs of the Spanish State towards that company and various other companies in the same group.

29. In the first of its submissions, more specifically in the Counter-Memorial, the Spanish Government contends that the Belgian Application of 1962 seeks, though disguised as the same object as the Application of 1958, i.e., the protection of the Barcelona Traction company as such, as a separate corporate entity, and that the claim should in consequence be dismissed. However, in making its new Application, as it has chosen to frame it, the Belgian Government was only exercising the freedom of action of any State to formulate its claim in its own way. The Court is therefore bound to examine the claim in accordance with the explicit content imparted to it by the Belgian Government.

30. The States which the present case principally concerns are Belgium, the national State of the alleged shareholders, Spain, the State whose organs are alleged to have committed the unlawful acts complained of, and Canada, the State under whose laws Barcelona Traction was incorporated and in whose territory it has its registered office ("head office" in the terms of the by-laws of Barcelona Traction).

31. Thus the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office.

32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

"The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account
of its nationals’ having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium’s capacity.

“This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.” (Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 16.)

It follows that the same question is determinant in respect of Spain’s responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

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37. In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law. Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity.

38. In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treat-

ment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.

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39. Seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations. Of this, municipal law has had to take due account, whence the increasing volume of rules governing the creation and operation of corporate entities, endowed with a specific status. These entities have rights and obligations peculiar to themselves.

40. There is, however, no need to investigate the many different forms of legal entity provided for by the municipal laws of States, because the Court is concerned only with that exemplified by the company involved in the present case: Barcelona Traction—a limited liability company whose capital is represented by shares. There are, indeed, other associations, whatever the name attached to them by municipal legal systems, that do not enjoy independent corporate personality. The legal difference between the two kinds of entity is that for the limited liability company it is the overriding tie of legal personality which is determinant; for the other associations, the continuing autonomy of the several members.

41. Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.

42. It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too. Ordinarily, no individual shareholder can take legal steps, either in the
name of the company or in his own name. If the shareholders disagree with the decisions taken on behalf of the company they may, in accordance with its articles or the relevant provisions of the law, change them or replace its officers, or take such action as is provided by law. Thus to protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders. Nonetheless the shareholders’ rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.

43. At this point the Court would recall that in forming a company, its promoters are guided by all the various factors involved, the advantages and disadvantages of which they take into account. So equally does a shareholder, whether he is an original subscriber of capital or a subsequent purchaser of the company’s shares from another shareholder. He may be seeking safety of investment, high dividends or capital appreciation—or a combination of two or more of these. Whichever it is, it does not alter the legal status of the corporate entity or affect the rights of the shareholder. In any event he is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazards or from prejudice caused to the company by illegal treatment of some kind.

44. Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

45. However, it has been argued in the present case that a company represents purely a means of achieving the economic purpose of its members, namely the shareholders, while they themselves constitute in fact the reality behind it. It has furthermore been repeatedly emphasized that there exists between a company and its shareholders a relationship describable as a community of destiny. The alleged acts may have been directed against the company and not the shareholders, but only in a formal sense: in reality, company and shareholders are so closely interconnected that prejudicial acts committed against the former necessarily wrong the latter; hence any acts directed against a company can be conceived as directed against its shareholders, because both can be considered in substance, i.e., from the economic viewpoint, identical. Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is in case it enjoys an independent existence. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.

46. It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not ipso facto justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.

47. The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder’s rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

48. The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders had an
independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights.

49. The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further.

50. In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law—the distinction and the community between the company and the shareholder—which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

51. On the international plane, the Belgian Government has advanced the proposition that it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself. In strict logic and law this formulation of the Belgian claim to jus standi assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State.

52. International law may not, in some fields, provide specific rules in particular cases. In the concrete situation, the company against which allegedly unlawful acts were directed is expressly vested with a right, whereas no such right is specifically provided for the shareholder in respect of those acts. Thus the position of the company rests on a positive rule of both municipal and international law. As to the shareholder, while he has certain rights expressly provided for him by municipal law as referred to in paragraph 42 above, appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder.

53. It is quite true, as was recalled in the course of oral argument in the present case, that concurrent claims are not excluded in the case of a person who, having entered the service of an international organization and retained his nationality, enjoys simultaneously the right to be protected by his national State and the right to be protected by the organization to which he belongs. This however is a case of one person in possession of two separate bases of protection, each of which is valid (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 185). There is no analogy between such a situation and that of foreign shareholders in a company which has been the victim of a violation of international law which has caused them damage.

54. Part of the Belgian argument is founded on an attempt to assimilate interests to rights, relying on the use in many treaties and other instruments of such expressions as property, rights and interests. This is not, however, conclusive. Property is normally protected by law. Rights are ex hypothesi protected by law, otherwise they would not be rights. According to the Belgian Government, interests, although distinct from rights, are also protected by the aforementioned conventional rules. The Court is of the opinion that, for the purpose of interpreting the general rule of international law concerning diplomatic protection, which is its task, it has no need to determine the meaning of the term interests in the conventional rules, in other words to determine whether by this term the conventional rules refer to rights rather than simple interests.

55. The Court will now examine other grounds on which it is conceivable that the submission by the Belgian Government of a claim on behalf of shareholders in Barcelona Traction may be justified.

56. For the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have
sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of—among others—the shareholders, but only in exceptional circumstances.

58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

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59. Before proceeding, however, to consider whether such circumstances exist in the present case, it will be advisable to refer to two specific cases involving encroachment upon the legal entity, instances of which have been cited by the Parties. These are: first, the treatment of enemy and allied property, during and after the First and Second World Wars, in peace treaties and other international instruments; secondly, the treatment of foreign property consequent upon the nationalizations carried out in recent years by many States.

60. With regard to the first, enemy-property legislation was an instrument of economic warfare, aimed at denying the enemy the advantages to be derived from the anonymity and separate personality of corporations. Hence the lifting of the veil was regarded as justified ex necessitate and was extended to all entities which were tainted with enemy character, even the nationals of the State enacting the legislation. The provisions of the peace treaties had a very specific function: to protect allied property, and to seize and pool enemy property with a view to covering reparation claims. Such provisions are basically different in their rationale from those normally applicable.

61. Also distinct are the various arrangements made in respect of compensation for the nationalization of foreign property. Their rationale too, derived as it is from structural changes in a State's economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are sui generis and provide no guide in the present case.

62. Nevertheless, during the course of the proceedings both Parties relied on international instruments and judgments of international tribunals concerning these two specific areas. It should be clear that the developments in question have to be viewed as distinctive processes, arising out of circumstances peculiar to the respective situations. To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as lex specialis and hence to court error.

63. The Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case. Other decisions, allowing or disallowing claims by way of exception, are not, in view of the particular facts concerned, directly relevant to the present case.

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64. The Court will now consider whether there might not be, in the present case, other special circumstances for which the general rule might not take effect. In this connection two particular situations must be studied: the case of the company having ceased to exist and the case of the company's national State lacking capacity to take action on its behalf.

65. As regards the first of these possibilities the Court observes that the Parties have put forward conflicting interpretations of the present situation of Barcelona Traction. There can, however, be no question but that Barcelona Traction has lost all its assets in Spain, and was placed in receivership in Canada, a receiver and manager having been appointed. It is common ground that from the economic viewpoint the company has been entirely paralyzed. It has been deprived of all its Spanish sources of income, and the Belgian Government has asserted that the company
could no longer find the funds for its legal defence, so that these had to be supplied by the shareholders.

66. It cannot however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: the company’s status in law is alone relevant, and not its economic condition, nor even the possibility of its being “practically defunct”—a description on which argument has been based but which lacks all legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.

67. In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist. Moreover, it is a matter of public record that the company’s shares were quoted on the stock-market at a recent date.

68. The reason for the appointment in Canada not only of a receiver but also of a manager was explained as follows:

“In the Barcelona Traction case it was obvious, in view of the Spanish bankruptcy order of 12 February 1948, that the appointment of only a receiver would be useless, as positive steps would have to be taken if any assets seized in the bankruptcy in Spain were to be recovered.” (Hearing of 2 July 1969.)

In brief, a manager was appointed in order to safeguard the company’s rights; he has been in a position directly or indirectly to uphold them. Thus, even if the company is limited in its activity after being placed in receivership, there can be no doubt that it has retained its legal capacity and that the power to exercise it is vested in the manager appointed by the Canadian courts. The Court is thus not confronted with the first hypothesis contemplated in paragraph 64, and need not pronounce upon it.

69. The Court will now turn to the second possibility, that of the lack of capacity of the company’s national State to act on its behalf. The first question which must be asked here is whether Canada—the third apex of the triangular relationship—is, in law, the national State of Barcelona Traction.

70. In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (siège social) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the “genuine connection” has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another. In this connection reference has been made to the Nottebohm case. In fact the Parties made frequent reference to it in the course of the proceedings. However, given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in that case.

71. In the present case, it is not disputed that the company was incorporated in Canada and has its registered office in that country. The incorporation of the company under the law of Canada was an act of free choice. Not only did the founders of the company seek its incorporation under Canadian law but it has remained under that law for a period of over 50 years. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. Thus a close and permanent connection has been established, fortified by the passage of over half a century. This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside Canada, for that was its declared object. Barcelona Traction’s links with Canada are thus manifold.

72. Furthermore, the Canadian nationality of the company has received general recognition. Prior to the institution of proceedings before the Court, three other governments apart from that of Canada (those of the United Kingdom, the United States and Belgium) made representa-
tions concerning the treatment accorded to Barcelona Traction by the Spanish authorities. The United Kingdom Government intervened on behalf of bondholders and of shareholders. Several representations were also made by the United States Government, but not on behalf of the Barcelona Traction company as such.

73. Both Governments acted at certain stages in close co-operation with the Canadian Government. An agreement was reached in 1950 on the setting-up of an independent committee of experts. While the Belgian and Canadian Governments contemplated a committee composed of Belgian, Canadian and Spanish members, the Spanish Government suggested a committee composed of British, Canadian and Spanish members. This was agreed to by the Canadian and United Kingdom Governments, and the task of the committee was, in particular, to establish the monies imported into Spain by Barcelona Traction or any of its subsidiaries, to determine and appraise the materials and services brought into the country, to determine and appraise the amounts withdrawn from Spain by Barcelona Traction or any of its subsidiaries, and to compute the profits earned in Spain by Barcelona Traction or any of its subsidiaries and the amounts susceptible of being withdrawn from the country at 31 December 1949.

74. As to the Belgian Government, its earlier action was also undertaken in close co-operation with the Canadian Government. The Belgian Government admitted the Canadian character of the company in the course of the present proceedings. It explicitly stated that Barcelona Traction was a company of neither Spanish nor Belgian nationality but a Canadian company incorporated in Canada. The Belgian Government has even conceded that it was not concerned with the injury suffered by Barcelona Traction itself, since that was Canada's affair.

75. The Canadian Government itself, which never appears to have doubted its right to intervene on the company's behalf, exercised the protection of Barcelona Traction by diplomatic representation for a number of years, in particular by its note of 27 March 1948, in which it alleged that a denial of justice had been committed in respect of the Barcelona Traction, Ebro and National Trust companies, and requested that the bankruptcy judgment be cancelled. It later invoked the Anglo-Spanish treaty of 1922 and the agreement of 1924, which applied to Canada. Further Canadian notes were addressed to the Spanish Government in 1950, 1951 and 1952. Further approaches were made in 1954, and in 1955 the Canadian Government renewed the expression of its deep interest in the affair of Barcelona Traction and its Canadian subsidiaries.

76. In sum, the record shows that from 1948 onwards the Canadian Government made to the Spanish Government numerous representations which cannot be viewed otherwise than as the exercise of diplomatic protection in respect of the Barcelona Traction company. Therefore this was not a case where diplomatic protection was refused or remained in the sphere of fiction. It is also clear that over the whole period of its diplomatic activity the Canadian Government proceeded in full knowledge of the Belgian attitude and activity.

77. It is true that at a certain point the Canadian Government ceased to act on behalf of Barcelona Traction, for reasons which have not been fully revealed, though a statement made in a letter of 19 July 1955 by the Canadian Secretary of State for External Affairs suggests that it felt the matter should be settled by means of private negotiations. The Canadian Government has nonetheless retained its capacity to exercise diplomatic protection; no legal impediment has prevented it from doing so: no fact has arisen to render this protection impossible. It has discontinued its action of its own free will.

78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.

79. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.

80. This cannot be regarded as amounting to a situation where a violation of law remains without remedy: in short, a legal vacuum.
There is no obligation upon the possessors of rights to exercise them. Sometimes no remedy is sought, though rights are infringed. To equate this with the creation of a vacuum would be to equate a right with an obligation.

81. The cessation by the Canadian Government of the diplomatic protection of Barcelona Traction cannot, then, be interpreted to mean that there is no remedy against the Spanish Government for the damage done by the allegedly unlawful acts of the Spanish authorities. It is not a hypothetical right which was vested in Canada, for there is no legal impediment preventing the Canadian Government from protecting Barcelona Traction. Therefore there is no substance in the argument that for the Belgian Government to bring a claim before the Court represented the only possibility of obtaining redress for the damage suffered by Barcelona Traction and, through it, by its shareholders.

82. Nor can the Court agree with the view that the Canadian Government had of necessity to interrupt the protection it was giving to Barcelona Traction, and to refrain from pursuing it by means of other procedures, solely because there existed no link of compulsory jurisdiction between Spain and Canada. International judicial proceedings are but one of the means available to States in pursuit of their right to exercise diplomatic protection (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 178). The lack of a jurisdictional link cannot be regarded either in this or in other fields of international law as entailing the non-existence of a right.

83. The Canadian Government's right of protection in respect of the Barcelona Traction company remains unaffected by the present proceedings. The Spanish Government has never challenged the Canadian nationality of the company, either in the diplomatic correspondence with the Canadian Government or before the Court. Moreover it has unreservedly recognized Canada as the national State of Barcelona Traction in both written pleadings and oral statements made in the course of the present proceedings. Consequently, the Court considers that the Spanish Government has not questioned Canada's right to protect the company.

84. Though, having regard to the character of the case, the question of Canada's right has not been before it, the Court has considered it necessary to clarify this issue.

85. The Court will now examine the Belgian claim from a different point of view, disregarding municipal law and relying on the rule that in inter-State relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the State. As the Permanent Court said,

"The question, therefore, whether the ... dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint." (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12. See also Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955, p. 24.)

86. Hence the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State's nationals abroad are thus prejudicially affected, and that since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State.

87. Governments have been known to intervene in such circumstances not only when their interests were affected, but also when they were threatened. However, it must be stressed that this type of action is quite different from and outside the field of diplomatic protection. When a State admits into its territory foreign investments or foreign nationals it is, as indicated in paragraph 33, bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. Every investment of this kind carries certain risks. The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case. On the other hand it has been stressed that it must be proved that the investment effectively belongs to a particular economy. This is, as it is admitted, sometimes very difficult, in particular where complex undertakings are involved. Thus the existing concrete test would be replaced by one which might lead to a situation in which no diplomatic protection could be exercised, with the consequence that an unlawful act by another State would remain without remedy.

88. It follows from what has already been stated above that, where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.

89. Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are
often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

90. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.

91. With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.

92. Since the general rule on the subject does not entitle the Belgian Government to put forward a claim in this case, the question remains to be considered whether nonetheless, as the Belgian Government has contended during the proceedings, considerations of equity do not require that it be held to possess a right of protection. It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.

93. On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

94. In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection. In this connection, account should also be taken of the practical effects of deducing from considerations of equity any broader right of protection for the national State of the shareholders. It must first of all be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test; it would seem that the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection. The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations. In that field, protection by the national State of the shareholders can hardly be graduated according to the absolute or relative size of the shareholding involved.

95. The Belgian Government, it is true, has also contended that as high a proportion as 88 per cent. of the shares in Barcelona Traction belonged to natural or juristic persons of Belgian nationality, and it has used this as an argument for the purpose not only of determining the amount of the damages which it claims, but also of establishing its right of action on behalf of the Belgian shareholders. Nevertheless, this does
not alter the Belgian Government's position, as expounded in the course of the proceedings, which implies, in the last analysis, that it might be sufficient for one single share to belong to a national of a given State for the latter to be entitled to exercise its diplomatic protection.

96. The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater insomuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company. Furthermore, study of factual situations in which this theory might possibly be applied gives rise to the following observations.

97. The situations in which foreign shareholders in a company wish to have recourse to diplomatic protection by their own national State may vary. It may happen that the national State of the company simply refuses to grant it its diplomatic protection, or that it begins to exercise it (as in the present case) but does not pursue its action to the end. It may also happen that the national State of the company and the State which has committed a violation of international law with regard to the company arrive at a settlement of the matter, by agreeing on compensation for the company, but that the foreign shareholders find the compensation insufficient. Now, as a matter of principle, it would be difficult to draw a distinction between these three cases so far as the protection of foreign shareholders by their national State is concerned, since in each case they may have suffered real damage. Furthermore, the national State of the company is perfectly free to decide how far it is appropriate for it to protect the company, and is not bound to make public the reasons for its decision. To reconcile this discretionary power of the company's national State with a right of protection falling to the shareholders' national State would be particularly difficult when the former State has concluded, with the State which has contravened international law with regard to the company, an agreement granting the company compensation which the foreign shareholders find inadequate. If, after such a settlement, the national State of the foreign shareholders could in its turn put forward a claim based on the same facts, this would be likely to introduce into the negotiation of this kind of agreement a lack of security which would be contrary to the stability which it is the object of international law to establish in international relations.

98. It is quite true, as recalled in paragraph 53, that international law recognizes parallel rights of protection in the case of a person in the service of an international organization. Nor is the possibility excluded of concurrent claims being made on behalf of persons having dual nationality, although in that case lack of a genuine link with one of the two States may be set up against the exercise by that State of the right of protection. It must be observed, however, that in these two types of situation the number of possible protectors is necessarily very small, and their identity normally not difficult to determine. In this respect such cases of dual protection are markedly different from the claims to which recognition of a general right of protection of foreign shareholders by their various national States might give rise.

99. It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders.

100. In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, *jus standi* is conferred on the Belgian Government by considerations of equity.

* 

102. In the course of the proceedings, the Parties have submitted a great amount of documentary and other evidence intended to substantiate
their respective submissions. Of this evidence the Court has taken cognizance. It has been argued on one side that unlawful acts had been committed by the Spanish judicial and administrative authorities, and that as a result of those acts Spain has incurred international responsibility. On the other side it has been argued that the activities of Barcelona Traction and its subsidiaries were conducted in violation of Spanish law and caused damage to the Spanish economy. If both contentions were substantiated, the truth of the latter would in no way provide justification in respect of the former. The Court fully appreciates the importance of the legal problems raised by the allegation, which is at the root of the Belgian claim for reparation, concerning the denial of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection is a prerequisite for the examination of these problems. Since no jus standi before the Court has been established, it is not for the Court in its Judgment to pronounce upon any other aspect of the case, on which it should take a decision only if the Belgian Government had a right of protection in respect of its nationals, shareholders in Barcelona Traction.

* * * * *

103. Accordingly,

The Court

rejects the Belgian Government's claim by fifteen votes to one, twelve votes of the majority being based on the reasons set out in the present Judgment.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifth day of February, one thousand nine hundred and seventy, in three copies, one of which will be placed in the Archives of the Court and the others transmitted to the Government of the Kingdom of Belgium and to the Government of the Spanish State, respectively.

(Signed) J. L. Bustamante y Rivero,
President.
(Signed) S. Aquarone,
Registrar.

Judge Petren and Judge Onyeama make the following Joint Declaration:

We agree with the operative provision and the reasoning of the Judgment subject to the following declaration:

With regard to the nationality of Barcelona Traction, the Judgment refers to the expression of opinions to the effect that the absence of a genuine connection between a company and the State claiming the right of diplomatic protection of the company might be set up against the exercise of such a right. In this context the Judgment also mentions the decision in the Nottebohm case to the effect that the absence of a genuine connecting link between a State and a natural person who has acquired its nationality may be set up against the exercise by that State of diplomatic protection of the person concerned. The present Judgment then concludes that given the legal and factual aspects of protection in the present case there can be no analogy with the issues raised or the decision given in the Nottebohm case.

Now in the present case the Spanish Government has asserted and the Belgian Government has not disputed that, Barcelona Traction having been incorporated under Canadian law and having its registered office in Toronto, it is of Canadian nationality and Canada is qualified to protect it.

Canada's right of protection being thus recognized by both Parties to the proceedings, the first question which the Court has to answer within the framework of the third preliminary objection is simply whether, alongside the right of protection pertaining to the national State of a company, another State may have a right of protection of the shareholders of the company who are its nationals. This being so, the Court has not in this case to consider the question whether the genuine connection principle is applicable to the diplomatic protection of juristic persons, and, still less, to speculate whether, if it is, valid objections could have been raised against the exercise by Canada of diplomatic protection of Barcelona Traction.

Judge Lachs makes the following Declaration:

I am in full agreement with the reasoning and conclusions of the Judgment, but would wish to add the following observation:

The Court has found, in the light of the relevant elements of law and of fact, that the Applicant, the Belgian Government, has no capacity in the present case. At the same time it has stated that the Canadian Government's right of protection in respect of the Barcelona Traction company has remained unaffected by the proceedings now closed.
I consider that the existence of this right is an essential premise of the Court's reasoning, and that its importance is emphasized by the seriousness of the claim and the particular nature of the unlawful acts with which it charges certain authorities of the respondent State.

President Bustamante y Rivero, Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Padilla Nervo, Gros and Ammoun append Separate Opinions to the Judgment of the Court.

Judge ad hoc Riphagen appends a Dissenting Opinion to the Judgment of the Court.

(Initialled) J. L. B.-R.
(Initialled) S. A.
International Court of Justice

Elettronica Sicula S.p.A. (ELSI)
(United States of America v. Italy)
Judgment

I.C.J. Reports 1989
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
ELETTRONICA SICULA S.p.A. (ELSI)
(UNITED STATES OF AMERICA v. ITALY)

JUDGMENT OF 20 JULY 1989

1989

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

Affaire
DE L'ELETTRONICA SICULA S.p.A. (ELSI)
(ÉTATS-UNIS D'AMÉRIQUE c. ITALIE)

ARRÊT DU 20 JUILLET 1989

Official citation:
Elettronica Sicula S.p.A. (ELSI), Judgment,

Mode officiel de citation:
Elettronica Sicula S.p.A. (ELSI), arrêt,

Sales number
N° de vente: 562
as arbitrary in international law — Whether order made in context of operating system of law and remedies may be arbitrary measure.

Article VII of FCN Treaty — Right "to acquire, own and dispose of immovable property or interests therein" — Difference between English text ("interests") and Italian text ("diritti reali") — Standards of protection laid down by treaty.

JUDGMENT

Present: President RUDA; Judges ODA, AGO, SCHWEBEL, Sir Robert JENNINGS; Registrar VALENCIA-OSPINA.

In the case concerning Elettronica Sicula S.p.A. (ELSI),

between

the United States of America,

represented by

The Honorable Abraham D. Sofaer, Legal Adviser, Department of State,
Mr. Michael J. Matheson, Deputy Legal Adviser, Department of State,
as Co-Agents;
Mr. Timothy E. Ramish,
as Deputy Agent;
Ms Melinda P. Chandler, Attorney/Adviser, Department of State,
Mr. Sean D. Murphy, Attorney/Adviser, Department of State,
The Honorable Richard N. Gardner, Ambassador to Italy (1977-1981);
Henry L. Moses Professor of Law and International Diplomacy, Columbia University; Counsel to the Law Firm of Covdert Brothers,
as Counsel and Advocates;
Mr. Giuseppe Bisconti, Studio Legale Bisconti, Rome,
Mr. Franco Bonelli, Professor of Law, Genoa University; Partner, Studio Legale Bonelli,
Mr. Ello Fazzalari, Professor of Civil Procedure, Rome University; Partner, Studio Legale Fazzalari,
Mr. Shabtai Rosenne, Member of the Israel Bar; Member of the Institute of International Law; Honorary Member of the American Society of International Law,
as Advisers,
and

the Republic of Italy

represented by

Mr. Luigi Ferrari Bravo, Professor of International Law at the University of Rome; Head of the Legal Service of the Ministry of Foreign Affairs,
as Agent and Counsel;
Mr. Riccardo Monaco, Professor Emeritus at the University of Rome, as Co-Agent and Counsel;
Mr. Ignazio Caramazza, State Advocate; Secretary-General of the Avvocatura Generale dello Stato, as Co-Agent and Advocate;
Mr. Michael Joachim Bonell, Professor of Comparative Law at the University of Rome,
Mr. Francesco Capotorti, Professor of International Law at the University of Rome,
Mr. Giorgio Gaja, Professor of International Law at the University of Florence,
Mr. Keith Hight, Member of the Bars of New York and the District of Columbia,
Mr. Berardino Libonati, Professor of Commercial Law at the University of Rome,
as Counsel and Advocates;
assisted by
Mr. David Clark, L.I.B. (Hons), Member of the Law Society of Scotland,
Mr. Alberto Coiella, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Mr. Alan Derek Hayward, Fellow of the Institute of Chartered Accountants in England and Wales,
Mr. Pier Giusto Jaeger, Professor of Commercial Law at the University of Milan,
Mr. Attila Tanzi, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Mr. Eric Wyler, Maître assistant of Public International Law at the Faculty of Law of the University of Lausanne,
as Advisers.

The CHAMBER OF THE INTERNATIONAL COURT OF JUSTICE formed to deal with the case above mentioned,
composed as above,
after deliberation,
delivers the following Judgment:

1. By a letter dated 6 February 1987, filed in the Registry of the Court the same day, the Secretary of State of the United States of America transmitted to the Court an Application instituting proceedings against the Republic of Italy in respect of a dispute arising out of the acquisition by the Government of Italy of the plant and related assets of Raytheon-Elst S.p.A., previously known as Elettronica Sicula S.p.A. (ELS), an Italian company which was stated to have been 100% owned by two United States corporations. By the same letter, the Secretary of State informed the Court that the Government of the United States requested, pursuant to Article 26 of the Statute of the Court, that the dispute be resolved by a Chamber of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the Republic of Italy. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. By a telegram dated 13 February 1987 the Minister for Foreign Affairs of Italy informed the Court that his Government accepted the proposal put forward by the Government of the United States that the case be heard by a Chamber composed in accordance with Article 26 of the Statute; this acceptance was confirmed by a letter dated 13 February 1987 from the Agent of Italy.

4. By an Order dated 2 March 1987, the Court, after recalling the request for a Chamber and reciting that the Parties had been duly consulted as to the composition of the proposed Chamber in accordance with Article 26, paragraph 2, of the Rules of Court, decided to accede to the request of the Governments of the United States of America and Italy to form a special Chamber of five judges to deal with the case, declared that at an election held on that day President Nagendra Singh and Judges Oda, Ago, Schwebel and Sir Robert Jennings had been elected to the Chamber, and declared a Chamber to deal with the case to have been duly constituted by the Order, with the composition indicated.

5. The Court further fixed time-limits, by the said Order, for the filing of a Memorial by the United States of America and a Counter-Memorial by Italy, which were duly filed within the time-limits. In its Counter-Memorial, Italy presented an objection to the admissibility of the Application; by letters addressed to the Registrar on 16 November 1987, the Parties agreed, with reference to Article 79, paragraph 8, of the Rules of Court, that the objection should "be heard and determined within the framework of the merits". By an Order dated 17 November 1987, the Chamber took note of that agreement, found that the filing of further pleadings by the Parties was necessary, authorized the filing of a Reply by the United States of America and a Rejoinder by Italy, and fixed time-limits for these; the Reply and Rejoinder were duly filed within those time-limits.

6. On 11 December 1988 Judge Nagendra Singh, President of the Chamber, died. Following further consultations with the Parties with regard to the composition of the Chamber in accordance with Article 17, paragraph 2, of the Rules of Court, the Court, by Order dated 20 December 1988, declared that Judge Ruda, President of the Court, had that day been elected a Member of the Chamber to fill the vacancy left by the death of Judge Nagendra Singh. In accordance with Article 18, paragraph 2, of the Rules of Court, President Ruda became President of the Chamber.

7. At 12 public sittings held between 13 February and 2 March 1989, the Chamber was addressed by the following representatives of the Parties:
For the United States of America:  The Honorable A. D. Sofaer Mr. M. J. Matheson Mr. T. E. Ramish Ms M. P. Chandler Mr. S. D. Murphy The Honorable R. N. Gardner Mr. G. Bisconti Professor F. Bonelli Professor E. Fazzalari
8. The United States called as witnesses Mr. Charles Francis Adams (who was examined by Mr. Soffaer and cross-examined by Mr. Hight) and Mr. John Dickens Clare (who was examined by Ms. Chandler and cross-examined by Mr. Hight). The United States called as expert Mr. Timothy Lawrence (who was cross-examined by Professor Bonell). Mr. Giuseppe Bisconti also addressed the Court on behalf of the United States; since he had occasion to refer to matters of fact within his knowledge as a lawyer acting for Raytheon Company, the President of the Chamber accorded to a request by the Agent of Italy that Mr. Bisconti be treated pro tanto as a witness. Mr. Bisconti, who informed the Chamber that both Raytheon Company and Mr. Bisconti himself waived any relevant privilege, was cross-examined by Mr. Hight. Italy called as expert Mr. Alan Derek Hayward.

9. During the hearings questions were put to the Parties, and to the witnesses and experts, by the President and Members of the Chamber; replies were given orally or in writing prior to the close of the oral proceedings, with documents in support. The Chamber decided further that each Party might comment in writing on the replies of the other Party to a series of questions, put at a late stage of the oral proceedings, and a time-limit was fixed for that purpose; written comments were duly filed within that time-limit. A further question was put to one Party after the close of the hearings and answered in writing; the other Party was given an opportunity to comment on the answer.

10. In the course of the written proceedings the following submissions were presented by the Parties:

On behalf of the United States of America,

in the Application:

"while reserving the right to supplement and amend this submission as appropriate in the course of further proceedings, the United States requests the Court to adjudge and declare as follows:

(a) that the Government of Italy has violated the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948, in particular, Articles II, III, V and VII of the Treaty, and Articles I and V of the 1951 Supplement; and

(b) that the Government of Italy is responsible to pay compensation to the United States, in an amount to be determined by the Court, as measured by the injuries suffered by United States nationals as a result of these violations, including the additional financial losses which Raytheon suffered in repaying the guaranteed loans and in not recovering amounts due on open accounts, as well as expenses incurred in defending against Italian bank lawsuits, in mitigating the damage to its reputation and credit, and in pursuing its claim for redress";

in the Memorial:

"the United States submits to the Court that it is entitled to a declaration and judgment that:

(a) Italy — by engaging in the acts and omissions described above, which prevented Raytheon and Machlett, United States corporations, from liquidating the assets of their wholly-owned Italian corporation ELSI and caused the latter's bankruptcy, and by its subsequent actions and omissions — violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, in particular, violated:

- Article III (2), in that Italy's actions and omissions prevented Raytheon and Machlett from exercising their right to manage and control an Italian corporation;
- Article V (1) and (3), in that Italy’s actions and omissions constituted a failure to provide the full protection and security as required by the Treaty and by international law;
- Article V (2), in that Italy’s actions and omissions constituted a taking of Raytheon's and Machlett’s interests in property without just compensation and due process of law;
- Article VII, in that these actions and omissions denied Raytheon and Machlett the right to dispose of their interests in immovable property on terms no less favorable than an Italian corporation would enjoy on a reciprocal basis;
- Article I of the Supplement, in that the treatment afforded Raytheon and Machlett was both arbitrary and discriminatory, prevented their effective control and management of ELSI, and also impaired their other legally acquired rights and interests;

(b) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to compensation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(c) that Italy accordingly should pay to the United States the amount of US$12,679,000, plus interest, computed as described above";
in the Reply:

"the United States submits to the Court that it is entitled to a declaration and judgment that:

(a) the claims brought by the United States are admissible before the Court since all reasonable local remedies have been exhausted;

(b) Italy — by engaging in the acts and omissions described above and in the Memorial, which prevented Raytheon and Machlett, United States corporations, from liquidating the assets of their wholly-owned Italian corporation ELSI and caused the latter’s bankruptcy, and by its subsequent actions and omissions — violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated:

- Article III (2), in that Italy's actions and omissions prevented Raytheon and Machlett from exercising their right to manage and control an Italian corporation;
- Article V (1) and (3), in that Italy’s actions and omissions constituted a failure to provide the full protection and security as required by the Treaty and by international law;
- Article V (2), in that Italy’s actions and omissions constituted a taking of Raytheon’s and Machlett’s interests in property without just compensation and due process of law;
- Article VII, in that these actions and omissions denied Raytheon and Machlett the right to dispose of their interests in immovable property on terms no less favorable than an Italian corporation would enjoy on a reciprocal basis;
- Article I of the Supplement, in that the treatment afforded Raytheon and Machlett was both arbitrary and discriminatory, prevented their effective control and management of ELSI, and also impaired their other legally acquired rights and interests;

(c) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to compensation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(d) that Italy accordingly should pay to the United States the amount of US$12,679,000, plus interest, computed as described above and in the Memorial."

On behalf of the United States of America,
at the hearing of 16 February 1989:

"The United States requests that the objection of the Respondent be dismissed and submits to the Court that it is entitled to a declaration and judgment that:

(1) the Respondent violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated Articles III, V, and VII of the Treaty and Article I of the Supplement; and

(2) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to reparation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(3) that Italy accordingly should pay to the United States the amount of $12,679,000 plus interest."

At the hearing of 27 February 1989 (afternoon) the Agent of the United States confirmed that these were the final submissions of the United States.

On behalf of the Republic of Italy,
at the hearing of 23 February 1989, repeated as final submissions at the hearing of 2 March 1989 (afternoon):

"May it please the Court,
A. To adjudge and declare that the Application filed on 6 February
1987 by the United States Government is inadmissible because local remedies have not been exhausted.

B. If not, to adjudge and declare:

(1) that Article III of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;
(2) that Article V, paragraphs 1 and 3, of the Treaty has not been violated;
(3) that Article V, paragraph 2, of the Treaty, and the related provisions of the Protocol to the Treaty, have not been violated;
(4) that Article VII of the Treaty has not been violated;
(5) that Article I of the Supplementary Agreement of 26 September 1951 has not been violated; and
(6) that no other Article of the Treaty or the Supplementary Agreement has been violated.

C. On a subsidiary and alternative basis only: to adjudge and declare that, even if there had been a violation of obligations under the Treaty or the Supplementary Agreement, such violation caused no injury for which the payment of any indemnity would be justified.

And, accordingly, to dismiss the claim.”

* *

12. The claim of the United States in the present case is that Italy has violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries concluded on 2 February 1948 (“the FCN Treaty”) and the Supplementary Agreement thereto concluded on 26 September 1951, by reason of its acts and omissions in relation to, and its treatment of, two United States corporations, the Raytheon Company (“Raytheon”) and The Machlett Laboratories Incorporated (“Machlett”), in relation to the Italian corporation Raytheon-Elsi S.p.A. (previously Elettronica Sicula S.p.A. (ELSI)), which was wholly owned by the two United States corporations. Italy contests certain of the facts alleged by the United States, denies that there has been any violation of the FCN Treaty, and contends, on a subsidiary and alternative basis, that if there was any such violation, no injury was caused for which payment of any indemnity would be justified.

13. In 1955, Raytheon (then known as Raytheon Manufacturing Company) agreed to subscribe for 14 per cent of the shares in Elettronica Sicula S.p.A. Over the period 1956-1967, Raytheon successively increased its holding of ELSI shares (as well as investing capital in the company in other ways) to a total holding of 99.16 per cent of its shares. In April 1963 the name of the company was changed from Elettronica Sicula S.p.A. to “Raytheon-Elsi S.p.A.”; it will however be referred to hereafter as “ELSI”. The remaining shares (0.84 per cent) in ELSI were acquired in April 1967 by Machlett, which was a wholly-owned subsidiary of Raytheon. ELSI was established in Palermo, Sicily, where it had a plant for the production of electronic components: in 1967 it had a workforce of slightly under 900 employees. Its five major product lines were microwave tubes, cathode-ray tubes, semiconductor rectifiers, X-ray tubes and surge arresters.

14. During the fiscal years 1964 to 1966 inclusive, ELSI made an operating profit, but this profit was insufficient to offset its debt expense or accumulated losses, and no dividends were ever paid to its shareholders. In June 1964, the accumulated losses exceeded one-third of the company’s share capital, and ELSI was thus required by Article 2446 of the Italian Civil Code to reduce its equity from 4,300 million lire to 2,000 million lire. The capital stock was therefore devalued by 2,300 million lire and recapitalized by an equal amount subscribed by Raytheon. A similar operation was necessary in March 1967. In February 1967, according to the United States, Raytheon began taking steps to endeavour to make ELSI self-sufficient. Raytheon and Machlett designated a number of highly-qualified personnel to provide financial, managerial and technical expertise, and Raytheon provided a total of over 4,000 million lire in recapitalization and guaranteed credit. By December 1967, according to the United States, major steps had been taken to upgrade plant facilities and operations.

15. At the same time, however, the Chairman of ELSI, and other senior Raytheon officials, held numerous meetings, between February 1967 and March 1968, with cabinet-level officials of the Italian Government and of the Sicilian region, as well as representatives of the Istituto per la Ricerca Industriale (“IRI”), the Ente Siciliano per la Produzione Industriale (“ESPI”), and the private sector. IRI was a holding company controlled by Italy with extensive commercial interests, and dominated at this time the telecommunications, electronics and engineering markets. ESPI was the Sicilian Government industrial organization responsible for the promotion of local development. The purpose of these meetings was stated to be to find for ELSI an Italian partner with economic power and influence and to explore the possibilities of other governmental support. The management of Raytheon had formed the view that, “without a partnership with IRI or other equivalent Italian Governmental entity, ELSI would continue to be an outsider to the Italian industrial community”; such a partnership would, it was thought, “positively influence government decision-making in economic planning”, and enable ELSI also to secure benefits and incentives under Italian legislation designed to favour industrial development in the southern region, the Mezzogiorno. Evidence has been given that the management of ELSI was advised that the company was entitled to such Mezzogiorno benefits, but the Chamber has been told by Italy that it was not so entitled. The support of the national and regional governments was regarded as particularly important because in numerous markets crucial to ELSI’s operations and success
the Italian Government, through IRI or otherwise, played a dominant role as a customer. A detailed “Project for the Financing and Reorganization of the Company” was prepared and submitted to ESPI in May 1967.

16. The management of ELSI took the view that one of the reasons for its lack of success was that it had trained and was employing an excessively large labour force. In June 1967 it was decided to dismiss some 300 employees; under an Italian union agreement this involved a procedure of notifications and negotiations. On the intervention of ESPI, an alternative plan was agreed to whereby 168 workers would be suspended from 10 July 1967, with limited pay by ELSI for a period not exceeding six weeks. After a training programme during which the workers were paid by the Sicilian Government, it was contemplated that ELSI would endeavour to re-employ the suspended employees. The necessary additional business to make this possible was not forthcoming, and the suspended employees were dismissed early in March 1968. A number of random strikes had occurred in early 1968, and as a result of the dismissals a complete strike of the plant occurred on 4 March 1968. According to the Government of Italy, this strike also involved an occupation of the plant by the workforce, which occupation was still continuing when the plant was requisitioned on 1 April 1968 (paragraph 30 below). The United States claims however that strikes and “sit-ins” prior to the requisition were only sporadic and that only after the filing of a petition in bankruptcy on 26 April 1968 (paragraph 36 below) did the workers actually occupy the plant for a sustained period.

17. When it became apparent that the discussions with Italian officials and companies were unlikely to lead to a mutually satisfactory arrangement to resolve ELSI’s difficulties, Raytheon and Machlett, as shareholders in ELSI, began seriously to plan to close and liquidate ELSI to minimize their losses. General planning for the potential liquidation of ELSI began in the latter part of 1967, and in early 1968 detailed plans were made for a shut-down and liquidation at any time after 16 March 1968. On 2 March 1968, the company’s books and accounting records, and, according to a witness at the hearing, “quite a lot of inventory”, were transferred from its offices in Palermo to a regional office in Milan. On 7 March 1968, Raytheon formally notified ELSI that, notwithstanding ELSI’s need for further capital, Raytheon would not “subscribe to any further stock which might be issued by Raytheon-Elsi or to guarantee any additional loans which might be made by others to Raytheon-Elsi”.

18. This decision was stated to have been taken, inter alia, on review of the proposed balance sheet showing the position on 30 September 1967; that balance sheet showed the book value of the assets of ELSI as 17,956.3 million lire, its total debt as 13,123.9 million lire; the accumulated losses of 2,681.3 million lire had reduced the value of the equity (capital stock and capital subscription account) from 4,000 million lire to 1,318.7 million lire. The total debt included a number of liabilities to one United States bank and several Italian banks, some (but not all) of which were guaranteed by Raytheon. For the purposes of a possible liquidation, an asset analysis was prepared by the Chief Financial Officer of Raytheon showing the expected position on 31 March 1968. This showed the book value of ELSI’s assets as 18,640 million lire; as explained in his affidavit filed in these proceedings, it also showed “the minimum prospects of recovery of assets which we could be sure of, in order to ensure an orderly liquidation process”, and the total realizable value of the assets on this basis (the “quick-sale value”) was calculated to be 10,838.8 million lire. A balance sheet subsequently prepared to show the position at 31 March 1968, extrapolated from the balance sheet at 30 September 1967, showed the book value of total assets as 17,053.5 million lire and total debt of 12,970.6 million lire.

19. During the hearings, at the request of the Agent of Italy, the Chamber asked the Government of the United States to produce the financial report showing ELSI’s financial position at 30 September 1967, from which the figures for the book value of its assets had been derived. The report, prepared by Raytheon’s Italian auditors, and dated 22 March 1968, was produced in evidence. The balance sheet attached thereto showed two sets of figures: the first of these, corresponding to the figures for assets and liabilities set out in paragraph 18 above, gave the figures as recorded in the company’s books of account. The second set of figures was based on the first set, but a number of adjustments had been made in accordance with the financial accounting policy of Raytheon “in order to assure comparability of the financial information reported from abroad” by its subsidiary companies. According to the Co-Agent of the United States, the major difference between the accounts on the Italian basis and the Raytheon basis was

“the item of Deferred Charges, which for the most part represented the cost of developing new lines and improving product quality. This asset is carried on the Italian books but is routinely written off by Raytheon Company.”

The adjustment of the item for “Deferred Charges” reduced the total assets figure by 1,653 million lire. Taking all adjustments into account,
the second set of figures gave a value of 14,893.9 million lire for the assets, and 15,775.2 million lire for the liabilities. The auditors stated in their covering letter to Raytheon accountants that

"The adjustments made by the company in preparing the above mentioned balance sheet and statement of income and accumulated losses have not, at the date of this report, been recorded in the books, essentially for tax reasons. Accordingly, the accompanying financial statements are not in agreement with the company's books of account."

Among the "Notes on Financial Statements" attached to the accounts by the auditors was the following:

"10. The adjusted accumulated losses at September 30, 1967 exceeded the total of the paid up capital stock, capital reserve and Stockholders subscription account by an amount of 881.3 million lire. Should this become 'officially' the case (e.g. should the adjustments made in arriving at this total of accumulated losses be entered in the company's books of account), under Articles 2447 and 2448 of the Italian Civil Code the directors would be obliged to convene a Stockholders' Meeting forthwith to take measures either to cover the losses by providing new capital or to put the company into liquidation."

The auditors also expressed reservations on two other items totalling 1,168.5 million lire.

20. The officials of Raytheon and ELSI were nevertheless advised by their Italian counsel in March 1968 that "ELSI's capital, after taking into account losses to date at that time, was well in excess of the minimum statutory requirement" (1 million lire) under Articles 2447 and 2448 of the Italian Civil Code, which provide that if action is not taken to restore the capital to the required minimum, the company is dissolved as a matter of law. In the view of ELSI's counsel, "it was therefore possible under Italian law for ELSI's shareholders to plan an orderly liquidation of the company."

21. Throughout this Judgment this phrase "orderly liquidation" is used solely in the sense in which it was employed by the officers of ELSI and by the representatives of the United States, i.e., to denote the operation planned in 1967-1968 by ELSI's management for the sale of the business or of its assets, en bloc or separately, and the discharge of ELSI's debts, fully or otherwise, out of the proceeds, the whole operation being under the control of ELSI's own management.

22. According to the United States, the chief objectives in the planned orderly liquidation were to conserve the assets and preserve as many of the characteristics of a going concern as possible in order to attract and interest prospective buyers; it was planned to advertise ELSI's assets widely, offering them both as a total package and as separate items — the distinct manufacturing lines of the plant. The intention was, if the sums realized by the sale of the assets were sufficient, to pay all creditors in full. Planning had however also proceeded on the basis of the "quick-sale" valuation of the assets (paragraph 18 above), which, it was recognized, was less than the total liabilities of the company. It was not considered possible to continue normal production; the personnel was to be dismissed, with the exception of some 120 key employees needed for the wind-up operation and for continuing limited production for a time to meet (in particular) military contracts and maintain customer contact.

23. The intended treatment of creditors in the planned liquidation, in the event of only the "quick-sale" value being realized, was stated by the Financial Controller of Raytheon to have been as follows:

"Ideally, we would settle first with the small creditors, subject, of course, to the agreement of the major creditors, in order to minimize the administrative effort during liquidation. Secured and preferred creditors would take priority and would be paid when the assets used for collateral were sold. Major unsecured creditors were to be paid on a pro rata basis from within the funds realized from the sale of assets. Then Raytheon would be called upon to satisfy any guaranteed creditor to the extent not already paid from asset sale proceeds. We calculated that the secured and preferred creditors would receive 100 per cent of their outstanding claims, while the unsecured major creditors who were not covered by Raytheon guarantees would realize about 50 per cent of their claims. The latter creditors were certain banks and Raytheon and its subsidiaries. We were confident that an orderly liquidation of this type would be acceptable to the creditors as it was much more favorable than could be expected through bankruptcy."

According to the United States, settlement with all the smaller creditors was regarded as a priority

"to reduce the creditors to a manageable number and also to eliminate the risk that a small irresponsible creditor would take precipitous action which would raise formidable obstacles in the way of orderly liquidation."

Appended to one of the affidavits by officers of Raytheon and ELSI annexed to the United States Memorial were detailed calculations showing (inter alia) various valuations of ELSI's assets, analysis of the company's
liabilities and their priority in liquidation, and estimated distribution of the proceeds of disposal of assets calculated both on book value and alternatively on a "minimum liquidation value".

24. It is contended by the United States that notwithstanding Raytheon's formal notification on 7 March 1968 that it would not subscribe to any further stock or guarantee any additional loans (paragraph 17 above, in fine), Raytheon was ready to give certain financial support and guarantees to enable the orderly liquidation to proceed, as distinct from making more funds available to ELSI for continued operations. According to officials of ELSI, if Raytheon had handled the liquidation as planned, it would have guaranteed the settlements outlined in the previous paragraph; they stated that

"Demonstrating its support of the liquidation plan, Raytheon organized to provide funds to ELSI in advance of the sale of its assets so that disbursements could easily be made to the small creditors and, as a first step, transferred 150 million lire to the First National City Bank branch in Milan specifically for that purpose."

Evidence was given at the hearing that payment of small creditors out of these funds was begun, but then stopped by the creditor banks because this was "showing preference". It was contended that Raytheon would take over ELSI's accounts receivable (subsequently valued at some 2,879 million lire) at face value, thus supplying immediate cash resources.

25. In the view of ELSI's legal counsel at the time (paragraph 20 above) and of Italian lawyers consulted by the United States, ELSI was in March 1968 entitled to engage in orderly liquidation of its assets, was under no obligation to file a petition in bankruptcy, and was never in jeopardy of compulsory dissolution under Article 2447 of the Italian Civil Code, and was at all times in compliance with Article 2446 of the Code. It has however been contended by Italy that ELSI was in March 1968 unable to pay its debts, and its capital of 4,000 million lire was completely lost; accordingly, an orderly liquidation was not available to it, but as an insolvent debtor it was under an obligation to file a petition in bankruptcy. The disagreement turns on the value of ELSI's assets for this purpose at 31 March 1968: the Parties have made conflicting statements of what is correct accounting practice for the purposes of compliance with the relevant requirements of Italian law. It has also been observed by Italy that, whether or not ELSI was insolvent, the procedure contemplated did not correspond to a voluntary liquidation as provided for in Article 2450 of the Italian Civil Code; under that procedure a liquidator has to be appointed by the shareholders, or if they fail to do so, by the Tribunal. According to one expert appearing on behalf of Italy, ELSI being insolvent the only course open to it in order to avoid the duty of filing a petition in bankruptcy was to request to the tribunal to be admitted to the procedure of judicial settlement ("concertato preventivo") under Articles 160 et seq. of the Italian Bankruptcy Act; this would have required proof that at least 40 per cent of the unsecured claims would be met. The expert appearing on behalf of the United States however stated that apparent inability to pay all creditors at 100 per cent is not fatal to voluntary and orderly liquidation. In this context he mentioned in particular the practice of "private settlement" ("concertato straordinario").

26. The management of ELSI was conscious that a financial crisis was imminent, and during the period from September 1967, the responsible officers of the company were keeping a close watch on the declining funds to ensure that the company did not reach a point where continued operations would be contrary to Italian law. At a meeting held on 21 February 1968 between representatives of Raytheon and ELSI and the President of the Sicilian region, the Chairman of ELSI "drew a precise time chart showing: (a) February 25 — Board Meeting; (b) February 26 to 29 — inevitable bank crisis; (c) March 8 — we run out of money and shut the plant"; the hand-written minutes of that meeting record also that "the date of March 8 was stressed repeatedly as the absolute limit for the shut-down due to a total financial crisis".

27. On 16 March 1968, the Board of Directors of ELSI met to consider a report on the financial situation, and concluded "that there is no alternative to the discontinuation of the company's activities"; the Board

"decided the cessation of the company's operations, to be carried out as follows:
(1) production will be discontinued immediately;
(2) commercial activities and employment contracts will be terminated on March 29, 1968.".

This decision was notified to the employees of ELSI by a letter of 16 March 1968. On 28 March 1968, a meeting of shareholders of ELSI was held, at which it was decided (inter alia) "to ratify the resolutions adopted by the Board of Directors at the meeting of March 16, 1968, and hence to agree that the Company cease operations". Meetings with Italian officials however continued up to 29 March 1968; the Italian authorities continued to give broad assurances of an intervention by ESPI, and vigorously pressed ELSI not to close the plant and not to dismiss the workforce, but the officials of the company insisted that this was inevitable unless more capital was forthcoming. On 29 March 1968 letters of dismissal were mailed to the employees of ELSI.
28. The Managing Director of ELSI had a meeting early on the morning of 31 March 1968 with the President of the Sicilian region, Mr. Caroillo, at which the latter stated that the Italian Prime Minister had said that a company would be formed by ESPI and IMI (Istituto Mobiliare Italiano) to deal with the acquisition of ELSI's assets, and that a holding company would be formed which would eventually own ELSI. Mr. Caroillo continued by saying that "to keep the people in Palermo and avoid an exodus to other jobs, and to protect the plant and machinery, the plant would be requisitioned ...". On 1 April 1968 representatives of the company met representatives of the bank creditors of ELSI to discuss the company's plans for an orderly liquidation. According to the United States, ELSI's representatives stated that Raytheon was not prepared to provide any further financial support to ELSI either by way of capital, loans, advances, or guarantees, but also informed the banks of the arrangement (referred to in paragraph 24 above) which would provide for ELSI's immediate cash needs in such an orderly liquidation through the sale to Raytheon of ELSI's accounts receivable at 100 per cent of face value, the proceeds being used to pay off the small creditors and to meet payroll and severance pay claims as well as other pressing priority obligations.

29. No agreement was reached at that meeting; certain of the banks requested more information, and another meeting was to be held later with an agreed agenda. Subsequently ELSI's representatives learnt that the plant had been requisitioned. According to the United States, and in the view of the officers of Raytheon and ELSI, there was reason to believe that in a liquidation the creditor banks would have accepted a settlement of their claims on payment of 40 to 50 per cent of each, but no independent evidence is available that such was the banks' attitude at that time. It does not appear from the evidence that the banks were asked specifically at the meeting of 1 April 1968 whether they would co-operate on the basis of a guaranteed 50 per cent of their claims: on the contrary, it was contended on behalf of the United States by ELSI's then legal adviser that

"There is no evidence of bank negotiations at the time of the requisition because at the time the stockholders were fully confident that ELSI's assets would have recovered book value, and there was no need at the time to start any such negotiations. What the stockholders and ELSI's Board were seeking at the time was an understanding with the banks on the manner and timing of an orderly liquidation."

30. On 1 April 1968 the Mayor of Palermo issued an order, effective immediately, requisitioning ELSI's plant and related assets for a period of six months. The text of this order, in the translation supplied by the United States, was as follows:

"The Mayor of the Municipality of Palermo,

Taking into consideration that Raytheon-ELSI of Palermo has decided to close its plant located in this city at Via Villagrazia, 79, because of market difficulties and lack of orders;

That the company has furthermore decided to send dismissal letters to the personnel consisting of about 1,000 persons;

Taking notice that ELSI's actions, beside provoking the reaction of the workers and of the unions giving rise to strikes (both general and sectional) has caused a wide and general movement of solidarity of all public opinion which has strongly stigmatized the action taken considering that about 1,000 families are suddenly destituted;

That, considering the fact that ELSI is the second firm in order of importance in the District, because of the shutdown of the plant a serious damage will be caused to the District, which has been so severely tried by the earthquakes had during the month of January 1968;

Considering also that the local press is taking a great interest in the situation and that the press is being very critical toward the authorities and is accusing them of indifference to this serious civic problem;

That, furthermore, the present situation is particularly touchy and unforeseeable disturbances of public order could take place;

Taking into consideration that in this particular instance there is sufficient ground for holding that there is a grave public necessity and urgency to protect the general economic public interest (already seriously compromised) and public order, and that these reasons justify requisitioning the plant and all equipment owned by Raytheon-ELSI located here at Via Villagrazia 79;

Having noted Article 7 of the law of 20 March 1865 No. 2248 enclosure e;

Having noted Article 69 of the Basic Regional Law E.E.LL.,
ORDERS

the requisition, with immediate effect and for the duration of six months, except as may be necessary to extend such period, and without prejudice for the rights of the parties and of third parties, of the plant and relative equipment owned by Raytheon-Elsi of Palermo.

With a subsequent decree, the indemnification to be paid to said company for the requisition will be established.”

The order was served on the company on 2 April 1968.

31. On 6 April 1968 the Mayor issued an order entrusting the management of the requisitioned plant to Mr. Aldo Profumo, the Managing Director of ELSI, for the purpose, inter alia, of “avoiding any damage to the equipment and machinery due to the abandoning of all activity, including maintenance”. Mr. Profumo declined to accept this appointment, and on 16 April 1968 the Mayor wrote to Mr. Silvio Laurin, the senior director, appointing him temporarily to replace Mr. Profumo “in the same capacity, with the same powers, functions and limitations”, and Mr. Laurin accepted this appointment. The company management requested another of its directors, Mr. Rico Merluzzo, to stay at the plant night and day “to preclude local authorities from somehow asserting that the plant had been ‘abandoned’ by ELSI”.

32. On 9 April 1968 ELSI addressed a telegram to the Mayor of Palermo, with copies to other Government authorities, claiming (inter alia) that the requisition was illegal and expressing the company’s intention to take all legal steps to have it revoked and to claim damages. On 12 April 1968 the company served on the Mayor a formal document dated 11 April 1968 inviting him to revoke the requisition order. The Mayor did not respond and the order was not revoked, and on 19 April 1968 ELSI brought an administrative appeal against it to the Prefect of Palermo, who was empowered to hear appeals against decisions by local governmental officials. The decision on that appeal was not given until 22 August 1969 (paragraph 41 below); in the meantime however the requisition was not formally prolonged, and therefore ceased to have legal effect after six months, more than four months after the bankruptcy of ELSI had been declared (paragraph 36 below).

33. As noted above (paragraph 16) the Parties disagree over whether, immediately prior to the requisition order, there had been any occupation of ELSI’s plant by the employees, but it is common ground that the plant was so occupied during the period immediately following the requisition. On 19 April 1968 the representatives of the company stated, in an appeal against the requisition addressed to the Prefect of Palermo, that there had at that time been no occupation of the plant as a consequence of the dismissal of the employees on 29 March 1968, but that on 30 March 1968 a group of representatives of the personnel went to the plant to talk to the company executives and “peacefully remained thereafter all day on the premises”, and on subsequent days a small group of employees wandered about on the premises. The Mayor of Palermo, in an affidavit, has stated that

“The occupation of the plant by the employees (which started well before the requisition) turned out to be of a ‘cooperative’ nature after the requisition and was no obstacle to the continuation of those activities which were possible under the circumstances”;

and an official of the Municipality of Palermo has stated, in an affidavit, that “there were no problems such as ‘hard’ picketing” and that one of the production lines was re-activated and “we proceeded regularly with the contracts in hand”. According to an affidavit filed by the United States “the plant sat idle for the remainder of 1968”, but Italy has produced evidence showing that some work in progress was continued and completed in the months following the requisition, in particular for the Nato Hawk programme.

34. On 19 and 20 April 1968 meetings were held between officials of Raytheon and the President of the Sicilian region, Mr. Carullo, who stated that “the Regional and Central Governments had reached agreement to form a management company with IRI participation to operate ELSI” and invited Raytheon to join the management company. The proposal would have entailed the contribution by ELSI of new capital and its assuming complete responsibility for past debts; in the discussion Mr. Carullo stated that “the Region now has a single goal, to keep the workers employed”. At the request of Raytheon, Mr. Carullo, on 20 April 1968 supplied Raytheon with a memorandum to provide the company with “some fundamental elements of judgment”. In that memorandum he explained that it was impossible for the time being for Raytheon to liquidate ELSI, for the following reasons:

“1. Nobody in Italy will purchase [Nessuno in Italia comprerà], that is to say IRI will not purchase, neither for a low nor for a high price, the Region will not purchase, private enterprise will not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed.

2. The Banks, which have outstanding credits for approximately 16 billion Lire, cannot and will not accept any settlement even at the cost of dragging the Company into litigation on an international level. I mean to refer to Raytheon and not to ELSI because the distinction between ELSI and Raytheon is not found to be admissible, since any and all financing was granted to ELSI based on the moral
guarantee of Raytheon, whose executives have always negotiated said financing.

3. Anyway, it is known in Italy that one can enforce the claims directly against Raytheon because it has interests and revenues in our country also outside ELSI.

It is obvious that every attempt will be made (even at the cost of long litigation) to obtain from Raytheon what is owed by ELSI.

4. In the event that the plant will be kept closed, waiting for Italian buyers who will never materialize, the requisition will be maintained at least until the courts will have resolved the case. Months will go by ...

35. On 26 April 1968 the Chairman of the Board of ELSI wrote to Mr. Carollo formally rejecting the proposal for participation in the new management company; in his view the proposal “was a temporary caretaker measure which would not solve the fundamental problem, namely keeping ELSI in Sicily and making it a viable and vital industry”, and that it “would only aggravate ELSI’s critical financial condition”. The letter continued: “We are therefore forced to file a voluntary petition for bankruptcy, as required by Italian law.”

36. In view of what had been said by Mr. Carollo that the requisition of the plant would be maintained for months, “at least until the courts will have resolved the case”, ELSI’s Italian counsel advised as follows:

“The disposability of ELSI’s assets was a fundamental prerequisite to ELSI’s shareholders’ ability to take ELSI through an orderly liquidation; they were relying on the proceeds of these sales in large part to pay ELSI’s creditors in an orderly manner. Without the ability to dispose of its assets, ELSI would not have the liquidity needed to pay its debts as they came due and therefore would soon become technically insolvent under Italian law.

I advised ELSI’s directors that they had an obligation to file a petition for a declaration of bankruptcy, failing which they could be held personally liable pursuant to Article 217 of the Bankruptcy Law, Royal Decree of March 16, 1942, No. 267.”

On 25 April 1968 the Board of Directors voted to file a voluntary petition in bankruptcy, and the bankruptcy petition was filed on 26 April 1968. The petition referred to the requisition order of 1 April 1968 and stated (inter alia):

“Because of the order of requisition, against which the Company has in due time filed an appeal, the Company has lost the control of the plant and cannot avail itself of an immediate source of liquid funds; in the meanwhile payments have become due (as for instance instalments of long-term loans; an instalment of Lit. 800,000,000 to Banca Nazionale del Lavoro became due on April 18, 1968 and the note therefor has been or will be protested, etc.); it is acknowledged that it is impossible for the Company to pay such sums with the funds existing or available such impossibility being due to the events of these last weeks…”

A decree of bankruptcy was issued by the Tribunale di Palermo on 16 May 1968, and a Palermo lawyer was appointed curatore (trustee in bankruptcy). A creditors’ committee of five members was appointed, composed of two representatives of ELSI’s employees, two representatives of bank creditors, and a representative of Raytheon Europe International Company (“Raytheon Europe”) (the European management subsidiary of, and wholly owned by, Raytheon), which had submitted a claim as creditor in the bankruptcy. Raytheon itself and another of its subsidiaries, Raytheon Service Company, had unsecured claims against ELSI of some 1,140 million lire for goods and services they had advanced to ELSI on unsecured open accounts. On advice of Italian counsel, however, Raytheon and Raytheon Service Company did not file claims in the bankruptcy proceedings because it was clear that they would not receive enough in the bankruptcy to justify their filing costs.

37. From April 1968 onwards discussions were held between Raytheon’s Italian counsel, representatives of the creditor banks and officials of the Italian Government, with a view to the takeover of ELSI by a company owned by the Italian Government and a settlement with the ELSI creditors. This proposed settlement involved the grant to the new company by Raytheon of a technical license (to use Raytheon patents and know-how) of the same scope as ELSI had; the payment by Raytheon of the debts of ELSI which it had guaranteed, but no others, and a formal release and indemnity of Raytheon in this latter respect; and a waiver by Raytheon of its rights of subrogation resulting from payment of the guaranteed debts. According to Raytheon’s Italian counsel, he was told by Italian Government officials in October 1968 that the majority of the Italian creditor banks were agreeable to a settlement on payment of 40 per cent of their claims, and that only one bank was holding out for 50 per cent. In July, a statement had been made in the Italian Parliament by the Minister of Industry, Commerce and Crafts, which has been subject to differing interpretations, but which put forward as a fact the establishment by the Sicilian region and other public agencies of a management company, which would allow productive activities to be resumed until such time as the financial problems of ELSI could be
finally resolved, if possible through settlement out of court. On 13 November 1968 the Italian Government issued a press communiqué which stated that

“while the STET Group [Società finanziaria telefonica, an affiliate or subsidiary of IRI] remains committed to build a new plant in Palermo for the production of telecommunication products, the IRI-STET Group, urged by the Government, after the examination of alternative solutions which proved unfeasible, stated its willingness to intervene in the take-over of the [ELSI] plant in the organization of new lines of production”.

According to the communiqué, the conditions of STET's intervention were to be agreed between the STET Group and the authorities of the Sicilian region.

38. The court dealing with the bankruptcy ordered an auction of ELSI's premises, plant and equipment to be held on 18 January 1969, and set a minimum bid of 5,000 million lire. This auction, and the subsequent auctions mentioned below, were advertised in leading newspapers both in Italy and in Belgium, Japan, the Netherlands, the United Kingdom and the United States. No bids were received at this auction, and a second auction was set for 22 March 1969, this time with the inclusion also of the entire inventory at the plant and elsewhere, the minimum bid being set at 6,223,293,258 lire. In the meantime negotiations were being carried on for a takeover of the plant by an IRI subsidiary and the re-employment of most of ELSI's former staff. It was reported in the Sicilian press, first that on 18 March 1969 it had been agreed that IRI would acquire ELSI's assets, beginning with a lease of the plant for 150 million lire, and secondly that the former President of Sicily, Mr. Carollo, had stated at a public meeting on 5 April 1969 that there had been a written agreement with IRI in October 1968 that

“entailed the acquisition of the [ELSI] factory by IRI for the sum of four billion lire. It was even agreed that IRI would be absent from the first auction, participating instead in the second one, where the basic price was precisely four billion lire”.

39. No bids were received at the second auction. A week later a proposal to lease and re-open the plant was made to the trustee in bankruptcy by ETEL (Industria Elettronica Telecommunicazioni S.p.A.), a subsidiary of IRI set up in December 1968. The terms proposed for the lease were not acceptable as such to the creditors' committee, which did however recom-

40. The third auction of ELSI's premises, plant and equipment and inventory was held on 3 May 1969, the minimum bid being set at 5,000 million lire, but again no bids were received. ETEL had informed the bankruptcy court on 16 April 1969 that it was willing to offer 3,205 million lire for the premises, plant and equipment, excluding the supplies — “merchandise, raw materials and semifinished goods” — which it did not regard as indispensable. On 3 May 1969, the trustee in bankruptcy requested the bankruptcy court to approve a sale of the work in progress to ETEL on the terms proposed by ETEL and approved by the creditors' committee. On 9 May 1969, Raytheon Europe's appeal against the decision authorizing the lease of the premises and plant to ETEL was rejected. On 27 May 1969 ETEL made an offer to the bankruptcy court to buy the remaining plant, equipment and supplies for 4,000 million lire. The trustee in bankruptcy proposed acceptance (subject to minor changes in the terms), and the creditors' committee decided on 6 June 1969 to approve the proposal, the Raytheon Europe representative voting against. On 7 June 1969 the bankruptcy judge set 12 July 1969 as date for an auction on the terms approved by the creditors' committee. On 9 June 1969 Raytheon Europe appealed against this decision, but the appeal was rejected on 20 June 1969. The auction was held on 12 July 1969, and ETEL purchased the auctioned property at the total price of 4,006 million lire.

41. The appeal filed by ELSI on 19 April 1968 (paragraph 32 above) against the requisition order of 1 April 1968 was determined by the Prefect of Palermo by a decision given on 22 August 1969. The Parties are at issue on the question whether this period of time was or was not normal for an appeal of this character. The decision on the appeal was given following a request to that effect by the trustee in bankruptcy made on 9 July 1969, in exercise of a right to request a decision conferred by an Italian Law of 3 March 1934. That Law provides that if the appeal has not been heard 120 days after it has been filed (i.e., in this case by 17 August 1968), a request
may be served on the Prefect requiring him to render a decision within 60 days thereafter; if he fails to do so, this is treated as a dismissal of the appeal. The decision of the Prefect was to uphold the appeal and thus to annul the requisition order made by the Mayor of Palermo; the precise terms of the decision will be considered later in this Judgment (paragraphs 75, 96, 125 and 126). The Mayor of Palermo appealed against the Prefect’s decision to the President of Italy who, having been advised by the Council of State that the Mayor’s appeal was inadmissible, so ruled on 22 April 1972.

42. In the meantime, on 16 June 1970 the trustee in bankruptcy had brought proceedings in the Tribunale di Palermo (“the Court of Palermo”) against the Minister of the Interior of Italy and the Mayor of Palermo for damages resulting from the requisition. The damages claimed were identified as

“the considerable decrease in value of the plant and the electronic equipment existing in Palermo at 79 Via Villagrazia, which results from the difference between the book value at the date of the bankruptcy of Raytheon-Elsi, of Lire 6,623,000,000 and the evaluation made on October 11, 1968 (that is, immediately after the six-month period of requisition had elapsed) by the Court Appraiser, Prof. Mario Puglisi, appointed by the Judge by Decree of September 19, 1968, of Lire 4,560,588,400, with a real loss of value of Lire 2,062,411,600 and as the lack of disposability of the plant and relative equipment for six months which, on the basis of the amortization rate for the industrial plants, equal to 10% per year, can be determined in Lire 33,150,000, and, therefore, in the aggregate amount of Lire 2,395,561,600, plus the interests at the legal rate from October 1, 1968 to the payment.”

43. On 2 February 1973, the Court of Palermo, in a decision to be examined more fully below (paragraphs 57, 58, 97 and 127), ruled that the trustee was not entitled to compensation for the requisition, either in respect of the alleged decrease in value of the plant and equipment, or of the alleged lack of disposability thereof. On appeal, the Corte di Appello di Palermo (“the Court of Appeal of Palermo”), in its decision of 24 January 1974, upheld the conclusion of the lower court as regards the damages claimed for the alleged decrease in value of the plant and equipment. It however reversed the finding of the lower court on the second head of damage, and found that the trustee was entitled to compensation from the Minister of the Interior for loss of use and possession of ELSI’s plant and assets during the six-month requisition period. It therefore awarded, in effect, a “rental” payment of some 114 million lire, computed as half the annual rate of 5 per cent of the total value of the assets. This decision, which will be examined in more detail below (paragraphs 97, 98 and 127), was upheld by the Court of Cassation on 26 April 1975. The amount of

the judgment was ultimately received by the trustee and, less costs and expenses, distributed to ELSI’s creditors.

44. In the bankruptcy proceedings, creditors presented claims against ELSI totalling some 13,000 million lire; these did not include amounts due to Raytheon and Raytheon Service Company (see paragraph 36 above). The bankruptcy proceedings closed in November 1985. According to the bankruptcy reports, the bankruptcy realized only some 6,570 million lire for ELSI’s assets, as compared with the minimum liquidation value estimated by ELSI’s management in March 1968 at 10,840 million lire. Of the amount realized, some 6,080 million lire went to pay banks, employees, and other creditors. The remainder went to pay bankruptcy administration, tax, registry, and customs charges. All of the secured and preferred creditors who filed claims in the bankruptcy were paid in full. The unsecured creditors received less than one per cent of their claims; accordingly no surplus remained for distribution to the shareholders, Raytheon and Machlett.

45. Raytheon had guaranteed the indebtedness of ELSI to a number of banks, and on the bankruptcy of ELSI it was accordingly liable for, and paid, the sum of 5,787.6 million lire to the banks in accordance with the terms of the guarantees. Five of the seven banks which had also made unguaranteed loans to ELSI brought proceedings in the Italian courts seeking payment of these loans by Raytheon, on the basis primarily of Article 2362 of the Italian Civil Code, which renders a sole shareholder liable for the debts of the company. It was argued that Raytheon was in effect sole shareholder, since Machlett was its wholly-owned subsidiary. Three of these cases were ultimately resolved by the Italian Court of Cassation in favour of Raytheon, and two were discontinued by the plaintiffs.

* * * 

46. On 7 February 1974, the Embassy in Rome of the United States transmitted to the Italian Ministry of Foreign Affairs a note enclosing the “claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated”. That claim, which was based not only on the FCN Treaty but also on customary international law, incorporated a Memorandum of Law, Chapter VI of which was devoted to “Exhaustion of Local Remedies”. It was there noted that it was “generally recognized that local remedies must be exhausted before a claim may be formally espoused under principles of international law”; an account was given of the relevant litigation in Italy (some of which was at the time still pending) and, in the light of annexed opinions
of two Italian legal experts, it was concluded that "Raytheon and Machlett have exhausted every meaningful legal remedy available to them in Italy". At the time this claim was submitted, the Court of Appeal of Palermo had ruled on the action by the trustee in bankruptcy, but the case was thereafter brought before the Court of Cassation (paragraph 43 above); it is recognized by both Parties that any other action arising out of the requisition would by then have been barred by limitation of time. It appears that the United States received no formal response from Italy to the claim until 13 June 1978, when Italy denied the claim in a written aide-mémoire, the text of which has been supplied to the Chamber. The aide-mémoire contained no suggestion that local remedies had not been exhausted, and indeed stated that "the claim is juridically groundless, both from the international and domestic point of view". During the oral proceedings in the present case, counsel for Italy asserted that at an unspecified date prior to the institution of the present proceedings the Italian Government "had made it clear to the United States Government that as a Respondent it would raise the objection of non-exhaustion of local remedies in judicial proceedings". No evidence to that effect has however been supplied to the Chamber.

* * *

47. Many of the documents constituting evidence submitted to the Chamber are in the Italian language. Where the Chamber relies in the present Judgment on passages in these documents, it will, for the sake of clarity, set out the original Italian together with an English translation, which is not always the translation supplied by one of the Parties pursuant to Article 51, paragraph 3, of the Rules of Court.

* * *

48. It is common ground between the Parties that the Court has jurisdiction in the present case, under Article 36, paragraph 1, of its Statute, and Article XXVI of the Treaty of Friendship, Commerce and Navigation, of 2 June 1948 ("the FCN Treaty"), between Italy and the United States; which Article reads:

"Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means."

50. The United States questioned whether the rule of the exhaustion of local remedies could apply at all to a case brought under Article XXVI of the FCN Treaty. That Article, it was pointed out, is categorical in its terms, and unqualified by any reference to the local remedies rule; and it seemed right, therefore, to conclude that the parties to the FCN Treaty, had they intended the jurisdiction conferred upon the Court to be qualified by the local remedies rule in cases of diplomatic protection, would have used express words to that effect; as was done in an Economic Co-operation Agreement between Italy and the United States of America also concluded in 1948. The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so. This part of the United States response to the Italian objection must therefore be rejected.

51. The United States further argued that the local remedies rule would not apply in any event to the part of the United States claim which requested a declaratory judgment finding that the FCN Treaty had been violated. The argument of the United States is that such a judgment would declare that the United States own rights under the FCN Treaty had been infringed; and that to such a direct injury the local remedies rule, which is a rule of customary international law developed in the context of the espousal by a State of the claim of one of its nationals, would not apply. The Chamber, however, has not found it possible in the present case to
find a dispute over alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett. The case arises from a dispute which the Parties did not "satisfactorily adjust by diplomacy"; and that dispute was described in the 1974 United States claim made at the diplomatic level as a "claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated". The Agent of the United States told the Chamber in the oral proceedings that "the United States seeks reparation for injuries suffered by Raytheon and Machlett". And indeed, as will appear later, the question whether there has been a breach of the FCN Treaty is itself much involved with the financial position of the Italian company, ELSI, which was controlled by Raytheon and Machlett.

52. Moreover, when the Court was, in the Interhandel case, faced with a not dissimilar argument by Switzerland that in that case its "principal submission" was in respect of a "direct breach of international law" and therefore not subject to the local remedies rule, the Court, having analysed "principal submission", found that it was bound up with the diplomatic protection claim, and that the Applicant's arguments "do not deprive the dispute . . . of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national . . ." (Interhandel, Judgment, I.C.J. Reports 1959, p. 28). In the present case, likewise, the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett, said to have resulted from the actions of the Respondent. Accordingly, the Chamber rejects the argument that in the present case there is a part of the Applicant's claim which can be severed so as to render the local remedies rule inapplicable to that part.

53. There was a further argument of the Applicant, based on estoppel in relation to the application of the local remedies rule, which should be examined. In the "Memorandum of Law" elaborating the United States claim on the diplomatic plane, transmitted to the Italian Government by Note Verbale of 7 February 1974, one finds that the whole of Part VI (pp. 53 et seq.) deals generally and at some length with the "Exhaustion of Local Remedies". There were also annexed the opinions of the lawyers advising the Applicant, which dealt directly with the position of Raytheon and Machlett in relation to the local remedies rule. The Memorandum concluded that Raytheon and Machlett had indeed exhausted "every meaningful legal remedy available to them in Italy" (paragraph 46 above). In view of this evidence that the United States was very much aware that it must satisfy the local remedies rule, that it evidently believed that the rule had been satisfied, and that it had been advised that the shareholders of

ELSI had no direct action against the Italian Government under Italian law, it was argued by the Applicant that Italy, if it was indeed at that time of the opinion that the local remedies had not been exhausted, should have apprised the United States of its opinion. According to the United States, however, at no time until the filing of the Respondent's Counter-Memorial in the present proceedings did Italy suggest that Raytheon and Machlett should sue in the Italian courts on the basis of the Treaty. The written aide-mémoire of 13 June 1978, by which Italy rejected the 1974 claim, had contained no suggestion that the local remedies had not been exhausted, nor indeed any mention of the matter.

54. It was argued by the Applicant that this absence of riposte from Italy amounts to an estoppel. There are however difficulties about drawing any such conclusion from the exchanges of correspondence when the matter was still being pursued on the diplomatic level. In the Interhandel case, when Switzerland argued that the United States had at one time actually "admitted that Interhandel had exhausted the remedies available in the United States courts", the Court, far from seeing in this admission an estoppel, dismissed the argument by merely observing that "This opinion was based upon a view which has proved unfounded" (Interhandel, Judgment, I.C.J. Reports 1959, p. 27). Furthermore, although it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said, there are obvious difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges.

55. On the basis that the local remedies rule does apply in this case, this Judgment may now turn to the question whether local remedies were, or were not, exhausted by Raytheon and Machlett.
the Prefect against the requisition order. After the bankruptcy, however, the pursuit of local remedies was no longer a matter for ELSI's management but for the trustee in bankruptcy (Raytheon could, even after the bankruptcy, have influenced decisions of the committee of creditors, had it not decided against claiming in bankruptcy in respect of sums due to it as creditor; it did exercise some influence however through its subsidiary company, Raytheon Europe, which did claim as a creditor).

57. After the trustee in bankruptcy was appointed, he, acting for ELSI, by no means left the Italian authorities and courts unoccupied with ELSI's affairs. It was he who, under an Italian law of 1934, formally requested the Prefect to make his decision within 60 days of that request; which decision was itself the subject of an unsuccessful appeal by the Mayor to the President of Italy. On 16 June 1970, the trustee, acting for the bankrupt ELSI, brought a suit against the Acting Minister of the Interior and the Acting Mayor of Palermo, asking the court to adjudge that the defendants should

"pay to the bankrupt estate of Raytheon-Elxi ... damages for the illegal requisition of the plant machinery and equipment ... for the period from April 1 to September 30, 1968, in the aggregate amount of Lire 2,395,561,600 plus interests ..."

On 2 February 1973, the Court of Palermo, as indicated above (paragraph 43), rejected the claim. The trustee in bankruptcy then appealed to the Court of Appeal of Palermo; which Court gave a judgment on 24 January 1974 which "partly revising the judgment of the Court of Palermo" ordered payment by the Ministry of the Interior of damages of 114,014,711 lire with interest. Appeal was taken finally to the Court of Cassation which upheld the decision of the Court of Appeal, by a decision of 26 April 1975.

58. It is pertinent to note that this claim for damages (paragraph 42 above), as it came before the Court of Palermo in the action brought by the trustee, was described by that Court as being based (inter alia) upon the argument of the trustee in bankruptcy

"that the requisition order caused an economic situation of such gravity that it immediately and directly triggered the bankruptcy of the company"

("il provvedimento di requisizione avrebbe determinato una situazione economica di tale pesantezza da farne scaturire immediatamente e direttamente il fallimento della società").

Similarly the Court of Appeal of Palermo had to consider whether there was a "causal link between the requisition order and the company's bankruptcy". It is thus apparent that the substance of the claim brought to the adjudication of the Italian courts is essentially the claim which the United States now brings before this Chamber. The arguments were different, because the municipal court was applying Italian law, whereas this Chamber applies international law; and, of course, the parties were different. Yet it would seem that the municipal courts had been fully seized of the matter which is the substance of the Applicant's claim before the Chamber. For both claims turn on the allegation that the requisition, by frustrating the orderly liquidation, triggered the bankruptcy, and so caused the alleged losses.

59. With such a deal of litigation 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. This burden Italy never sought to deny. It contended that it was possible for the matter to have been brought before the municipal courts, citing the provisions of the treaties themselves, and alleging their violation. This was never done. In the actions brought before the Court of Palermo, and subsequently the Court of Appeal of Palermo, and the Court of Cassation, the FCN Treaty and its Supplementary Agreement were never mentioned. This is not surprising, for, as Italy recognizes, the way in which the matter was pleaded before the courts of Palermo was not for Raytheon and Machlett to decide but for the trustee. Furthermore, the local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.

60. The question, therefore, reduces itself to this: ought Raytheon and Machlett, suing in their own right, as United States corporations allegedly injured by the requisition of property of an Italian company whose shares they held, have brought an action in the Italian courts, within the general limitation-period (five years), alleging violation of certain provisions of the FCN Treaty between Italy and the United States; this mindful of the fact that the very question of the consequences of the requisition was already in issue in the action brought by its trustee in bankruptcy, and that any damages that might there be awarded would pass into the pool of realized assets, for an appropriate part of which Raytheon and Machlett had the right to claim as creditors?

61. Italy contends that Raytheon and Machlett could have based such an action before the Italian courts on Article 2043 of the Italian Civil Code, which provides that "Any act committed either wilfully or through fault which causes wrongful damages to another person implies that the wrongdoer is under an obligation to pay compensation for those dam-
ages.” According to Italy, this provision is frequently invoked by individuals against the Italian State, and substantial sums have been awarded to claimants where appropriate. If Raytheon and Machlett suffered damage caused by violations of Italian public authorities of the FCN Treaty and the Supplementary Agreement, an Italian court would, it was contended, have been bound to conclude that the relevant acts of the public authorities were wrongful acts for the purposes of Article 2043. It is common ground between the Parties that implementing legislation (“ordini di esecuzione”) was enacted (Law No. 385 of 15 June 1949 and Law No. 910 of 1 August 1960), to give effect in the FCN Treaty and Supplementary Agreement, but that their provisions cannot be invoked in protection of individual rights before the Italian courts unless those provisions are regarded by the courts as self-executing. In order to show that the relevant provisions would be so regarded, decisions of the Court of Cassation have been cited by Italy in which provisions of the FCN Treaty (not the provisions relied on in the present case) have been applied for the benefit of United States nationals who have invoked them before Italian courts, and a provision of a treaty between Italy and the Federal Republic of Germany, said to be comparable with Article V of the FCN Treaty, was given effect.

62. However, those decisions were not based on Article 2043 of the Italian Civil Code; and the treaty provisions applied were given effect in conjunction with municipal legislation or the provisions of other treaties, through the mechanism of a most-favoured-nation provision. In none of the cases cited was the FCN Treaty provision relied on to establish the wrongfulness of conduct of Italian public officials. When in 1971 Raytheon consulted two Italian jurists on the question of local remedies for the purposes of a diplomatic claim, it apparently did not occur to either of them to refer even as a possibility to action under Article 2043 in conjunction with the FCN Treaty. It thus appears to the Chamber to be impossible to deduce, from the recent jurisprudence cited, what the attitude of the Italian courts would have been had Raytheon and Machlett brought an action, some 20 years ago, in reliance on Article 2043 of the Civil Code in conjunction with the provisions of the FCN Treaty and the Supplementary Agreement. Where the determination of a question of municipal law is essential to the Court’s decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and “If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law” (Brazilian Loans, P.C.I.J., Series A, Nos. 20/21, p. 124). In the present case, however, 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.

63. It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been “exhausted”. But in this case Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI’s trustee in bankruptcy, ought to have pursued and exhausted. Accordingly, the Chamber will now proceed to consider the merits of the case.

* * *

64. Paragraph 1 of the United States final submissions claims that:

“(1) the Respondent violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated Articles III, V, and VII of the Treaty and Article I of the Supplement”.

It is necessary therefore to examine these Articles of the FCN Treaty and the Supplementary Agreement, against the conduct which is said to have been a violation of the obligations set out in these Articles. In doing so, it will be kept in mind that although the stated purposes of the FCN Treaty were those normally to be found in treaties of that kind, nevertheless a purpose of the Supplementary Agreement, which is to “constitute an integral part” of the FCN Treaty, was to give “added encouragement to investments of the one country in useful undertakings in the other country”.

65. The acts of the Respondent which are thus alleged to violate its treaty obligations were described by the Applicant’s counsel in terms which it is convenient to cite here:

“First, the Respondent violated its legal obligations when it unlawfully requisitioned the ELSI plant on 1 April 1968 which denied the ELSI stockholders their direct right to liquidate the ELSI assets in an orderly fashion. Second, the Respondent violated its obligations when it allowed ELSI workers to occupy the plant. Third, the Respondent violated its obligations when it unreasonably delayed ruling on the lawfulness of the requisition for 16 months until immediately after the ELSI plant, equipment and work-in-process had all been acquired by ELTEL. Fourth and finally, the Respondent violated its obligations when it interfered with the ELSI bankruptcy proceedings, which allowed the Respondent to realize its previously expressed intention of acquiring ELSI for a price far less than its fair market value.”

66. The most important of these acts of the Respondent which the Applicant claims to have been in violation of the FCN Treaty is the requisition of the ELSI plant by the Mayor of Palermo on 1 April 1968, which is claimed to have frustrated the plan for what the Applicant terms an “orderly liquidation” of the company as set out in paragraphs 22-25.
above. It is fair to describe the other impugned acts of the Respondent, to be explained more fully below (paragraph 115), as ancillary to this core claim based on the requisition and its effects.

67. The Chamber is faced with a situation of mixed fact and law of considerable complexity, wherein several different strands of fact and law have to be examined both separately and for their effect on each other: the meaning and effect of the relevant Articles of the FCN Treaty and Supplementary Agreement; the legal status of the Mayor's requisition of ELSI's plant and assets; and the legal and practical significance of the financial position of ELSI at material times, and its effect, if any, upon ELSI's plan for orderly liquidation of the company. It will be convenient to begin by examining these considerations in relation to the Applicant's claim that the requisition order was a violation of Article III of the FCN Treaty.

* * *

68. Article III of the FCN Treaty is in two paragraphs. Paragraph 1 provides for rights of participation of nationals of one High Contracting Party, in corporations and associations of the other High Contracting Party, and for the exercise by such corporations and associations of their functions. Since there is no allegation of treatment less favourable than is required according to the standards set by this paragraph, it need not detain the Chamber. Paragraph 2 of Article III is however important for the Applicant's claim; it provides:

"The nationals, corporations and associations of either High Contracting Party shall be permitted, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, to organize, control and manage corporations and associations of such other High Contracting Party for engaging in commercial, manufacturing, processing, mining, educational, philanthropic, religious and scientific activities. Corporations and associations, controlled by nationals, corporations and associations of either High Contracting Party and created or organized under the applicable laws and regulations within the territories of the other High Contracting Party, shall be permitted to engage in the aforementioned activities therein, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to corporations and associations of such other High Contracting Party controlled by its own nationals, corporations and associations."

Again there is no allegation of treatment of ELSI according to standards less favourable than those laid down in the second sentence of the para-

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graph: the allegation by the United States of a violation of this paragraph by Italy relates to the first sentence.

69. In terms of the present case, the effect of the first sentence of this paragraph is that Raytheon and Machlett are to be permitted, in conformity with the applicable laws and regulations within the territory of Italy, to organize, control and manage ELSI. The claim of the United States focuses on the right to "control and manage": the right to "organize", apparently in the sense of the creation of a corporation, is not in question in this case. Is there, then, a violation of this Article if, as the United States alleges, the requisition had the effect of depriving ELSI of both the right and practical possibility of selling off its plant and assets for satisfaction of its liabilities to its creditors and satisfaction of its shareholders?

70. It is undeniable that the requisition of a firm's "plant and relative equipment" must normally amount to a deprivation, at least in important part, of the right to control and manage. It was objected by Italy that the requisition in no way affected "control by the shareholders over the company", but merely concerned the management by the company of property belonging to the company. It is true that the direct impact of the requisition was only on control of the property requisitioned. It is however also undeniable that this requisition, which remained in effect until 30 September 1968, was issued to avoid the closure of ELSI's plant, the dismissal of its workforce, and as a consequence the probable dispersal of the assets, all of which were integral to ELSI's plan for orderly liquidation. Since the requisition thus had the design of preventing Raytheon from exercising, for six critical months, what was at that time a most important part of its right to control and manage ELSI, there exists a question whether the requisition was in conformity with the requirements of Article III, paragraph 2, of the FCN Treaty. Before coming to a conclusion on that question it is necessary now to take into consideration certain other matters.

71. Article III of the FCN Treaty, both in paragraph 1 concerning rights to be enjoyed by the nationals of one party in the territory of the other, and in paragraph 2, concerning rights of nationals of one party to "organize, control and manage" corporations of the other party, contains the qualifying phrase, "in conformity with the applicable laws and regulations" of the latter party. It was argued by Italy that this clause confirms that the correct interpretation of that paragraph is that it was not intended to confer upon United States nationals any rights of control and management more extensive, or more extensively protected, than those enjoyed by other stockholders, of whatever nationality, in Italian companies. Therefore, it was said, the requisition was no breach of the rights conferred by the FCN Treaty, because its "invalidity . . . as ascertained by the decision of the Prefect of Palermo, does not alter the fact that it was issued by the competent authority on a regular legal basis". But, in the Chamber's view, the reference to conformity with "the applicable laws and regu-
lations” cannot mean that, if an act is in conformity with the municipal law and regulations, that would of itself exclude any possibility that it was an act in breach of the FCN Treaty.

72. The reference to conformity with “the applicable laws and regulations” surely means no more than that Italian corporations and associations controlled by United States nationals must conform to the local applicable laws and regulations; moreover, they must do so even if they believe a law or regulation to be in breach of the FCN Treaty, and, indeed, even if it were in breach of the FCN Treaty. This the Applicant has never denied. Raytheon and Machlett did conform to the terms of the requisition. Indeed they had no other choice.

73. The question still remains, therefore, whether the requisition was or was not a violation of Article III, paragraph 2. This question arises irrespective of the position in municipal law. Compliance with municipal laws and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.

74. This question whether or not certain acts could constitute a breach of the treaty right to be permitted to control and manage is one which must be appreciated in each case having regard to the meaning and purpose of the FCN Treaty. Clearly the right cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like. In this respect considerable interest must attach to the reasons given by the Prefect in his decision, and to the legal analysis of that decision by the Court of Appeal of Palermo.

75. The Prefect took note in his decision of the fact that the Mayor had relied on legislative authority empowering him to act in cases of “grave public necessity and unforeseen urgency”. He did not find that those conditions were absent; he however annulled the requisition on the basis primarily of the following considerations:

“Non v’ha dubbio che anche se possono considerarsi, in linea del tutto teorica, sussistenti, nella fattispecie, gli estremi della grave necessità pubblica e della contingibilità ed urgenza che determinarono l’adozione del provvedimento, il fine cui tendeva la requisizione non poteva trovare pratica realizzazione con il provvedimento stesso, tanto è vero che nessuna ripresa di attività dell’azienda vi è stata a seguito della requisizione, né avrebbe potuto esserci. Manca, pertanto, nel provvedimento, genericamente, la causa giuridica che possa giustificarlo e renderlo operante.”

There has been some controversy between the Parties as to the translation of this passage (see paragraph 123 below); in the view of the Chamber it may be translated as follows:

“There is no doubt that, even though, from the purely theoretical standpoint, the conditions of grave public necessity and of unforeseen urgency warranting adoption of the measure may be considered to exist in the case in point, the intended purpose of the requisition could not in practice be achieved by the order itself, since in fact there was no resumption of the company’s activity following the requisition, nor could there have been such resumption. The order therefore lacks, generically, the juridical cause which might justify it and make it operative.”

The Court of Appeal of Palermo, for reasons to be examined more fully below (paragraph 127), considered that the Prefect’s finding had been one of

“un tipico caso di eccesso di potere, che è, come è noto, un vizio di legittimità dell’atto amministrativo”

(“a typical case of excess of power, which is of course a defect of lawfulness of an administrative act”).

The requisition was thus found not to have been justified in the applicable local law; if therefore, as seems to be the case, it deprived Raytheon and Machlett of what were at the moment their most crucial rights to control and manage, it might appear prima facie a violation of Article III, paragraph 2.

76. There remains however a crucial question to be considered. According to the Respondent, Raytheon and Machlett were, because of ELSI’s financial position, already naked of those very rights of control and management of which they claim to have been deprived. It is necessary now, therefore, to consider what effect, if any, the financial position of ELSI may have had in that respect, first as a practical matter, and then also as a question of Italian law.

77. The essence of the Applicant’s claim has been throughout that Raytheon and Machlett, which controlled ELSI, were by the requisition deprived of the right, and of the practical possibility, of conducting an orderly liquidation of ELSI’s assets. This plan for an orderly liquidation was however very much bound up with the financial state of ELSI, and the two need to be considered together.

78. ELSI’s lack of success was attributed by its management at least in part to the fact that it was over-manned in relation to its order book; it had needed repeated injections of fresh capital, and was never able to produce an operating profit sufficient to offset its debt expense and its accumul-
ing losses. No dividends were ever paid to its shareholders. The 30 September 1966 balance sheet already showed accumulated losses of some 2,000 million lire.

79. The position was worsening, moreover, as the balance sheet for 30 September 1967 (above at paragraphs 18-19) showed. Raytheon's Italian auditors pointed out that the balance sheet, when “adjusted” to Raytheon’s own accounting requirements for internal purposes (the unadjusted statement, however, appears to have satisfied Italian legal requirements), then showed adjusted accumulated losses, actually exceeding “the total of the paid up capital stock, capital reserve and Stockholders’ subscription account” by 881.3 million lire; and warned that if these adjustments to the total of accumulated losses were entered in the company's books of account,

“under Articles 2447 and 2448 of the Italian Civil Code, the directors would be obliged to convene a Stockholders' meeting forthwith to take measures either to cover the losses by providing new capital or to put the company into liquidation”.

80. On 7 March 1968, Raytheon formally notified ELSI of its decision that Raytheon would not provide any further capital, whether in the form of subscribing to new stock or guaranteeing additional loans. At a board meeting of ELSI held in Rome on 16 March 1968, it was decided on the “cessation of the company's operations”; that production would be “discontinued immediately”; that “commercial activities and employment contracts” would be terminated on 29 March 1968; and that “a shareholders' meeting be called for 28 March 1968, to adopt the necessary resolutions”. This was not, however, in ELSI's plans, to involve a liquidation under Article 2450 of the Italian Civil Code, which requires a liquidator to be appointed. The plan for an orderly liquidation, as conceived by the ELSI management, was to be managed by them. At a special meeting of shareholders, held on 28 March 1968, in Palermo, it was resolved to ratify the resolutions adopted by the Board of Directors at the meeting of 16 March 1968; and

“to empower the Board of Directors to make contacts with the banks and principal creditors of the company to reach an agreement on procedures to be followed in the interest of all the creditors for the orderly disposal of the company’s assets at their highest realizable value . . .”

("di dare mandato al Consiglio di Amministrazione di prendere contatti con gli istituti di credito e con i maggiori creditori della Società per concordare procedure che consentano nell'interesse di tutti i creditori una ordinata alienazione delle attività sociali al massimo valore di realizzazione").

81. This policy of the ELSI management during the months prior to the requisition had, however, a Janus-like character. Although the orderly liquidation contemplated closure of the plant, and dismissal of the workforce, an alternative aim of the management and of Raytheon was to keep the place going, the hope being that the threat of closure and dismissal of the workforce might bring such pressures to bear on the Italian authorities as to persuade them to provide what Raytheon had long hoped for: an influential Italian partner, new capital, and Mezzogiorno benefits. The “Project for the Financing and Reorganization of the Company” prepared in May 1967 spelled out the need for additional capital, new products from Italian Government sources, and financial help for transport costs, capital investment and training; the Project made it clear that the alternative was that Raytheon would decline to invest more funds, over 300 people would become redundant forthwith, and dwindling markets would reduce the employment level still further; as stated in that Project, “The alternative is really the actual destruction of the existing asset with the undesirable social effects which must follow.”

82. Right up to the eve of the requisition the company’s representatives went on talking to Italian officials; but at the same time the company’s management, according to an affidavit by one of its officials,

“were aware of the need to have back-up plans in case these efforts were not successful. In the latter part of 1967, we reluctantly began to plan in general for the potential liquidation of ELSI.”

In the words of the affidavit of another company official, Raytheon had

“developed a plan for the orderly disposal of ELSI over about six months during 1968. While this plan was being developed, Raytheon and ELSI representatives continued to meet with Italian Government representatives in an ongoing attempt to find a way for the company to continue to operate.”

The company no doubt wished to postpone liquidation as long as possible, both in the hope of avoiding it, and because the threat of closure of the plant would be a means of pressure on the Italian authorities so long as it remained only a threat. The risk, of which the company was well aware, was that to carry on too long might topple the company into insolvency under Italian law. In the event the Italian authorities did not come to the rescue, at least not with terms acceptable to ELSI’s management; and the management was left at the last minute with the orderly liquidation plan to be put into effect as seemingly the only way of avoiding bankruptcy or liquidation under the supervision of the Italian court; and the
bankruptcy of its subsidiary was undoubtedly a most unwelcome prospect for Raytheon.

83. The crucial question is whether Raytheon, on the eve of the requisition, and after the closure of the plant and the dismissal, on 29 March 1968, of the majority of the employees, was in a position to carry out its orderly liquidation plan, even apart from its alleged frustration by the requisition. That plan, as originally conceived, contemplated that the disposal of plant and assets might produce enough to pay all creditors 100 per cent of their dues, with a modest residue for the shareholders. In one of the affidavits quoted above it is stated: “If the assets had been disposed of at book value all liabilities, including the payables to Raytheon Company, would have been paid in full.” And, indeed, the trustee in bankruptcy, in his report of 28 October 1968 to the bankruptcy judge, explained that in March 1968:

> “the management of Raytheon-Elsi decided, and publicly stated their intention (which was later adopted by the Board of Directors), to suggest to the shareholders the liquidation of the company. The intention was to proceed with an orderly liquidation of all assets in order to pay all the Company’s creditors 100 per cent.”

This must have seemed a reasonable aim, for the “book value” may well have been a conservative figure. It has not been demonstrated that ELSI was, until shortly before the bankruptcy petition, ever actually in default. Moreover, Raytheon had opened an account in Milan for the payment at 100 per cent of small creditors.

84. Nevertheless since no new investment capital was forthcoming, the possibility of paying creditors in full depended upon putting the orderly liquidation plan into operation in good time. Time was running out because money was running out. As the position worsened daily, the moment might at any time arrive when liabilities exceeded assets, or default resulted from lack of liquidity. ELSI’s management had prepared the assessment of the “quick-sale value” (see paragraph 18 above), which was markedly less than book value, being aware that the sale of the company’s assets might fail to provide sums approximating to book value. There were plans also to approach the large bank creditors in the hope of securing their agreement to settlements of 50 per cent.

85. Did ELSI, in this precarious position at the end of March 1968, still have the practical possibility to proceed with an orderly liquidation plan? The successful implementation of a plan of orderly liquidation would have depended upon a number of factors not under the control of ELSI’s management. Since the company’s coffers were dangerously low, funds had to be forthcoming to maintain the cash flow necessary while the plan was being carried out. Evidence has been produced by the Applicant that Raytheon was prepared to supply cash flow and other assistance necessary to effect the orderly liquidation, and the Chamber sees no reason to question that Raytheon had entered or was ready to enter into such a commitment. Other factors governing the matter however give rise to some doubt.

86. First, for the success of the plan it was necessary that the major creditors (i.e., the banks) would be willing to wait for payment of their claims until the sale of the assets released funds to settle them: and this applied not only to the capital sums outstanding, which may not at the time have yet been legally due for repayment, but also the agreed payments of interest or instalments of capital. Though the Chamber has been given no specific information on the point, this is of the essence of such a liquidation plan: the creditors had to be asked to give the company time. If ELSI had been confident of continuing to meet all its obligations promptly and regularly while seeking a buyer for its assets, no negotiations with creditors, and no elaborate calculations of division of the proceeds, on different hypotheses, such as have been produced to the Chamber, would have been needed.

87. Secondly, the management were by no means certain that the sale of the assets would realize enough to pay all creditors in full; in fact, the existence of the calculation of a “quick-sale value” suggests perhaps more than uncertainty. Thus the creditors had to be asked to give time in return for an assurance, not that 100 per cent would be paid, but that a minimum of 50 per cent would be paid. While in general it might be in the creditors’ interest to agree to such a proposal, this does not mean in this case that ELSI could count on such agreement. At the date of the requisition, it seems apparent that the banks, while informed of the financial position, had not yet even been consulted on whether they would accept a guaranteed 50 per cent (see paragraphs 28-29 above), so their reaction remains a matter of speculation.

88. Nor should it be overlooked that the dismissed employees of ELSI ranked as preferential creditors for such sums as might be due to them for severance pay or arrears. In this respect Italy has drawn attention to the Sicilian regional law of 13 May 1968, providing for the payment:

> “for the months of March, April and May 1968, to the dismissed employees of Raytheon-Elsi of Palermo of a special monthly indemnity equal to the actual monthly pay received until the month of February 1968”.

From this it could be inferred, said Italy, that ELSI did not pay its employees for the month of March 1968. Further it was conceded by the former
Chairman of ELSI, when he appeared as a witness and was cross-examined, that the cash available at 31 March 1968 ("22 million in the kitty"), would have been insufficient to meet the payroll of the full staff even for the first week of April ("at least 25 million"). The suggestion that ELSI did not meet its March 1968 payroll was not put to the witness; and counsel for the United States later stated that the assertion that "ELSI could not make its March payroll", was "simply wrong". It is in any event certain that when the company ceased activity there were still severance payments due to the dismissed staff; those, the Applicant suggested, would have been covered by funds to be provided by Raytheon (paragraph 28 above). They could not have been met from the money still remaining in ELSI's coffers at the time.

89. Thirdly, the plan as formulated by ELSI's management involved a potential inequality among creditors: unless enough was realized to cover the liabilities fully, the major creditors were to be content with some 50 per cent of their claims; but the smaller creditors were still to be paid in full. Whether or not this would have been legally objectionable as a breach of the rule of par condicio creditorum (it appears that Raytheon contemplated accepting a smaller share in the eventual distribution so that the small creditors could receive 100 per cent without affecting the share attributed to the banks), it was an additional factor which might have caused a major creditor to hesitate to agree. According to the evidence, when in late March 1968 ELSI started using funds made available by Raytheon to pay off the small creditors in full, "the banks intervened and said that they did not want that to happen as that was showing preference". Once the banks adopted this attitude, the whole orderly liquidation plan was jeopardized, because a purpose of the settlement with small creditors was, according to the 1974 diplomatic claim, "to eliminate the risk that a small irresponsible creditor would take precipitous action which would raise formidable obstacles in the way of orderly liquidation".

90. Fourthly, the assets of the company had to be sold with the minimum delay and at the best price obtainable — desiderata which are often in practice irreconcilable. The United States has emphasized the damaging effect of the requisition on attempts to realize the assets; after the requisition it was no longer possible for prospective buyers to view the plant, nor to assure them that if they bought they would obtain immediate possession. It is however not at all certain that the company could have counted on unfettered access to its premises and plant, and the opportunity of showing it to buyers without disturbance, even if the requisition had not been made. There has been argument between the Parties on the question whether and to what extent the plant was occupied by employees of ELSI both before and after the requisition; but what is clear is that the company was expecting trouble at the plant when its closure plans became known: the books had been removed to Milan, according to the evidence given at the hearings, "so that if we did have problems we could at least control the books" and "we had moved quite a lot of inventory [to Milan] so that we could sell it from there if we had to".

91. Fifthly, there was the attitude of the Sicilian administration: the company was well aware that the administration was strongly opposed to a closure of the plant, or more specifically, to a dismissal of the workers. True, the measure used to try to prevent this — the requisition order — was found by the Prefect to have lacked the "juridical cause which might justify it and make it operative" (paragraph 75 above). But ELSI's management in March 1968 could not have been certain that the hostility of the local authorities to their plan of closure and dismissals would not take practical form in a legal manner. The company's management had been told before the staff dismissal letters were sent out that such dismissals would lead to a requisition of the plant.

92. All these factors point towards a conclusion that the feasibility at 31 March 1968 of a plan of orderly liquidation, an essential link in the chain of reasoning upon which the United States claim rests, has not been sufficiently established.

93. Finally there was, beside the practicalities, the position in Italian bankruptcy law. Article 5 of the Italian Bankruptcy Act of 1942 provides that

"An entrepreneur who is in a state of insolvency shall be declared bankrupt.

The state of insolvency, moreover, becomes apparent not only by default but also by other external acts which show that the debtor is no longer in a position regularly to discharge his obligations."

("L'imprenditore che si trova in stato d'insolvenza è dichiarato fallito.

Lo stato d'insolvenza si manifesta con inadempimenti od altri fatti esteriori, i quali dimostrino che il debitore non è più in grado di soddisfare regolarmente le proprie obbligazioni.")

This formula excludes a merely momentary or temporary disability, and refers to one which shows every sign of going on. "Regular" payment ("regolarmente") apparently refers to payment in full at the due time. Given this definition it is apparent that ELSI could have been "insolvent" in the sense of Italian bankruptcy law, at the end of March, even though not actually in default. The Chamber has been given conflicting evidence on the question whether a debtor in such a position is bound under Italian law to go into bankruptcy, or whether he may still enter into voluntary composition with his creditors outside the supervision of the bankruptcy court (paragraph 25 above).
94. If however ELSI was in a state of legal insolvency at 31 March 1968, and if, as contended by Italy, a state of insolvency entailed an obligation on the company to petition for its own bankruptcy, then the relevant rights of control and management would not have existed to be protected by the FCN Treaty. While not essential to the Chamber’s conclusion, already stated in paragraph 92 above, an assessment of ELSI’s solvency as a matter of Italian law is thus highly material.

95. Italy has argued that even before the requisition, ELSI was insolvent in the sense that its liabilities exceeded the value of its assets, and in support of this has pointed to, first, the “quick-sale value” calculated for the purposes of the liquidation plan, and secondly the observations of the auditors on the September 1967 balance sheet. The Chamber does not however consider that it has to conclude from this that ELSI was insolvent as early as 1967. The value of assets of this kind, until they are actually sold, must be a matter for assessment by informed opinion, and different views, and the use of different accounting conventions, may lead to different results. The company’s management was clearly of the view that it could legally continue trading up to the end of March 1968, since its former Chairman has told the Chamber that the company’s legal and financial advisers were keeping a close and continuous watch on the position to ensure that Italian legal requirements were respected. But there is no doubt that ELSI was indeed in a state of insolvency when on 25 April 1968 its Board of Directors voted to file a petition in bankruptcy. The conclusion then made that “the company’s financial situation has worsened and has now reached a state of insolvency” was based, according to the minutes of the board meeting, on the fact that “there are payments on long-term loans that fell due a few days ago, and other payments which the company cannot make as a result of lack of liquidity.” In the bankruptcy petition, it was specified that “an instalment of L 800,000,000 to Banca Nazionale del Lavoro became due on 18 April 1968 and the note therefor has been or will be protested, etc.” In other words, the company had by then committed a default (“inadempimento”), by failing to meet its debts as they became due.

96. On this matter of insolvency in Italian law, consideration must also be given to the reasons employed by the Prefect of Palermo for his decision to annul the requisition order, and the findings of the Court of Palermo and the Court of Appeal of Palermo on the action brought by ELSI’s trustee in bankruptcy, for damages following the decision of the Prefect annulling the requisition order. As indicated above (paragraph 75), the Prefect considered that the purpose of the requisition could not be achieved, since the company’s activity could not be resumed. He explained that

“lo stato dell’azienda era tale, per circostanze di carattere economico-funzionale e di mercato, da non consentire la prosecuzione dell’attiv…”

97. The Court of Palermo was faced with the argument, mentioned in paragraph 58 above, that “the requisition order caused an economic situation of such gravity that it immediately and directly triggered the bankruptcy of the company”. It dealt with this by pointing to the situation of the company on the eve of the requisition:

“A 31 marzo 1968, in sostanza, lo stabilimento dell’elsi non era più in fase produttiva, fermata per deliberazione dell’organo sociale competente che… aveva… opinato, non potendo trovare altro rimedio, per la soluzione più drastica, evidentemente reputandola più conforme agli interessi della società e che aveva come oggetto preciso l’arresto totale della produzione… Devesi a ciò aggiungere che proprio dai primi dell’anno 1968 vi era stato un notevole peggioramento della situazione generale dell’azienda, che via via si andava aggravando per le sfavorevoli condizioni del mercato, avversata, altresì, dai fatti sismici del gennaio e da una serie di scioperi che, per l’appunto, nel mese di marzo ebbero a carattere ora di continuità ora di intermittenza, con la conseguenza della perdita di un considerevole numero di ore lavorative…”

“(On March 31, 1968, the Elsi plant was for all practical purposes no longer in operation, stopped in accordance with a decision of the competent organ of the company which… had decided, in the absence of any other solution, to go for the most drastic solution, evidently considering it most conducive to the interests of the company, a solution which meant the total shutdown of production… To this must be added… that in the early part of 1968, there was a notable deterioration of the general situation of the company, which was further aggravated by unfavourable market conditions as well as the January earthquakes and a series of strikes which in March were sometimes continuous and sometimes intermittent, causing the loss of a considerable amount of production hours…”

From this the Court was able to conclude that

“Dalle condizioni premesse discende che l’aggancio del fallimento della società all’intervenuta requisizione non ha fondamento, siccome, esattamente, è stato sostenuto coll’amministrazione convenuta, essendo la situazione economica della Raytheon-Elsi già gravemente compromessa da anni per esplicito riconoscimento dei suoi stessi dirigenti.”
changed nothing, then the United States has failed to prove that there was any interference with control and management in any real sense. The Chamber has no need to go into the question of the extent to which it could or should question the validity of a finding of Italian law, the law governing the matter, by the appropriate Italian courts. It is sufficient to note that the conclusion above, that the feasibility of an orderly liquidation plan is not sufficiently established, is reinforced by reference to the decision of the courts of Palermo on the claim by the trustee in bankruptcy for damages for the injury caused by the requisition. Whether regarded as findings of Italian law or as findings of fact, the decisions of the courts of Palermo simply constitute additional evidence of the situation which the Chamber has to assess.

100. It is important, in the consideration of so much detail, not to get the matter out of perspective; given an under-capitalized, consistently loss-making company, crippled by the need to service large loans, which company its stockholders had themselves decided not to finance further but to close and sell off because, as they were anxious to make clear to everybody concerned, the money was running out fast, it cannot be a matter of surprise if, several days after the date at which the management itself had predicted that the money would run out, the company should be considered to have been actually or virtually in a state of insolvency for the purposes of Italian bankruptcy law.

101. If, therefore, the management of ELSI, at the material time, had no practical possibility of carrying out successfully a scheme of orderly liquidation under its own management, and may indeed already have forfeited any right to do so under Italian law, it cannot be said that it was the requisition that deprived it of this faculty of control and management. Furthermore, one feature of ELSI's position stands out: the uncertain and speculative character of the causal connection, on which the Applicant's case relies, between the requisition and the results attributed to it by the Applicant. There were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition. There was the warning loudly proclaimed about its precarious position; there was the socially damaging decision to terminate the business, close the plant, and dismiss the workforce; there was the position of the banks as major creditors. In short, the possibility of that solution of orderly liquidation, which Raytheon and Machlett claim to have been deprived of as a result of the requisition, is purely a matter of speculation. The Chamber is therefore unable to see here anything which can be said to amount to a violation by Italy of Article III, paragraph 2, of the FCN Treaty.

* * *
102. There are two claims of the Applicant that are based upon the provisions of Article V of the FCN Treaty: one relates to paragraphs 1 and 3, and concerns protection and security of nationals and their property; another relates to paragraph 2, and is concerned with the taking or expropriation of property. No claim is based upon paragraph 4 of Article V. The Applicant's claim under paragraphs 1 and 3 will be dealt with first.

103. Paragraph 1 of Article V provides as follows:

"1. The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law. To these ends, persons accused of crime shall be brought to trial promptly, and shall enjoy all the rights and privileges which are or may hereafter be accorded by the applicable laws and regulations; and nationals of either High Contracting Party, while within the custody of the authorities of the other High Contracting Party, shall receive reasonable and humane treatment. In so far as the term 'nationals' used in this paragraph is applicable in relation to property it shall be construed to include corporations and associations."

Paragraph 2 of this Article is not relevant here, but is set out in paragraph 113 of this Judgment. Paragraph 3 provides as follows:

"3. The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the applicable laws and regulations, no less than the protection and security which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country. Moreover, in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control, enterprises in which nationals, corporations and associations of either High Contracting Party have a substantial interest shall be accorded, within the territories of the other High Contracting Party, treatment no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of any third country have a substantial interest."

104. Paragraph 1 thus provides for "the most constant protection and security" for nationals of each High Contracting Party, both "for their persons and property"; and also that, in relation to property, the term "nationals" shall be construed to "include corporations and associations"; and in defining the nature of the protection, the required standard is established by a reference to "the full protection and security required by international law". Paragraph 3 elaborates this notion of protection and security further, by requiring no less than the standard accorded to the nationals, corporations and associations of the other High Contracting Party; and no less than that accorded to the nationals, corporations and associations of any third country. There are, accordingly, three different standards of protection, all of which have to be satisfied.

105. A breach of these provisions is seen by the Applicant to have been committed when the Respondent "allowed ELSI workers to occupy the plant" (see paragraph 65 above). It is the contention of the United States that once the plant had been requisitioned, ELSI's employees began an occupation of the premises which continued, so far as the United States was aware, up to the re-opening of the plant by ELTEI; and that this occupation had the tacit approval of local authorities, who made no effort to prevent or to end it, or otherwise to protect the premises. To this occupation the United States attributes as injurious consequences, first a deterioration of the plant and related material and equipment, and secondly that it impeded the efforts of the trustee in bankruptcy to dispose of the plant.

106. Italy has objected that Article V, paragraphs 1 and 3, guarantees the protection and security of property belonging to United States companies in Italy, but the plant in Palermo which, according to the United States, should have been protected under the FCN Treaty belonged to the Italian company ELSI. The United States replies that the "property of Raytheon and Machlett in Italy" was ELSI itself, and Italy was obligated to protect the entire entity of ELSI from the deleterious effects of the requisition. While there may be doubts whether the word "property" in Article V, paragraph 1, extends, in the case of shareholders, beyond the shares themselves, to the company or its assets, the Chamber will nevertheless examine the matter on the basis argued by the United States that the "property" to be protected under this provision of the FCN Treaty was not the plant and equipment the subject of the requisition, but the entity of ELSI itself.

107. That there was some occupation of the plant by the workers after the requisition is something that Italy has not sought to deny, and the Court of Appeal of Palermo referred in passing to the circumstance of the requisitioning authority having tolerated the "unlawful" act of occupation of the plant by the workers ("la autorità requirente avesse tollerato l'illecito penale di una occupazione dei reparti di lavorazione da parte delle manifatture"). It appears, nevertheless, to have been a peaceful occupation, as may be learned from ELSI's own administrative appeal of 19 April 1968 to
the Prefect against the requisition, and the affidavits of the Mayor of Palermo and one of his officials (see paragraph 33 above). It is difficult to accept that the occupation seriously harmed the interests of ELSI in view of the evidence produced by Italy that measures taken by the Mayor of Palermo for the temporary management of the plant permitted the continuation and completion of work in progress in the months following the requisition. The United States has asserted that the continued production was very limited, and cannot be equated with resumption of full production in the plant, and continues to contend that the plant and machinery fell into disuse following the requisition and deteriorated rapidly in value. The Court of Palermo however found itself unable to establish that any damage to the plant had been caused by the occupying workers.

108. The reference in Article V to the provision of “constant protection and security” cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. The dismissal of some 800 workers could not reasonably be expected to pass without some protest. Indeed, the management of ELSI seems to have been very much aware that the closure of the plant and dismissal of the workforce could not be expected to pass without disturbance; as is apparent from the removal of the company’s books and “quite a lot of inventory” to Milan (paragraph 17 above). In any event, considering that it is not established that any deterioration in the plant and machinery was due to the presence of the workers, and that the authorities were able not merely to protect the plant but even in some measure to continue production, the protection provided by the authorities could not be regarded as falling below “the full protection and security required by international law”; or indeed as less than the national or third-State standards. The mere fact that the occupation was referred to by the Court of Appeal of Palermo as unlawful does not, in the Chamber’s view, necessarily mean that the protection afforded fell short of the national standard to which the FCN Treaty refers. The essential question is whether the local law, either in its terms or its application, has treated United States nationals less well than Italian nationals. This, in the opinion of the Chamber, has not been shown. The Chamber must, therefore, reject the charge of any violation of Article V, paragraphs 1 and 3.

109. The Applicant sees a further breach of Article V, paragraphs 1 and 3, of the FCN Treaty, in the time taken — 16 months — before the Prefect ruled on ELSI’s administrative appeal against the Mayor’s requisition order, or, to cite the words of counsel for the Applicant (paragraph 65 above),

“the Respondent violated its obligations when it unreasonably delayed ruling on the lawfulness of the requisition for 16 months until immediately after the ELSI plant, equipment and work-in-process had all been acquired by ELTEL”.

The time taken by the Prefect was undoubtedly long; and the Chamber was not entirely convinced by the Respondent’s suggestion that such lengthy delays by Prefects were quite usual. Yet it must be remembered that the requisition in fact lapsed after six months and that Italian law did provide a safeguard against delays by the Prefect. It was possible after 120 days from the filing of the appeal to serve on the Prefect a request requiring him to render a decision within 60 days (paragraph 41 above). Raytheon and Machlett were never in a position to take advantage of this procedure, because by the time the 120 days had elapsed the trustee in bankruptcy was in control of the company; on the other hand, the trustee in bankruptcy did employ this procedure, and the Prefect shortly afterwards gave his decision on the appeal.

110. Counsel for the Applicant has referred to this delay as “a denial of the level of procedural justice accorded by international law”. Its claim in this respect is however not founded on the rules of customary international law concerning denial of justice, nor on the text of the FCN Treaty (Article V, paragraph 1) which provides for access to justice. The relevance of the delay of the Prefect’s ruling has been expressed in two ways. First, it is said, had there been a speedy decision by the Prefect, the bankruptcy of ELSI could have been avoided; the Chamber is unable to accept this argument, for the reasons already explained in connection with the claim under Article III, paragraph 2, of the FCN Treaty. Secondly, it is contended that once the requisition occurred, the Respondent had an obligation to protect ELSI from its deleterious effects, and one of the ways in which it fell short of this obligation was by failing to provide an adequate method of overturning the requisition.

111. The primary standard laid down by Article V is “the full protection and security required by international law”, in short the “protection and security” must conform to the minimum international standard. As noted above, this is supplemented by the criteria of national treatment and most-favoured-nation treatment. The Chamber is here called upon to apply the provisions of a treaty which sets standards — in addition to the reference to general international law — which may go further in protecting nationals of the High Contracting Parties than general international law requires; but the United States has not — save in one respect — suggested that these requirements do in this respect set higher standards than the international standard. It must be doubted whether in all the circumstances, the delay in the Prefect’s ruling in this case can be regarded as falling below that standard. Certainly, the Applicant’s use
of so serious a charge as to call it a “denial of procedural justice” might be thought exaggerated.

112. The United States has also alleged that the delay in ELSI’s case was far in excess of the delay experienced in prior suits involving companies owned by Italian nationals, and that it therefore constituted a failure to accord a national standard of protection. As already stated, the Chamber was not entirely convinced by the contention that such a lengthy delay was quite usual (paragraph 109 above); nevertheless, it is not satisfied that a “national standard” of more rapid determination of administrative appeals has been shown to have existed. The Chamber is therefore unable to see in this delay a violation of paragraphs 1 and 3 of Article V of the FCN Treaty.

* * *

113. The Chamber now turns to the United States claim based on Article V, paragraph 2, of the FCN Treaty, which provides as follows:

“2. The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation. The recipient of such compensation shall, in conformity with such applicable laws and regulations as are not inconsistent with paragraph 3 of Article XVII of this Treaty, be permitted without interference to withdraw the compensation by obtaining foreign exchange, in the currency of the High Contracting Party of which such recipient is a national, corporation or association, upon the most favorable terms applicable to such currency at the time of the taking of the property, and exempt from any transfer or remittance tax, provided application for such exchange is made within one year after receipt of the compensation to which it relates.”

This is a most important paragraph, of a kind that is central to many investment treaties. Where the English version begins by providing that

“...the corresponding Italian text reads as follows:

“I beni dei cittadini e delle persone giuridiche ed associazioni di ciascuna Altar Parte Contraente non saranno espropriati entro i territori dell’altra Altar Parte Contraente, senza una debita procedura legale e senza il prompto pagamento di giusto ed effettivo indennizzo.”

There was considerable argument before the Chamber over the difference between the English version of the provision, which uses the word “taken”, and the Italian, which uses the word “espropriati”. Both versions are authentic. Obviously there is some difference between the two versions. The word “taking” is wider and looser than “espropriazione”.

114. The United States argued that, however the provision is read, the result is the same in this case; which is not the same as arguing that the two versions mean the same thing; and if one looks at the acts and conduct which the Applicant claims to constitute a violation of Article V, paragraph 2, one finds this claim expressed in the following terms. In the contention of the United States, both the Respondent’s act of requisitioning the ELSI plant and its subsequent acts in acquiring the plant, assets, and work in progress, singly and in combination, constitute takings of property without due process of law and just compensation. The requisition in itself is, in the view of the United States, such a taking, because Italy physically restrained ELSI’s property with the object and effect of ending Raytheon and Machlett’s control and management, in order to prevent them from conducting the planned liquidation; and according to the United States, in international law a “taking” is generally recognized as including not merely outright expropriation of property, but also unreasonable interference with its use, enjoyment or disposal. Secondly, the United States claims that the Respondent, after the requisition and before the Prefect ruled on the administrative appeal, proceeded through ELTEL to acquire the ELSI plant and assets for less than fair market value. The matter was summed up by counsel at the hearings as follows:

“The requisition and the delay in overturning the requisition not only interfered with Raytheon and Machlett’s management and control of ELSI, not only impaired Raytheon and Machlett’s legally acquired interests in ELSI, but also resulted in what can only be described as the taking of the property.”

115. The specific United States allegations of interference by the Italian Government with the ELSI bankruptcy proceedings may be summarized as follows. The object in view is said to have been to secure ELSI’s facilities for IRI, on the terms and at the below-market price which IRI desired, while responding to the political pressure brought by ELSI’s former workers. Having requisitioned the plant and caused ELSI’s bank-
ruptcy, the Government of Italy discouraged private bidders at the auctions held to dispose of ELSI's assets, by informing the public at large that the Government would be taking over ELSI's facilities. While proceeding with plans to take over ELSI, for example by negotiating agreements for rerenting the staff, IRI is said to have "boycotted" the first three auctions of the assets, at which the terms set by the bankruptcy judge were not to its liking. ETEL proposed to the trustee in bankruptcy that it be permitted to lease the plant, and to purchase the work in progress, and this was agreed to by the bankruptcy authorities on terms which, it is claimed, were adverse to ELSI's interests, both because the sums involved were too low and because ETEL was placed in a position to dictate the terms of the final sale. At the final auction, ETEL, already in possession under the lease, acquired the plant and related equipment for 4,000 million lire, the figure reported in the press to have been previously agreed on between IRI and the Italian authorities. As a result of the arrangements made with the bankruptcy authorities for a piecemeal take-over, the total amount received for ELSI's assets was slightly over 4,000 million lire, as compared with the company's book valuation of over 12,000 million lire.

116. Thus, the charge based on the combination of the requisition and subsequent acts is really that the requisition was the beginning of a process that led to the acquisition of the bulk of the assets of ELSI (which was wholly owned by Raytheon and Machlett) for far less than market value. That is a charge, not of mere temporary taking — though the United States also contended that a temporary requisition can constitute an indirect taking — but of a process by which title to ELSI's assets itself was in the end transferred. So far as the requisition is concerned, counsel put the United States argument this way:

"the fact that the requisition was for an extendable six-month period does not make this any less of an expropriation of interests in property, given the fact that the requisition drove ELSI into bankruptcy".

What is thus alleged by the Applicant, if not an overt expropriation, might be regarded as a disguised expropriation; because, at the end of the process, it is indeed title to property itself that is at stake. The argument is that if a series of acts or omissions of the Italian authorities had the end result, whether intended or not and whether the result of collusion or not, of causing United States property in Italy to be ultimately transferred into the ownership of Italy, without proper compensation, there would be a violation of Article V, paragraph 2, of the FCN Treaty.

117. It must immediately be added that the United States, in the course of the oral proceedings, in response to an Italian assertion that it was attempting to establish a conspiracy to bring about the change of ownership, made it very clear that this part of its case did not depend upon, or in any way involve, any allegation that the Italian authorities were parties to such a conspiracy. The United States stated formally that it "has never argued and does not now argue that the acts and omissions of the Respondent that violated the Treaty amount to a "conspiracy". Moreover, it was added that whilst the relief sought was "based on the acts and omissions of the Respondent's agents and officials at the federal and local levels (including IRI), without any allegation that these officials were working in conspiracy" the United States did not "speculate as to why these agents and officials of the Respondent acted in the manner they did"; or, as the United States Agent put it in his argument:

"These acts and omissions constituted Treaty violations ... whether or not the Italian Government entities involved knew of each other's actions, and whether or not they were acting in concert or at cross purposes."

118. The argument that there was a "taking" involving transfer of title gives rise to a number of difficulties. Even assuming, though without deciding, that "espropriazione" might be wide enough to include not only formal and open expropriation, but also a disguised expropriation, there would still be a question whether the paragraph can be extended to include even a "taking" of an Italian corporation in Italy, of which, strictly speaking, Raytheon and Machlett only held the shares. This, however, is where account must also be taken of the first paragraph of the Protocol appended to the FCN Treaty, which provides:

"1. The provisions of paragraph 2 of Article V, providing for the payment of compensation, shall extend to interests held directly or indirectly [si estenderanno ai diritti spettanti direttamente od indirettamente ai cittadini . . .] by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party."

The English text of this provision suggests that it was designed precisely to resolve the doubts just described. The interests of shareholders in the assets of a company, and in their residuary value on liquidation, would appear to fall in the category of the "interests" to be protected by Article V, paragraph 2, and the Protocol. Italy has however drawn attention to the use in the Italian text — which is equally authentic — of the narrower term
“diritti” (rights), and has argued that, on the basis of the principle expressed in Article 33, paragraph 4, of the Vienna Convention on the Law of Treaties, the correct interpretation of the Protocol must be in the more restrictive sense of the Italian text.

119. In the view of the Chamber, however, neither this question of interpretation of the two texts of the Protocol, nor the questions raised as to the possibilities of disguised expropriation or of a “taking” amounting ultimately to expropriation, have to be resolved in the present case, because it is simply not possible to say that the ultimate result was the consequence of the acts or omissions of the Italian authorities, yet at the same time to ignore the most important factor, namely ELSTI’s financial situation, and the consequent decision of its shareholders to close the plant and put an end to the company’s activities. As explained above (paragraphs 96-98), the municipal courts considered that ELSTI, if not already insolvent in Italian law before the requisition, was in a precarious state that bankruptcy was inevitable. The Chamber cannot regard any of the acts complained of which occurred subsequent to the bankruptcy as breaches of Article V, paragraph 2, in the absence of any evidence of collusion which is now no longer even alleged. Even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then, if ELSTI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation. Furthermore this requisition, independently of the motives which allegedly inspired it, being by its terms for a limited period, and liable to be overturned by administrative appeal, could not, in the Chamber’s view, amount to a “taking” contrary to Article V unless it constituted a significant deprivation of Raytheon and Machlett’s interest in ELSTI’s plant; as might have been the case if, while ELSTI remained solvent, the requisition had been extended and the hearing of the administrative appeal delayed. In fact the bankruptcy of ELSTI transformed the situation less than a month after the requisition. The requisition could therefore only be regarded as significant for this purpose if it caused or triggered the bankruptcy. This is precisely the proposition which is irreconcilable with the findings of the municipal courts, and with the Chamber’s conclusions in paragraphs 99-100 above.

* * *

120. Article I of the Supplementary Agreement to the FCN Treaty, which confers rights not qualified by national or most-favoured-nation standards, provides as follows:

"The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, (b) impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. Each High Contracting Party undertakes not to discriminate against nationals, corporations and associations of the other High Contracting Party as to their obtaining under normal terms the capital, manufacturing processes, skills and technology which may be needed for economic development."

The United States bases its claims upon allegations that measures were taken which were both “arbitrary” and “discriminatory” in the sense of this text.

121. The Applicant pressed strongly the claim that the requisition was an arbitrary or discriminatory act which violated both the “(a)” and the “(b)” clauses of the Article. The requisition, it is said, clearly prevented Raytheon and Machlett from exercising their control and management of ELSTI and also resulted in an impairment of their legally acquired rights and interests in ELSTI, inasmuch as it prevented the voluntary liquidation of ELSTI and caused it to file for bankruptcy. To the claim as it is presented in those terms, however, the Chamber has already given its answer: the absence of a sufficiently palpable connection between the effects of the requisition and the failure of ELSTI to carry out its planned orderly liquidation (paragraph 101 above). Accordingly, it cannot be said that it was the requisition per se which either prevented Raytheon’s effective control and management of ELSTI, or which resulted in impairing legally acquired rights, in the sense of the clauses called “(a)” and “(b)” in Article I of the Supplementary Agreement. Yet, although this is an answer to the claim as it is presented in terms of those clauses of Article I, it is not the end of the matter. The effect of the word “particularly”, introducing the clauses “(a)” and “(b)”, suggests that the prohibition of arbitrary (and discriminatory) acts is not confined to those resulting in the situations described in “(a)” and “(b)”, but is in effect a prohibition of such acts whether or not they produce such results. It is necessary, therefore, to examine whether the requisition was, or was not, an arbitrary or discriminatory act of itself.

122. The allegation of the United States that Raytheon and Machlett were subjected to “discriminatory” measures can be dealt with shortly. It is common ground that the requisition order was not made because of the nationality of the shareholders; there have been many cases of requisition
orders made in similar circumstances against wholly Italian-owned companies. But the United States claims that there was "discrimination" in favour of IRI, an entity controlled by Italy; and this was, in the view of the United States, contrary to the FCN Treaty and Supplementary Agreement. It is contended that the interests of IRI were directly contrary to those of Raytheon and Machlett, and the Italian Government intervened to advance its own commercial interests at the latter's expense. However, the requisition order in itself did not serve any interest of IRI; it is only if the requisition is regarded as a step in a process destined to transfer ELSI's assets to IRI that the factual situation would afford any basis for the argument now under examination. As indicated above, the United States stated formally during the oral proceedings that it was not arguing that the acts and omissions complained of amount to a "conspiracy", and did not speculate as to why the relevant agents and officials of the Respondent acted as they did (see paragraph 117 above). There is no sufficient evidence before the Chamber to support the suggestion that there was a plan to favour IRI at the expense of ELSI, and the claim of "discriminatory measures" in the sense of Article I of the Supplementary Agreement must therefore be rejected.

123. In order to show that the requisition order was an "arbitrary" act in the sense of the Supplementary Agreement to the FCN Treaty, the Applicant has relied (inter alia) upon the status of that order in Italian law. It contends that the requisition "was precisely the sort of arbitrary action which was prohibited" by Article I of the Supplementary Agreement, in that "under both the Treaty and Italian law, the requisition was unreasonable and improperly motivated"; it was "found to be illegal under Italian domestic law for precisely this reason". Relying on its own English translation of the decision of the Prefect of Palermo of 22 August 1969, the Applicant concludes that the Prefect found that the order was "destitute of any juridical cause which may justify it or make it enforceable". Italy first contended that the word "or" in the translation of this passage should be replaced by "and", and subsequently put forward the alternative translation that "the order, generically speaking, lacks the proper motivation that could justify it and make it effective". It may be noted in passing that when ELSI, immediately after the making of the requisition order, formally invited the Mayor of Palermo to revoke the order, it referred to it throughout as "the said illegal and arbitrary order" ("detto illegale ed arbitrario provvedimento"); but the appeal submitted to the Prefect, while citing numerous legal grounds for annulment, including "eccesso di potere persuasimento del fine" ("excess of power by deviation from the purpose"), contained no claim that the order had been "arbitrary". It is therefore appropriate for the Chamber to examine the legal grounds given by the Prefect of Palermo for his decision, as well as what was said by the Court of Appeal of Palermo on the legal impact of the Prefect's decision on the requisition order, and consider whether the findings of the

124. Yet it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law. To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.

125. The principal passage from the decision of the Prefect which is relevant here has already been quoted (paragraph 75 above), but it is convenient to set it out again here:

"Non s'ha dubbio che anche se possono considerarsi, in linea del tutto teorica, sussistenti, nella fattispecie, gli estremi della grave necessità pubblica e della contingibilità ed urgenza che determinarono l'adozione del provvedimento, il fine cui tendeva la requisizione non poteva trovare pratica realizzazione con il provvedimento stesso, tanto è vero che nessuna ripresa di attività dell'azienda vi è stata a seguito della requisizione, né avrebbe potuto esserci. Manca, pertanto, nel provvedimento, genericamente, la causa giuridica che possa giustificarlo e renderlo ope rante."

The differing translations offered by the Parties of the sentence upon which the Applicant places considerable reliance are set out in paragraph 123 above. In the Chamber's translation, the passage reads:

"There is no doubt that, even though, from the purely theoretical standpoint, the conditions of grave public necessity and of unforeseen urgency warranting adoption of the measure may be considered to exist in the case in point, the intended purpose of the requisition could not in practice be achieved by the order itself, since in fact there was no resumption of the company's activity following the requisition, nor could there have been such resumption. The order therefore
lacks, generically, the juridical cause which might justify it and make it operative."

126. In support of this conclusion, the Prefect explained that the Mayor had believed that he could deal with the situation by means of a requisition, without appreciating that

"the state of the company as a result of circumstances of a functional-economic and market nature, was such as not to permit of the continuation of its activity".

He also emphasized the shutdown of the plant and the protest actions of the staff, and the fact that the requisition had not succeeded in preserving public order. Finally the Prefect also observed that the order had been adopted

"anche sotto l’influsso delle pressioni e dei rilievi formulati dalla stampa cittadina, per cui è da ritenere che il Sindaco, anche per sottrarvisi e dimostrare l’intendimento della Pubblica Amministrazione di intervenire in qualche modo, addirittura alla requisizione quale provvedimento diretto più che altro a porre in evidenza la sua intenzione di affrontare comunque il problema".

In the translation of the Prefect’s decision supplied by the Applicant:

"also under the influence of the pressure created by, and of the remarks made by the local press; therefore we have to hold that the Mayor, also in order to get out of the above and to show the intent of the Public Administration to intervene in one way or another, issued the order of requisition as a measure mainly directed to emphasize his intent to face the problem in some way [or, as quoted in the judgment of the Court of Appeal of Palermo, in the translation supplied by the Applicant: ‘his intention to tackle the problem just the same’]".

It was of course understandable that the Mayor, as a public official, should have made his order, in some measure, as a response to local public pressures; and the Chamber does not see, in this passage of the Prefect’s decision, any ground on which it might be suggested that the order was therefore arbitrary.

127. In the action brought by the trustee in bankruptcy for damages on account of the requisition, the Court of Palermo and subsequently the Court of Appeal of Palermo had to consider the legal significance of the decision of the Prefect. The Court of Palermo accepted the argument of the respondent administration that "il provvedimento prefettizio è sostanzialmente di revoca dell’atto richiamato essendo stati ritenuti irrealizzabili gli scopi cui lo stesso miravano", i.e., that “the Prefect’s order is in substance a revocation of the act in question, the objectives which were contemplated by it having been adjudged to have been impossible to achieve”. When the matter came before the Court of Appeal, it observed that this argument was contrary to the argument of the trustee in bankruptcy "che ravvisa in detto decreto una dichiarazione di illegittimità del provvedimento di requisizione", i.e., “who regarded the [Prefect’s] decree as a declaration of the unlawfulness of the requisition order”. The Court of Appeal understood the lower court as meaning simply that "i vizi del provvedimento di requisizione, rilevati dal Prefetto, sono vizi di merito e non vizi di legittimità", i.e., “the defects found by the Prefect in the requisition order were defects in respect of the merits and not defects in respect of lawfulness”; it found that this finding was incorrect because the reasoning of the Prefect was, in its view, a clear finding of "un tipico caso di eccesso di potere, che è, come è noto, un vizio di legittimità dell’atto amministrativo", i.e., "a typical case of excess of power, which is of course a defect in respect of lawfulness of an administrative act". Having reached this conclusion, the Court of Appeal refers later in its judgment to the requisition as having been “unlawful” (“illecito”). The analysis of the Prefect’s decision as a finding of excess of power, with the result that the order was subject to a defect of lawfulness does not, in the Chamber’s view, necessarily and in itself signify any view by the Prefect, or by the Court of Appeal of Palermo, that the Mayor’s act was unreasonable or arbitrary.

128. Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of “arbitrary action" being "substituted for the rule of law" (Asylum, Judgment, I.C.J. Reports 1950, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light.

129. The United States argument is not of course based solely on the findings of the Prefect or of the local courts. United States counsel felt able to describe the requisition generally as being an “unreasonable or capricious exercise of authority”. Yet one must remember the situation in Palermo at the moment of the requisition, with the threatened sudden unemployment of some 800 workers at one factory. It cannot be said to have been unreasonable or merely capricious for the Mayor to seek to use the powers conferred on him by the law in an attempt to do something about a difficult and distressing situation. Moreover, if one looks at the requisition order itself, one finds an instrument which in its terms recites not only the reasons for its being made but also the provisions of the law on which it is based: one finds that, although later annulled by the Prefect because “the intended purpose of the requisition could not in practice be achieved by the order itself” (paragraph 125 above), it was nonetheless within the competence of the Mayor of Palermo, according to the very provisions of the law cited in it; one finds the Court of Appeal of Palermo, which did not differ from the conclusion that the requisition was intra vires, ruling that it was unlawful as falling into the recognized category of administrative law of acts of “eccesso di potere”. Furthermore, here was an act belong-
130. The Chamber does not, therefore, see in the requisition a measure which could reasonably be said to earn the qualification “arbitrary”, as it is employed in Article I of the Supplementary Agreement. Accordingly, there was no violation of that Article.

* * *

131. Finally, the United States claims that there has been a violation by Italy of Article VII of the FCN Treaty. This long and elaborately drafted Article, in four paragraphs, is principally concerned with ensuring the right “to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party”. The full text is as follows:

“1. The nationals, corporations and associations of either High Contracting Party shall be permitted to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party upon the following terms:

(a) in the case of nationals, corporations and associations of the Italian Republic, the right to acquire, own and dispose of such property and interests shall be dependent upon the laws and regulations which are or may hereafter be in force within the state, territory or possession of the United States of America wherein such property or interests are situated; and

(b) in the case of nationals, corporations and associations of the United States of America, the right to acquire, own and dispose of such property and interests shall be upon terms no less favorable than those which are or may hereafter be accorded by the state, territory or possession of the United States of America in which such national is domiciled, or under the laws of which such corporation or association is created or organized, to nationals, corporations and associations of the Italian Republic; provided that the Italian Republic shall not be obligated to accord to nationals, corporations and associations of the United States of America rights in this connection more extensive than those which are or may hereafter be accorded within the territories of such Republic to nationals, corporations and associations of such Republic.

2. If a national, corporation or association of either High Contracting Party, whether or not resident and whether or not engaged in business or other activities within the territories of the other High Contracting Party, is on account of alienage prevented by the applicable laws and regulations within such territories from succeeding as devisee, or as heir in the case of a national, to immovable property situated therein, or to interests in such property, then such national, corporation or association shall be allowed a term of three years in which to sell or otherwise dispose of such property or interests, this term to be reasonably prolonged if circumstances render it necessary. The transmission or receipt of such property or interests shall be exempt from the payment of any estate, succession, probate or administrative taxes or charges higher than those now or hereafter imposed in like cases of nationals, corporations or associations of the High Contracting Party in whose territory the property is or the interests therein are situated.

3. The nationals of either High Contracting Party shall have full power to dispose of personal property of every kind within the territories of the other High Contracting Party, by testament, donation or otherwise and their heirs, legatees or donees, being persons of whatever nationality or corporations or associations wherever created or organized, whether resident or non-resident and whether or not engaged in business within the territories of the High Contracting Party where such property is situated, shall succeed to such property, and shall themselves or by their agents be permitted to take possession thereof, and to retain or dispose of it at their pleasure. Such disposition, succession and retention shall be subject to the provisions of Article IX and exempt from any other charges higher, and from any restrictions more burdensome, than those applicable in like cases of nationals, corporations and associations of such other High Contracting Party. The nationals, corporations and associations of either High Contracting Party, shall be permitted to succeed, as heirs, legatees and donees, to personal property of every kind within the territories of the other High Contracting Party, left or given to them by nationals of either High Contracting Party or by nationals of any third country, and shall themselves or by their agents be permitted to take possession thereof and to retain or dispose of it at their pleasure. Such disposition, succession and retention shall be subject to the provisions of Article IX and exempt from any other charges, and from any restrictions, other or higher than those applicable in like cases of nationals, corporations and associations of such other High Contracting Party. Nothing in this paragraph shall be construed to affect the laws and regulations of either High Contracting Party prohibiting or restricting the direct or indirect ownership by
aliens or foreign corporations and associations of the shares in, or
instruments of indebtedness of, corporations and associations of
such High Contracting Party carrying on particular types of activi-
ties.

4. The nationals, corporations and associations of either High
Contracting Party shall, subject to the exceptions in paragraph 3 of
Article IX, receive treatment in respect of all matters which relate to
the acquisition, ownership, lease, possession or disposition of
personal property, no less favorable than the treatment which is
or may hereafter be accorded to nationals, corporations and asso-
ciations of any third country."

The Italian text of the opening sentence of paragraph 1 is as follows:

"I cittadini e le persone giuridiche ed associazioni di ciascuna Alta
Parte Contraente avranno facoltà di acquistare, possedere e disporre
beni immobili o di altri diritti reali nei territori dell'altra Alta Parte
Contraente alle seguenti condizioni..."

132. It was objected by Italy that this Article does not apply at all to
Raytheon and Machlett because their own property rights ("diritti reali")
were limited to shares in ELSI, and the immovable property in question
(the plant in Palermo) was owned by ELSI, an Italian company. The
United States contended that "immovable property or interests therein"
is a phrase sufficiently broad to include indirect ownership of property
rights held through a subsidiary that is not a United States corporation.
The argument turned to a considerable extent on the difference in
meaning between the English, "interests" and the Italian, "diritti reali".
"Interest" in English no doubt has several possible meanings. But since
it is in English usage a term commonly used to denote different kinds of
rights in land (for example rights such as charges, or easements, and many
kinds of "future interests"), it is possible to interpret the English and
Italian versions of Article VII as meaning much the same thing; especially
as the clause in question is in any event limited to immovable property.
The Chamber however has some sympathy with the contention of
the United States, as being more in accord with the general purpose of
the FCN Treaty. The United States argument is further that Raytheon and
Machlett, being the owners of all the shares, were in practice the persons
who alone could decide (before the bankruptcy), whether to dispose of
the immovable property of the company; accordingly, if the requisition
did, by triggering the bankruptcy, deprive ELSI of the possibility of dis-
posing of its immovable property, it was really Raytheon and Machlett
who were deprived; and allegedly in violation of Article VII.

133. There are however problems in any attempt to apply the provi-
sions of Article VII to the actual facts of this case. First, the protection
which paragraph 1 of Article VII affords to this group of rights is not un-
qualified. The qualification designated "(a)" refers to the rights enjoyed
by Italian nationals in the territory of the United States of America, which
in effect simply subjects Italian nationals to the municipal laws in the
United States, and does not concern us. Qualification "(b)" does, for this
applies to the rights enjoyed by United States nationals in the territory
of the Republic of Italy. It is a convoluted qualification because it lays
down alternative standards, which standards are themselves then both
qualified by the same proviso. The terms governing the rights are to be
no less favourable than those which are or may hereafter be accorded
by the "state, territory or possession of the United States of America in
which such national is domiciled, or under the laws of which such cor-
poration or association is created or organized" — which in the case of
Raytheon is the State of Delaware and in the case of Machlett the
State of Connecticut — "to nationals, corporations and associations of
the Italian Republic". The proviso is:

"that the Italian Republic shall not be obligated to accord to nation-
als, corporations and associations of the United States of America
rights in this connection more extensive than those which are or may
hereafter be accorded within the territories of such Republic to
nationals, corporations and associations of such Republic".

134. The Chamber has thus to make the somewhat elaborate juridical
calculus which this provision in the FCN Treaty appears to demand for its
application. No very cogent evidence was put before the Chamber to
show that the application of Italian law in this matter was less favourable
than the treatment accorded by Italy to its own nationals, corporations
and associations, in Italy. Indeed it appeared that, particularly during the
troubled times of 1968, requisitions of Italian companies by the local
Mayors had happened rather frequently. The claim must therefore be
taken to be that ELSI was given less favourable treatment than might have
been enjoyed by an Italian company under the laws of Delaware and
Connecticut in similar circumstances. The United States drew attention
to texts showing that

"Under the laws of both Delaware and Connecticut, corporations
may be dissolved and their assets sold pursuant to determinations by
their boards of directors and shareholders", 
and that if those States were to take the immovable property of a corpora-
tion for a lawful public use, they would have to make compensation; Italy
has not disputed these legislative provisions.

135. Secondly, however, even so there remains precisely the same difficul-
ty as in trying to apply Article III, paragraph 2, of the FCN Treaty: what
really deprived Raytheon and Machlett, as shareholders, of their
right to dispose of ELSI’s real property, was not the requisition but the
precarious financial state of ELSI, ultimately leading inescapably to
bankruptcy. In bankruptcy the right to dispose of the property of a cor-
poration no longer belongs even to the company, but to the trustee acting
for it; and the Chamber has already decided that ELSI was on a course to
bankruptcy even before the requisition. The Chamber therefore does not
find that Article VII of the FCN Treaty has been violated.

* * *

136. Having found that the Respondent has not violated the
FCN Treaty in the manner asserted by the Applicant, it follows that the
Chamber rejects also the claim for reparation made in the submissions of
the Applicant.

* * *

137. For these reasons,

THE CHAMBER,

(1) Unanimously,

Rejects the objection presented by the Italian Republic to the admissi-
bility of the Application filed in this case by the United States of America
on 6 February 1987;

(2) By four votes to one,

Finds that the Italian Republic has not committed any of the breaches,
alleged in the said Application, of the Treaty of Friendship, Commerce
and Navigation between the Parties signed at Rome on 2 February 1948,
or of the Agreement Supplementing that Treaty signed by the Parties at
Washington on 26 September 1951.

IN FAVOUR: President Ruda; Judges Oda, Ago and Sir Robert Jennings;
AGAINST: Judge Schwebel.

(3) By four votes to one,

Rejects, accordingly, the claim for reparation made against the Repub-
lic of Italy by the United States of America.

IN FAVOUR: President Ruda; Judges Oda, Ago and Sir Robert Jennings;
AGAINST: Judge Schwebel.
International Court of Justice

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections Judgment

_I.C.J. Reports 2007_ (excerpts)
39. The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the “ILC”), “diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of a national of another State for the protection of his rights against an injury caused by an international wrong committed on his territory or subject to his national jurisdiction.” Such responsibility of States to respect the inviolability of diplomatic missions has subsequently been extended to indivisible acts. Article 1(2), ILC Report, doc. A/61/10, p. 24. In view of the above, the Court will address the question of local remedies solely in respect of Mr. Diallo’s expulsion.

40. In the present case, Guinea seeks to exercise its diplomatic protection in respect of the way the DRC decided to remove Mr. Diallo from Zaire. As the Court stated in the Interhandel (Switzerland v. United States of America) case, “the rule that local remedies must be exhausted before international proceedings may be instituted is a principle of international law which has a wide application. It is based on the assumption that any State, individual or other person that has caused injury to another State, individual or other person, has an interest in redressing this injury and thus in finding a means of redressing it by its own means, within the framework of its own domestic legal system.” (I.C.J. Reports 1959, p. 27.) 

41. To begin with, the Court observes that it is not disputed by the Parties that Mr. Diallo was a national of Guinea and that he has continuously held that nationality from the date the proceedings were initiated. The Parties have however devoted much argument to the issue of exhaustion of local remedies.
even if he had been in a position to appoint a new ‘gérant’ and a ‘commissaire’ — and he was not, given his lack of funds — he was still being deprived of the right to appoint the management of his choice in violation of... the 1887 Decree, and he could not be expected to confer or abandon the management to some third party”.

Guinea adds that it is unrealistic to claim, as the DRC does, that Mr. Diallo could have exercised, from abroad, his rights of supervision and control, or indeed convoked, taken part in and voted at the general meetings.

59. The Court begins by noting the existence of a disagreement between the Parties on the circumstances surrounding the establishment of Africom-Zaire and the conduct of its activities, on the continuation of those activities after the 1980s, and on the consequences these questions may have under Congolese law. It nonetheless takes the view that this disagreement essentially relates to the merits and that it has no bearing on the question of the admissibility of Guinea’s Application as challenged in the Congo’s objections.

60. The Court notes that the Parties have referred frequently to the case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain). This involved a public limited company whose capital was represented by shares. The present case concerns SPRLs whose capital is composed of parts sociales (see paragraph 25 above).

61. As the Court recalled in the Barcelona Traction case, “[t]here is... no need to investigate the many different forms of legal entity provided for by the municipal laws of States” (I.C.J. Reports 1970, p. 34, para. 40). What matters, from the point of view of international law, is to determine whether or not these have a legal personality independent of their members. Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting. As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law.

62. The Court, in order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire, must refer to the domestic law of the DRC and, in particular, to the Decree of 27 February 1887 on commercial corporations. This text states, in Article 1, that “commercial corporations recognized by law in accordance with this Decree shall constitute legal persons having a personality distinct from that of their members”.

63. Congolese law accords an SPRL independent legal personality distinct from that of its associés, particularly in that the property of the associés is completely separate from that of the company, and in that the associés are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company’s debts receivable from and owing to third parties relate to its respective rights and obligations. As the Court pointed out in the Barcelona Traction case: “So long as the company is in existence the shareholder has no right to the corporate assets.” (I.C.J. Reports 1970, p. 34, para. 41.) This remains the fundamental rule in this respect, whether for a SPRL or for a public limited company.

64. The exercise by a State of diplomatic protection on behalf of a natural or legal person, who is associé or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. Ultimately, this is no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; what amounts to the internationally wrongful act, in the case of associés or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties, moreover. On this basis, diplomatic protection of the direct rights of associés of a SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.

65. Having considered all of the arguments advanced by the Parties, the Court finds that Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr. Diallo, and is directed against the allegedly unlawful acts of the DRC which are said to have infringed his rights, particularly his direct rights as associé of the two companies Africom-Zaire and Africontainers-Zaire.

66. The Court notes that Mr. Diallo, who was associé in Africom-Zaire and Africontainers-Zaire, also held the position of gérant in each of them. An associé of an SPRL holds parts sociales in its capital, while the gérant is an organ of the company acting on its behalf. It is not for the Court to determine, at this stage in the proceedings, which specific rights appertain to the status of associé and which to the position of gérant of an SPRL under Congolese law. It is at the merits stage, as appropriate, that the Court will have to define the precise nature, content and limits of these rights. It is also at that stage of the proceedings that it will be for the Court, if need be, to assess the effects on these various rights of the action against Mr. Diallo. There is no need for the Court to rule on these substantive matters in order to be able to dispose of the preliminary objections raised by the Respondent.
International Court of Justice

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits Judgment

*I.C.J. Reports 2010* (excerpts)
115. In the following paragraphs, the Court is careful to maintain the strict distinction between the alleged infringements of the rights of the two SPRLs at issue and the alleged infringements of the rights of the two SPRLs of these latter (see I.C.J. Reports 2007 (II), pp. 605-606, paras. 62-63). The Court understands that such a distinction could appear artificial in the case of an SPRL in which the parts sociales are held in practice by a single associé. It is nonetheless well-founded juridically, and it is essential rigorously to observe it in the present case. Guinea itself accepts this distinction in its arguments and presentations. The Court has therefore decided to deal with the claims as they were presented by the Applicant.

116. Guinea’s claims relating to Mr. Dallio’s direct rights as associé of the two companies. Guinea also presents a claim in respect of the two companies. The Court understands that such a distinction could appear artificial in the case of an SPRL in which the parts sociales are held in practice by a single associé. It is nonetheless well-founded juridically, and it is essential rigorously to observe it in the present case.

117. Guinea maintains that the DRC, in expelling Mr. Dallio, deprived him of his right, guaranteed by Article 79 of the Congolese Decree of 27 February 1887, to take part in general meetings and to vote. It claims that under DRC law general meetings of Africom-Zaire and Africontainers-Zaire could not be held outside the territory of the DRC. The Court observes that the DRC has failed to establish, by means of relevant corporate documents relating to the two companies, that Mr. N’Kanza was appointed “gérant associé” of Africontainers-Zaire. The Court therefore concludes that the only “gérant” acting for either of the companies at the time of Mr. Dallio’s expulsion was Mr. Dallio himself.

118. The DRC maintains that there cannot have been any violation of Mr. Dallio’s right to participate in general meetings, as there has been no evidence that any general meetings were convened and that Mr. Dallio was unable to attend owing to his removal from DRC territory. The DRC asserts that in any case general meetings are to be held in the territory of the DRC. It claims that Mr. N’Kanza was appointed on the basis of the decision of the Court d’Appel of Kisangani on 20 June 2002, in which it was decided that Mr. Dallio was not entitled to attend any general meetings of the companies. The Court notes that there is no evidence before it indicating that a judicial liquidation took place or that a general meeting appointing Mr. N’Kanza as “gérant” took place (see paragraphs 129 and 133 below on the appointment of the “gérant”).

119. Article 79 of the Congolese Decree of 27 February 1887 stipulates that: “notwithstanding any provision to the contrary, all associés of the two companies, fully in charge and in control of them, but that they nevertheless remained legal representatives of the companies, shall have the right to participate in general meetings and be entitled to one vote per share.”
It follows from these provisions that an 
associate’s right to take part and vote in general meetings may be exercised by the 
associate in person or through a proxy of his choosing. On the other hand, it is more difficult to infer 
with certainty that a vote expressed through a proxy at a general meeting has the same legal 
effect as a vote expressed by the associate himself. It is, therefore, a question whether the 
Congolese laws provide for an 
associate’s right to take part and vote in general meetings. The Court finds that 
no doubt in this connection that a vote expressed through a proxy at a general meeting has the same legal effect as a vote expressed by the 
associate in person. In the opinion of the Court, the 
primary purpose of these provisions is to ensure that the general meetings of companies can take 
place effectively. Guinea’s interpretation of Congolese law might frustrate that objective, by 
preventing the organs of the company from operating normally. Moreover, in respect of 
Africom-Zaire and Africontainers-Zaire, the Court does not see how the appointment of a representative by Mr. Diallo 
could in any way have deprived him of his right to take part and vote in general meetings of the two SPRs, since he had complete control over them.

123. According to Article 38 of the Congolese Decree of 27 February 1987, while the 
gérant or as 
associate holding at least one-fifth of the total number of shares (paragraph 2). In view of the evidence submitted to it by the Parties, the 
Court finds that there is no proof that Mr. Diallo, acting either as 
gérant or as 
associate, has taken any action to convene a general meeting, as guaranteed by Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations.

127. The Court observes that, at various points in the proceedings, Guinea has made four 
slightly different assertions, which it has grouped under the general claim of a violation of Mr. Diallo’s right to appoint a representative or agent of Africontainers-Zaire. Prior to the 
appointment of that proxy, and acting as 
gérant of Africontainers-Zaire, Mr. Diallo could have appointed such a representative or 
agent of the company. Therefore, the Court cannot sustain Guinea’s claim that the DRC has violated Mr. Diallo’s right to take part and vote in general meetings. Mr. Diallo, has probably impeded him from taking part in person in any general meeting, but, in the opinion of the 
Court, such hindrance does not amount to a deprivation of his right to take part and vote in general meetings.

129. The DRC contends that the right to appoint a 
gérant or as 
associate of the company, not of the 
associés, as it lies with the general meeting, which is an organ of the company. Furthermore, the DRC affirms that because, under the 1887 Decree, a 
gérant or as 
associate has been provided that Mr. Diallo would have been precluded from taking any action to convene a general meeting.
The Court will begin by dismissing the DRC's argument that Mr. Diallo's right to appoint a gérant could not have been violated because he in fact appointed a gérant for Africorners-Zaire in the person of M. N'Kanza. It has already concluded that this allegation has not been proved (see paragraphs 111 and 112 above).

132. The Court observes that the appointment and functions of gérants are governed in Congolese law by Article 64 of the 1887 Decree, which provides:

"A private limited company shall be managed by one or more persons, who may or may not be associates, called gérants."

133. As regards the first assertion put forward by Guinea that the DRC has violated Mr. Diallo's right to appoint a gérant, the Court finds that, in terms of Congolese law, the gérant is the manager of the company, who may be appointed either in the instrument of incorporation or by the general meeting. According to the DRC, Guinea has failed to show that a general meeting was convened and that the DRC intervened with the other associates to prevent Mr. Diallo from appointing a gérant for Africorners-Zaire in the person of M. N'Kanza. It has already concluded that this allegation has not been proved (see paragraphs 111 and 112 above).

134. As regards the second assertion put forward by Guinea that the DRC has violated Mr. Diallo's right to be appointed gérant, the Court notes that, in its 2007 Judgment on preliminary objections, it observed that:

"The DRC . . . agrees with Guinea on the fact that, in terms of Congolese law, the direct rights of associates are determined by the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations. The rights of Mr. Diallo as associate of both companies in question are therefore determined by Article 65 of the 1887 Decree, which provides:

'Gérants shall be appointed either in the instrument of incorporation or by the general meeting, for a period which may be fixed or indeterminate.'"

In addition, the Court notes that the general meeting may entrust the day-to-day management of the company to one of its managers or other proxies, whether or not associates, appointed by the general meeting.

135. The Court notes that, thirdly, Guinea has claimed that a right of Mr. Diallo to exercise his functions as gérant was violated. In this regard, Guinea has argued in its Reply that:

"It is clear that an associate has a right to be appointed gérant. However, this right cannot have been violated in this instance because Mr. Diallo has in fact been appointed as gérant, and still is the gérant of the companies Africom-Zaire and Africontainers-Zaire. In this regard, the Court recalls its finding in its 2007 Judgment “that Mr. Diallo, who was associated with the parties in question, held the position of manager (gérant) of both companies as of December 19, 2005.” This finding is confirmed by evidence submitted by the parties in the present stage of the proceedings, in particular by evidence submitted by Guinea itself. Accordingly, the Court concludes that there is no violation of Mr. Diallo's right to be appointed gérant."
The Court cannot accept this line of reasoning, and refers in this regard to Article 69 of the 1887 Decree, which provides that “the gérance may entrust the day-to-day management of the company and special powers to agents or other proxies, whether associés or not”. Moreover, with respect to Africontainers-Zaire, the Court also refers to Article 16 of its Articles of Incorporation, which provides that the “gérance is entitled to establish administrative bases in the Republic of Zaire and branches, offices, agencies, depots or trading outlets in any location whatsoever, whether in the Republic of Zaire or abroad”. While the performance of Mr. Diallo’s duties as gérant may have been rendered more difficult by his presence outside the country, Guinea has failed to demonstrate that it was impossible to carry out those duties. In addition, Guinea has not shown that Mr. Diallo attempted to appoint a proxy, who could have acted within the DRC on his instructions.

140. In light of all the above, the Court concludes that the various assertions put forward by Guinea, grouped under the general claim of a violation of Mr. Diallo’s rights relating to the gérance, must be rejected.

C. The right to oversee and monitor the management

141. Guinea submits that, in detaining and expelling Mr. Diallo, the DRC deprived him of his right to oversee and monitor the actions of management and the operations of Africom-Zaire and Africontainers-Zaire, in violation of Articles 71 and 75 of the 1887 Decree. Referring to those provisions, Guinea contends that the right to oversee and monitor the actions of management is a right attaching to the status of associé, not a right of the company, especially where there are five or fewer associés. It argues that because Mr. Diallo was the sole associé of both companies, he enjoyed all the rights and powers of the commissaire or auditor under Article 75 of the 1887 Decree. It adds that those rights are also recognized by Article 19 of Africontainers-Zaire’s Articles of Incorporation.

142. The DRC submits that under Articles 71 and 75 of the 1887 Decree, as well as Article 19 and Article 25, paragraph 3, of Africontainers-Zaire’s Articles of Incorporation, the task of overseeing and monitoring the gérance of an SPRL is entrusted not to an associé individually, but to financial experts known as “statutory auditors” [commissaires aux comptes]. In the view of the DRC, the right of the associé is limited to participating in the appointment of one or more such auditors at the general meeting. The DRC acknowledges that, under certain conditions, Congolese law accords associés the right to oversee and monitor the management of the company, but it argues that Guinea has failed to demonstrate that the DRC had ordered Africontainers-Zaire not to permit Mr. Diallo to monitor its operations.

143. Article 71 of the 1887 Decree provides as follows:

\textit{Article 71}

“Oversight of the management shall be entrusted to one or more administrators, who need not be associés, called ‘auditors’.

If there are more than one of these, the statutes or the general meeting may require them to act on a collegiate basis.

If the number of associés does not exceed five, the appointment of auditors is not compulsory, and each associé shall have the powers of an auditor.”

144. Article 75 of that Decree is couched in the following terms:
“The auditors’ task shall be to oversee and monitor, without restriction, all the actions performed by the management, all the company’s transactions and the register of associés.”

145. Article 19 of Africontainers-Zaire’s Articles of Incorporation provides:

“Each of the associés shall exercise supervision over the company. Should the company consist of more than five associés, supervision shall be exercised by at least one auditor appointed by the general meeting, which shall fix his/her term of office and remuneration.”

146. The Court concludes from the wording of Article 71, third paragraph, as cited above, that since both Africom-Zaire and Africontainers-Zaire had fewer than five associés, Mr. Diallo was permitted to act as auditor. However, the question arises of whether, under Congolese law, this provision applies in the case of a company where there is only one associé who is fully in charge and in control of it.

147. The Court considers that, even if a right to oversee and monitor the management exists in companies where only one associé is fully in charge and in control, Mr. Diallo could not have been deprived of the right to oversee and monitor the gérance of the two companies. While it may have been the case that Mr. Diallo’s detentions and expulsion from the DRC rendered the business activity of the companies more difficult, they simply could not have interfered with his ability to oversee and monitor the gérance, wherever he may have been.

148. Accordingly, the Court concludes that Guinea’s claim that the DRC has violated Mr. Diallo’s right to oversee and monitor the management fails.

D. The right to property of Mr. Diallo over his parts sociales in Africom-Zaire and Africontainers-Zaire

149. Guinea claims that Mr. Diallo, no longer enjoying control over, or effective use of, his rights as associé, has suffered the indirect expropriation of his parts sociales in Africom-Zaire and Africontainers-Zaire because his property rights have been interfered with to such an extent that he has been lastingly deprived of effective control over, or actual use of, or the value of those rights.

150. Guinea states that the acts of interference by the DRC with Mr. Diallo’s property rights in the parts sociales date back to 1988, when he was first placed in detention. Those acts allegedly resulted in the debts owed to the companies not being recovered and, by way of consequence, Mr. Diallo’s investment in the companies falling in value. According to Guinea, the interference by the DRC continued consequent to the Congolese authority’s decision in 1995 to stay enforcement of the judgment for the plaintiff handed down in Africontainers v. Zaire Shell, which resulted in reducing the value of Mr. Diallo’s parts sociales in the company. Guinea claims that the interference by the DRC culminated in the re-arrest and expulsion of Mr. Diallo who, as a result, was prevented from managing his companies and from participating in any way in the activities of their corporate organs and was deprived of any possibility of controlling and using his parts sociales. Guinea asserts that the indirect expropriation of Mr. Diallo’s rights constitutes an internationally wrongful act giving rise to the DRC’s international responsibility.

151. The essence of Guinea’s argument is that there is a factual element specific to this case, namely:

“That Mr. Diallo is the sole associé in the two companies, that is to say, the only owner of the parts sociales in Africom-[Zaire] and Africontainers-[Zaire]. As a consequence, even though officially they have separate legal personalities, the very special characteristics of the relationship between Mr. Diallo and his companies means that, from the factual perspective, which is the perspective of expropriation (expropriation is a question of fact), the property of the two companies merges with his. Thus, in expropriating his companies, the DRC infringed Mr. Diallo’s ownership rights in his parts sociales.”

152. For its part, the DRC claims that there cannot have been any violation of any rights attaching to ownership of the parts sociales. In particular, as regards the right to dividends, it alleges that, even on the assumption that any have actually been distributed by the companies, Guinea would still have to show that Mr. Diallo was unable to receive them on account of the decision to remove him from Congolese territory or of another wrongful act attributable to the DRC. The DRC argues in this respect that Guinea has not established that Mr. Diallo could not directly receive his dividends abroad or that he was prevented from doing so by an act attributable to the DRC.

153. The DRC contends as well that it cannot be accused of having impeded the exercise of rights held by Mr. Diallo as owner of his parts sociales. Specifically, the DRC at no time ordered Africontainers-Zaire not to make payments in respect of Mr. Diallo’s parts sociales in the annual dividend allocation. With regard to Africom-Zaire, the DRC notes that Guinea has failed to provide evidence showing that Mr. Diallo was still an associé in this company at the time of his expulsion and, if so, how many parts sociales he held (see paragraph 106 above).

154. The DRC finally asserts that the value of Mr. Diallo’s parts sociales is unrelated to his presence in its territory. It rejects Guinea’s arguments that acts attributable to the DRC were at the origin of the loss of value of his parts sociales and, in general, the economic demise of his companies. On this subject, the DRC claims that both Africom-Zaire and Africontainers-Zaire had been in a state of “undeclared bankruptcy” for several years before Mr. Diallo’s expulsion, not having engaged in any commercial activity since, at least, 1991.
Arbitral Tribunal

Delagoa Bay v. East African Railway Co.
Award of 29 March 1900

Lafontaine *Pasicrisie Internationale 1794-1900*, Berne, 1902
(French only)
Limites de Costa-Rica et de Colombie ;
Costa-Rica y Costa de Mosquitos ;
Jurisdiction territoriale de Costa-Rica ;
De l'exposé des titres territoriaux de la répu-
blique de Costa-Rica ;
De la réplique à l'exposé de la république de
Colombie ;
De l'atlas historico-geographico de Costa-Rica,
Veragusa y costa de Mosquitos ;
Du volume de M. de Peralta : Géographie
historique et droits territoriaux du Costa-Rica
Etc., etc.

Et, en général, de tous et toutes décisions,
capitations, ordres royaux, provisions, cédules
royales, lois, édités et promulgués par l'ancienne
monarchie espagnole, souveraine absolue et libre
dépositaire des territoires qui ont fait partie, dans
la suite, des deux républiques ;

Ayant procédé à une étude minutieuse
et approfondie des dits actes, à nous soumis par
les parties, notamment : des cédules royaux du
27 juillet 1513, du 6 septembre 1521, de la pro-
 visions royale du 21 avril 1541 des cédules royaux
de 2 mars 1537, des 11 janvier et 9 mai
1541, du 21 janvier 1557, des 23 février et
18 juillet 1558, des 4 et 9 août 1551, du 8 sep-
tembre 1558, des 12 décembre 1550, des 28 juin
1560, du 17 décembre 1572, de la capitulation du Pardo du 1er dé-
cembre 1573, de la Recopilación de les Leyes de
Indias de 1680, particulièrement des lois IV,
VI et IX de ce recueil, des cédules royales des
21 juillet et 13 novembre 1722, du 20 août 1730,
du 24 mai 1740, du 30 octobre 1742, du 30 no-
tembre 1750, des différentes instructions émanant
du souverain espagnol et adressées tant aux
autorités supérieures de la vice-royauté de Santa-Fé
que celles de la capitainerie générale de Gu-
temala au cours du dix-huitième siècle et dans
les années suivantes : des ordres royaux de 1803
et 1805, de stipulations du traité conclu en 1825
entre les deux républiques indépendantes, etc., etc.

Et conscient de l'importance de notre
haute mission, ainsi que du très grand honneur qui
nous a été fait d'être choisi comme juge dans
le présent débat, n'ayant rien négligé pour nous
rendre un compte exact de la valeur des titres
invocés par l'un et l'autre pays,

Arrêtons :

La frontière entre les républiques de
Colombie et de Costa-Rica sera formée par le contrefois
de la Cordillère, qui part du cap Mona sur
l'océan Atlantique et forme au nord la vallée du
Rio-Tarre ou Rio-Sixtola, puis la ligne de par-
tage des eaux entre l'Atlantique et le Pacifique
jusqu'à par 9 degrés environ de latitude : elle

suivra ensuite la ligne de partage des eaux entre le
Chiriqui-Viejo et les affluents du golfe Dulce,
proche de la pointe Burica sur l'océan
Pacifique.

En ce qui concerne les îles, groupes d'îles,
îlots, bancs, situés dans l'océan Atlantique, à
proximité de la côte, à l'est et au sud-est de la
pointe Mona, ces îles, quels que soient leur
nombre et leur étendue, feront partie du domaine
de la Colombie, les îlots et les bancs situés à l'ouest
et au nord-ouest de la dite île appartiendront
à la république de Costa-Rica.

Quant aux îles les plus éloignées du continent
carete des cées de Mosquitos et l'atlante du Panama, notamment : Mangle-Chico,
Mangle-Grande, Cayos-de-Albuqueque, San
Andrés, Santa-Catalina, Providencia, Escudo-de-
Veragua, ainsi que toutes autres îles, îlots et
bancs relevant de l'ancienne province de Car-
tagosa, sous la dénomination de canton de San
Andrés, il est entendu que le territoire de ces
îles, sauf en exceptant une, appartient aux Etats-
Unis de Colombie.

Du côté de l'océan Pacifique, la Colombie
possèdera également, à partir des îles Burica et
y compris celles-ci, toutes les îles situées à l'est
de la pointe de Burica, jusqu'au 60° de longitude
ouest de la pointe de Burica, ayant été attribuées
à l'ouest de cette pointe étant attribuées au
Costa-Rica.

CV. Etats-Unis d'Amérique, Grande-Bretagne,
Portugal.
13 juin 1891.

Il s'agit en cette affaire de la ression
d'une concession de chemin de fer, cédée par
le concessionnaire primitif à une compagnie
anglaise. Il était réclamé par les intéressés une
somme totale de 1,898,000 £ ; il leur fut accordée
15,314,000 francs, en plus des 28,000 £&n
versées à compte par le Portugal en 1890.

Protocole signé à Berne le 13 juin 1891, pour soumettre
t'à l'arbitrage l'indenité résultant de la ression
de la concession du chemin de fer de Lourenço Marques.

Le président de la Confédération suisse ayant
certifié au Gouvernement des Etats-Unis de
l'Amérique du Nord, de la Grande-Bretagne
de l'Opinion du Conseil fédéral suisse qu'il
avait pris en considération la demande que ces
gouvernements lui ont faite, de bien vouloir nommer
trois juristes, choisis parmi les plus distin-
gués, pour composer un tribunal arbitral chargé
de fixer le montant de l'indenité due par le
Portugal aux ayants droit de deux autres pays
de l'Amérique du Sud, ou de leur concession de
chemin de fer de Lourenço Marques et de la
prise de possession de ce chemin de fer par le
gouvernement portugais, les soussignés Eynine
extraordinaires et ministres plénipotentiaires des
Etats-Unis, du Royaume-Uni, et du Portugal, de la
Confédération suisse, détenant autorités par leurs
gouvernements respectifs, sont convenus de ce qui suit :

Article I. Le mandat que les trois gouverne-
ments sont convenus de conférer au Tribunal
 arbitral est de fixer, comme il jugera le plus juste,
de la concession du chemin de fer de Lourenço Marques
et de la prise de possession de ce chemin de fer par
le gouvernement portugais, les soussignés Eynine
extraordinaires et ministres plénipotentiaires des
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Etats-Unis, du Royaume-Uni, et du Portugal, de la
Confédération suisse, détenant autorités par leurs
gouvernements respectifs, sont convenus de ce qui suit :

Article II. Le Tribunal arbitral fixera aux
gouvernements des Etats-Unis d'Amérique du
Nord, de la Grande-Bretagne et du Portugal le délai
dans lequel ceux-ci devront lui remettre les mémoires,
coupons et conclusions et documentes à l'appui des reclama-
tsions de leurs ressortissants.

Ces pièces devront être remises en deux doubles
au gouvernement portugais avec invitation de
produire, également en deux doubles, sa réponse,
ses conclusions et les documentes à l'appui, dans
le délai qui lui sera fixé.

Le Tribunal arbitral fixera lui-même, après
avoir entendu les parties ou leurs représentants,
et d'accord avec elles, le mode de procédure,
normément les délais ci-dessous mentionnés et
ce délai fixer pour la remise de la réplique et de
toute la documentation, le régime à suivre pour l'audition
des parties ou de leurs représentants, la produc-
tion des documents, la délibération dans son
sein, le prononcé du jugement et la rédaction du
protocole.

Chacun des trois gouvernements s'engage à
taire tout ce qui dépendra de lui pour que les
pièces et renseignements demandés par le
Tribunal arbitral lui soient fournis en due forme
et dans le délai fixé par lui.

Article III. Le Tribunal arbitral aura pleine
compétence pour connaître des conclusions pré-
sentées par chacune des parties dans toute leur
étendue et dans toutes leurs dépendances ou
incidents, il rendra son jugement sur le fond de
la cause et prononce comme il jugera le plus
juste, sur le montant de l'indenité due par le
Portugal aux ayants droit des deux autres pays
par suite de la ression de la concession du
chemin de fer de Lourenço Marques et de la
prise de possession de ce chemin de fer par le
mêmes gouvernement.

Article IV. Le jugement sera définitif et
sans appel.

Le président du Tribunal arbitral a donné
l'objet de leur jugement, à savoir : la prise de possession
du chemin de fer de Lourenço Marques et de la
ression de la concession de ce chemin de fer par le
mêmes gouvernement.

par suite de la ression de la concession du
chemin de fer de Lourenço Marques et de la
prise de possession de ce chemin de fer par le
mêmes gouvernement.

Sentence finales du Tribunal arbitral du Delagao,
prononcées à Berne, le 28 mars 1900.

I. OBJET DU JUGEMENT ARBITRAL.

Le différend sur lequel les arbitres sont
appelés à statuer et qui fait l'objet de leur juge-
ment est déterminé par le compromis arbitral.
L'article premier de celui-ci leur donne le
mandat de fixer le montant de la compensation
due par le gouvernement portugais aux ayants
droit des deux autres pays par suite de la
ression de la concession du chemin de fer de
Lourenço Marques et de la prise de possession de ce
chemin de fer par le gouvernement portu-

gais.

Sentence finales du Tribunal arbitral du Delagao, p. 33.
Il résulte des termes ci-dessus que la résision de la concession et la prise de possession du chemin de fer, dûment portugais, sont considérées comme des faits acquis et irrévocables. Il n’est plus question de rapporter ces mesures ; il s’agit uniquement de fixer la somme à attribuer aux demandeurs en compensation de la perte de leur concession et de leur propriété.

II. LE DROIT APPLICABLE.

Aux termes de l’article premier du compromis, le Tribunal arbitral a pour mandat de fixer le montant de la compensation en question « comme il jugera le plus juste. »

Cette clause n’exclut pas, elle implique, au contraire, pour lui l’obligation de déterminer au préalable quelle est la législation qui devra le guider dans la recherche de la solution « juste. »

Or, l’entreprise qui, en vertu du contrat du 26 mai 1845, est devenue concessionnaire au lieu et place de Mac Murdo, était et devait être, conformément à l’article 91 de l’acte de concession, « une société anonyme négreant à Lisbonne » et portugaise pour tous les effets.

En réalité, c’est cette société portugaise qui est demeurée concessionnaire jusqu’à la renonciation de la compagnie anglo-négresse. Il n’est pas opposé au transfert de la concession à la compagnie anglo-négresse, qui devint simplement propriétaire de la presque totalité des actions de la compagnie portugaise, qui est également portugaise.

Enfin, d’après le troisième article, la compensation devrait équivaloir au prix d’estimation du bien approprié, calculé soit au moyen d’une évaluation, soit sur la base des dépenses utiles dans la construction de la ligne, les frais de la création ou de l’acquisition de ce bien, avec ou sans déductions.

Le Portugal a soutenu, à cet égard, que le choix entre ces diverses solutions se trouvait déjà posé jadis par l’entreprise. Ce choix, il est vrai, dans le compromis, alterne indéfiniment avec celui de l’espérance du chemin. C’est-à-dire que la compagnie anglo-négresse a accepté le chemin de fer, à la suite de la création ou de l’acquisition du bien, avec ou sans déductions.

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Le décret de réscision a-t-il été rendu et la prise de possession de la ligne a-t-elle été opérée, ou non, en conformité de l’acte de concession?

Cet acte, en effet, prévoit des cas où l’État aurait pu être réservé de résilier la concession de sa seule autorité. Ce sont — à part la faculté de rachat après 35 ans (art. 28) qui n’est pas en cause ici — les deux cas énoncés aux articles 42 et 45 :

- L’État de continuer les travaux sur une échelle proportionnelle à l’étendue de la ligne, ou défaut de terminer le chemin de fer « dans les termes et les délais fixés à l’art. 40 » (art. 42);
- Interruption totale ou partielle de l’exploitation pendant plus de trois mois, après une sommation de la part du gouvernement (art. 45).

« Les cas de force majeure dûment justifiées » faisant exception dans l’un comme dans l’autre de ces cas.

La partie défenderesse s’est, au cours du présent procès, prévalu cumulativement de l’art. 42 et de l’art. 45. Mais le décret de réscision, du 25 juin 1869, n’a point fait état de l’art. 45 ; il a invoqué uniquement l’art. 42.

L’art. 45 et les conséquences qu’on peut en tirer ne doivent donc pas être pris en considération sans doute comme un point de droit, mais plutôt comme le reflet d’un acte de fait du gouvernement lui-même, à tort ou à raison, en fait complètement abstraction que le gouvernement avait d’ailleurs omis de remplir les formalités spéciales prévues par l’article 40.

La question se réduit donc à ces termes : le gouvernement était-il, lors de la réscision, ou non, fondé à affirmer que l’entreprise n’avait point commencé les travaux sur une échelle proportionnelle à l’étendue de la ligne ou qu’elle n’avait pas terminé le chemin de fer « dans les termes et les délais fixés à l’art. 40 »?

L’examen de cette question appelle nécessairement celui d’une autre forme qui peut être dite, en avant du litige, la question de savoir ce qu’était et quand expirait le délai que l’art. 40 a énoncé en ces termes : Un délai de trois ans à partir du jour où les plans soumis par elle (l’entreprise) au gouvernement auront été approuvés.

C’est sur ce point essentiel que les avis des parties diffèrent du tout au tout. En fait, il y a eu deux approbations de plans : celle du 30 octobre 1884, pour les 82 premiers kilomètres, donnée sans préjudice de la présentation d’un projet intéressant la dernière partie de la voie ferrée jusqu’à la frontière, et celle du 23 février 1889, pour les huit derniers kilomètres.

La partie défenderesse fait courir les trois ans « bénévolement » prolongés par elle de la première de ces dates ; les demandeurs les comp- tent à dater de la seconde. La défenderesse, pour sa part, se souvient que le concessionnaire avait l’obligation de se renseigner lui-même sur la longueur réelle de la ligne et que, dès lors, si les plans présentés par lui paraissaient incomplets, le droit de résiliation de la concession, ont été incomplets, ce défaut qui fit l’objet d’une réserve insérée dans l’arrêt d’approbation lui demeurait imputable et engageait sa responsabilité ; c’était, dit le Portugal, à lui, et à lui seul, d’y remédier en présentant le complément de plans et en exécutant le complément de travaux avant l’expiration du délai qui courait, une fois pour toutes, du 30 octobre 1884.

Cette argumentation ne paraît compatible ni avec le texte ni avec l’esprit de l’art. 38 précité. Le texte de cet article vise un « tracé déjà étudié par l’État du gouvernement portugais et dont les projets devront être fournis » au concessionnaire, qui n’aurait plus qu’à étudier, dans les cent jours, les modifications désirables. Or, un prolongement de huit à neuf kilomètres est plus qu’une simple modification ; et l’interprétation logique corroborée ici le sens littéral ; car il serait par trop malaisé, sinon impossible, de livrer en un mois une telle largeur de trajectoire, de 90 kilomètres, étudié directement sur le terrain.

Il faut donc admettre que, suivant l’article 38, le gouvernement portugais était tenu de fournir un intégral cartographic, lequel devait être le dernier n’ayant plus qu’à contrôler. En tout cas, le concessionnaire était tenu d’admettre de bonne foi que les plans, tels qu’ils lui avaient été fournis, constituaient un prolongement, et le gouvernement portugais lui-même parait avoir été de cet avis, du moins à l’époque de la conclusion du contrat de concession.

Le gouvernement défendeur objecte, il est vrai, que le concessionnaire renseigné par l’ingénieur Machado, avait au titre de celui qui en était réellement, mais ce doit, dont la preuve incomberait à la partie portugaise, n’est pas suffisamment établi. Et le fait, qu’il ne serait pas pertinent, puisqu’il ne suffisait pas que le gouvernement renseigné le concessionnaire ; il fallait qu’il lui fournît les plans, et non un délai ne courait tant que les plans n’étaient pas fournis.

Or, il est avéré que les plans de la dernière section n’ont été livrés que le 23 juillet 1887, et le major Machado, dans la même lettre du 22, assure que c’était par manque de contact communiqué à l’entreprise, constatait d’autre part, qu’il était impossible de fixer le point final de la ligne sans un accord préalable avec le Tramway d’Estoril. Que devient au gouvernement, de ces conditions ? Le Tribunal estime qu’il avait le choix entre deux modes de procédure : ou bien...
renommer, comme il le fit plus tard, à l'entente préalable avec le Transvaal et fixer, de son propre chef, le point terminus, sauf à indemniser l'entreprise si, dans la suite, le déplacement de ce point venait à lui causer quelque préjudice, et inviter celle-ci à lui soumettre, pour approbation, les plans de la dernière section ; ou bien laisser les choses en suspens jusqu'à ce que l'entente avec le Transvaal intervienne. C'est à ce dernier parti que s'arrêta d'abord le gouvernement, parce qu'il attendait d'un moment à l'autre d'autres communications émanées. Et le ministre de la marine et des colonies déclara expressément que « la délimitation de la frontière une fois arrêtée, le gouvernement ne s'opposera pas à ce qu'il soit établi un délai raisonnable pour l'achèvement de la ligne ». Le ministre ajoutait, il est vrai, qu'il serait « possible et convenable » de soumettre dès à présent au gouvernement le projet des sept kilomètres à l'est de tout changement, mais il s'insinua pas et il émit même l'avis, sinon à l'adresse de l'entreprise, du moins vis-à-vis de son collègue des affaires étrangères, « qu'il ne serait pas raisonnable d'attendre de l'Empire à construire 7 ou 8 kilomètres pour renvoyer jusqu'au moment où la frontière serait fixée la construction de la petite partie restante ».

L'action de l'entreprise pendant cette période se trouva donc retardée par l'acquiescence pour le moins tacite du gouvernement.

Celui-ci, cependant, finit par se lasser d'attendre que l'accord avec le Transvaal aboutit et il prit sur lui d'arrêter de son seul chef le point terminus devant faire règle pour l'entreprise parfaitement légitime et que les parties deman-dées offrent à tort ; car elles n'avaient pas à s'immiscer dans les relations internationales du Transvaal, et non moins, de la mani
eriété, désignait une ligne de frontière, cette désignation devait être tenue pour valable, sauf à la compagnie à lui demander dans la suite la réparation du préjudice qu'aurait pu causer, le cas échéant, le déplacement ultérieur de cette ligne.

Mais le gouvernement portugais ne s'en tint pas là. Il fixa en même temps, par une déclaration du 24 octobre 1888, un délai global prévoyant de huit mois pour la présentation des plans de la dernière section, pour leur approbation et pour leur exécution, et il maintenait tissant des menaces de la compagnie concessionnaire.

Cette mesure prise unilatéralement se renforçait dans les limites des droits attribués au gouvernement défendeur par l'acte de concession, ou les excédait-elle ? Telle est la question de droit, primordiale et décisive, que ce tribunal est appelé à trancher.

Or, il est indéniable que la concession ne comporta pas spécifiquement que le gouvernement à fixer de son chef un délai d'achèvement et à décréter le délai ainsi fixé « remplacera pour tous les effets la période indiquée par l'art. 40 du contrat ».

Cette période, le gouvernement pouvait, à la vérité, la prolonger de son plein gré ; aussi s'il l'avait choisi, depuis, d'interpréter son acte comme une prolongation de délai ; mais cette interprétation ne saura être admise que si elle ne vient pas de soumettre le délai de la construction qui s'est démontrée être le délai pour la construction du dernier tronçon n'avait pas même commencé à courir tant que ces plans n'en étaient pas approuvés.

Il s'agissait donc bien, en espèce, d'imputer et non de prolonger un délai.

 Aussi bien, pour rester dans le cadre de la concession, qui formait sur ce point la loi des parties et attribuait notamment à la compagnie des garanties de nature civile, la fixation du délai d'achèvement ne pouvait-elle avoir lieu qu'en conformité de l'art. 40.

Est-ce à dire que, en vertu de cet article, l'entreprise dit absolument bénéficier ce droit strict, ainsi que l'affirment les demandeurs, pour la construction de ces huit derniers kilomètres, du délai de trois ans pleins statué par l'art. 40 en dehors d'un traité du 24 octobre ?

Le Tribunal ne le pense pas. Il estime que pour ce cas non spécialement prévu d'un tronçon complémentaire à construire, l'art. 40 n'était applicable que par analogie ; c'est-à-dire que de même que les parties avaient convenu à l'origine d'un délai de trois ans pour construire environ 80 kilomètres de ligne, elles auraient dû se tenir à nouveau au sujet du temps nécessaire pour la construction de la section finale ; ou à défaut d'entente provoquer sur ce point une décision des arbitres prévus par l'article 53 du contrat.

En revanche, il était décidément inadmissible et contraire au texte de la concession, ainsi qu'au caractère bilatéral de celle-ci, que le gouvernement portugais, cumulant les rôles de juge et de partie, fixât le délai lui seul, en remplacant celui indiqué dans la concession. Il suit de là, qu'en procédant ainsi qu'il l'a fait, le gouvernement a agi en dehors de la concession et notamment de l'art. 42 de celle-ci. Il n'était dès lors pas de droit d'interpréter cette disposition en faisant dans le préambule de son décret du 25 juin 1880, que l'entreprise n'avait pas terminé la construction... dans les termes et aux époques convenus, et à prévaloir expressément dudit art. 42 pour prononcer la résiliation du contrat de concession.

Et si le gouvernement du Portugal soutient aujourd'hui que même dans le premier tronçon, soit-disant acheté, de 82 kilomètres, il manquait bien une convention de son côté, que faut-il donc en déduire ? Il ne peut pas plus être invoqué par lui comme un motif de résiliation que lors de l'ouverture de la première section de la ligne, le 14 septembre 1871. Cette convention ne saura être considérée comme invalide en vertu de la loi portugaise indiquant les ouvrages manquants ou défectueux ; aussi est-il absolument impossible de distinguer les défauts ouvriers de celles occasionnées par la responsabilité de la compagnie, laquelle avait eu que le soin, dans le mois qui suit la fin de l'année 1889, de réparer ces ouvrages défectueux.

Les imperfections originales se confondaient dès lors avec les causes d'interruption ultérieures dont il n'y a pas à tenir compte, puisque, comme il a déjà été exposé plus haut, l'article 45 de la concession traitant des cas d'interruption n'a pas été allégué dans le décret de résiliation.

Il résulte de toutes ces considérations que la question primordiale posée plus haut doit être résolue en ce sens que le décret de résiliation et la prise de possession du chemin de fer n'ont pas été opérés en conformité du contrat de concession.

Il n'est dès lors pas nécessaire de spécifier la nature juridique de ces actes. Du moment qu'ils ne peuvent se justifier par des clauses même de la concession et qu'il n'est pas de contrat qui lait encouru en vertu même de celle-ci, il ne reste plus qu'un seul principe de droit qui puisse être appliqué à la fixation de la « compensation » à allouer par ce tribunal ; ce principe ne peut être que celui des dommages et intérêts, du id que judicium, compromis d'après les règles de droit universellement admises, le damnum emergens et le lucrum cessans ; le prénuptiarium et le gain du mois.

Que l'on veuille, en effet, taxer l'acte gouvernemental de mesure arbitraire et spoliatrice ou d'acte souverain délivré par la raison d'État à l'endroit de celui qui a été effet de dépréciation des particuliers de la compagnie dénoncerait subordonnée, voire même qu'on considère le cas actuel comme un cas d'expropriation légale, toujours est-il que cet acte a eu pour effet de dépréciation des titres de la compagnie et de privilèges d'ordre privé à eux conférés par la concession, et que, à défaut de dispositions légales contraires — dont l'existence n'a pas été alléguée dans l'espèce — l'Etat, auteur d'une telle dépossession, est tenu à la réparation intégrale du préjudice par lui causé.

Il convient cependant de relever des maintenances une autre condition, à savoir que la compagnie portugaise lui engage incontestablement sa responsabilité, résidant plutôt dans le cadre dans lequel le Tribunal. Le Tribunal s'est convaincu par l'étude du dossier que les actions, les articles 45 de la compagnie absolument immérité.

IV. LES PRINCIPES RÉGISSANTS LA FIXATION DES DOMMAGES ET INTÉRÊTS.

D'après le système des demandeurs, le préjudice encouru par les ayants droit serait représenté par la valeur des titres de la compagnie anglaise : valeur nominale des obligations et valeur marchande attribuée aux actions, à l'époque où il précéda l'arrêté assignant le délai de huit mois.

On s'est soucie d'aller encore plus loin et a demandé à lui attribuer 45 pour les actions en général et à 25 environ pour le lot d'actions réuni entre les mains de M. M. Mme....

Ce mode de calcul de l'indemnité paraît inadmissible pour plusieurs raisons.

Tout d'abord il se heurte au motif de forme suivant, qui a été invoqué à bon droit par le Portugal. Les ayants droit demandeurs, quels qu'ils soient d'ailleurs, ne font pas valoir un droit qui soit né en leur personne, mais seulement un droit dérivé. Ils ne sont parties au procès qu'en leur qualité de représentants de la compagnie portugaise ; or, celle-ci n'a rien de commun avec les titres de la compagnie anglaise.

Mais voulant-elle même, avec les demandeurs, identifier les deux compagnies, que l'on ne saurait qualifier de préjudice réel ni la perte d'un capital-actions purement nominal, sur lequel,
notoirement, pas un liard n'a été versé, ni celle d'un capital-obligations de £ 750,000 dont une partie encore restait déposée, indemnité qui, en principe, devra être calculée d'après le rendement capitalisé. 

Or d'après une loi économique qui repose sur l'événement, il est clair que les experts qui l'ont vérifié, est aussi applicable au cas particulier, le rendement du chemin de fer italien, comme celui des chemins de fer nationaux, dépend de l'augmentation de la courbe ascendante qui la représente. En d'autres termes, et bien que le fait de l'augmentation du trafic et du rendement corresponde à la règle, la proportion dans laquelle elle se produira est également variable, celle qui se traduit alors graphiquement par des ondulations et des inflexions imprévues de la courbe. Le tribunal ne peut que se dispenser de faire entrer en ligne de compte, dans l'évaluation du chemin de fer objet du litige, la perspective d'une augmentation graduelle de son rendement. En l'espèce, cela s'impose tout particulièrement, comme cela s'impose en toutes les situations où il s'agit de déterminer, de l'expérience, de l'habitude, de l'actualité, que le trafic augmente plus rapidement et aboutissant dans l'avenir, susceptible d'un grand développement. Il convient donc de se demander de quelle manière les experts peuvent être justement et, sans se contenter d'un simple constat de fait, de prétendre être substituer à un cadre scientifique, que le trafic augmentera de manière plus rapide. Il est clair que le calcul probabiliste, de toutes les autres chances favorables ou défavorables qui pourront influer sur l'auteur de la valeur commerciale de la concession, reste nécessaire. 

Ces réserve faites, la durée théorique de la période qui doit être prise en considération à cet égard peut, tout d'abord, se déduire de la commission de l'État qui décide de ses limites. En termes de l'article 28, le droit de racheter la ligne au bout de 35 ans, s'il est le point de départ de cette période de 35 ans que la compagnie concessionnaire avait la perspective de voyager de la ligne de chemin de fer portugais en suite d'un décret du 29 juin 1889 apparaît comme un rachat anticipé qui prévient les ayants droit des indemnités qui auraient évidemment pendant cette période de 35 ans. L'indemnité intangible consiste donc dans la bonification, 1° des bénéfices réels ou, du moins, vraisemblables de ces 35 exercices (sous déduction des pertes évoquées dans les premiers exercices) qui on le sait, soudain par un déficit; 2° du juge que le Portugal devrait payer dans 35 années; 3° de l'article 28 de la convention, ce prix serait égal au rendement moyen des sept dernières années multiplié par 20. 

Or, si c'est le cas, le chiffre de l'indemnité globale due à une date déterminée, celle de la réception par exemple, il suffit d'additionner les diverses sommes échelonnées sur les 35 années et de les mettre à une date unique par la déduction de l'escompte correspondant aux années intermédiaires. Ce mode de calcul de l'indemnité en prenant en considération toute la période de 35 ans ne s'impose à la vérité que si l'on admet que la marche ascendante du rendement se maintiendra et se poursuivra sans interruption jusqu'à l'année du rachat concessional. Les experts se sont toutefois refusés à tirer de leurs hypothèses des conséquences aussi osées: on a vu qu'ils n'arriveront pas à la limite de la capacité de transport réalisable avec une simple voie actuelle, limite qu'il est facile de voir que le chemin de fer n'atteindra jamais. Ce procédé a suscité les critiques des deux parties: le Portugal taxe d'exagération le coefficient d'augmentation annuelle que les experts ont fixé à 10%. Cette proportion, dit-il, serait déjà démentie par les faits et ne tiendrait d'ailleurs pas compte des aléas de toute sorte auxquels est exposé le trafic d'une ligne dans un pays neuf, sujet à des bouleversements imprévus. Les parties demanderesses, au contraire, affirment que le Transvaal dédouble certainement sa voie, une fois la limite de capacité de la ligne seule atteinte, et en tirer cette conséquence que la capacité de transport doit être considérée comme illimitée et la progression de 10% acceptée comme vraisemblable jusqu'à l'expiration du terme de 35 ans. Le Tribunal a le sentiment que les arguments pour et contre que font valoir ces critiques se contredisent; s'il est, d'une part, assez plausibles que les propriétaires de la ligne du Transvaal se prêteraient, le moment venu, à un doublement de la voie, le coefficient de 10% semble, d'autre part, n'avoir été admissible que sous l'entendu que les travaux pour la suppression des défauts de la ligne portugais portent en suite d'un dècret du 29 juin 1889. En 1886, année de prospérité exceptionnelle, et plus encore dans l'année qui suit de 1889. La somme ainsi obtenu, représentant la valeur intangible du chemin de fer, reviendrait, de droit, tout entière à la compagnie dépositaire, si le capital dépensé pour l'établissement de la ligne provenait d'elle seule. Or, tel n'est pas le cas. D'après le rapport des
experts, le capital provenant de la Compagnie au moment de la résiliation n'était que de fr. 5,690,000; c'est à cette somme que se réduisaient les déb- ses honoraires partiels payés par la Compagnie en anglais au nom de la Compagnie portugaise. La ligne se trouvait en état si précaire que le gouvernement portugais dut affecter fr. 2,310,000 à des réfections et parachèvements de la première section. La construction de la seconde section lui coûtait fr. 1,560,000, l'achat du matériel roulant fr. 1,200,000 et diverses améliorations et agrandissements fut fr. 700,000. Total des dépenses du gouvernement portugais, au dire des experts, pour la mise en état de la ligne, fr. 5,770,000. De plus, le Portugal devra encore, suivant l'expertise, dépenser dix millions de francs pour donner à la ligne la capacité de transport de 400,000 tonnes qui a servi de base au calcul des experts.

La valeur de la ligne, calculée comme il vient d'être exposé, se trouve donc représenté le produit d'une mise de fonds de fr. 21,450,000 dont fr. 5,690,000 seulement fournis par la Compagnie concessionnaire, fr. 5,770,000 fournis par le Portugal devraient suivre la concession et fr. 10,000,000 à fournir par lui de 1897 à 1907.

Il est évident que le Portugal, appelé à payer la ligne dont il a pris possession, a droit à ce qu'il lui soit rendu des apports qu'il a mis pour la mettre en état.

A première vue, la façon normale de lui en tenir compte consisterait, semble-t-il, à le traiter comme un bailleur de fonds, soit comme ayant revu la qualité de gérant de l'affaire d'autrui et à le rembourser, en capital et intérêts, par des prélèvements répartis sur les bénéfices des exercices soldant en bon, de façon à achever avec l'argent consacré aux fonds de 1897 l'année 1898. Le Portugal serait, en d'autres termes, réputé avoir prêté ce capital à l'entreprise et en avoir successivement reçu le remboursement, sur les bénéfices de celle-ci, de 1892 à 1907.

Cette méthode peut parfaitement être acceptée en tant qu'il s'agit des six millions que le Portugal est censé devoir avancer de 1897 à 1906 en vue du perfectionnement de la ligne. Les règlements probables de ces dix années sont, en effet, tels que l'entreprise, en quelques moins qu'elle se trouve, doive être considérée comme pouvant aisément obtenir ces capitaux aux conditions ordinaires du marché, soit qu'elle puisse les prêter sur ses bénéfices annuels, soit qu'elle doive les emprunter à n'importe qui. Le rôle du Portugal, pour cette période, est donc celui d'un prêteur ou éventuellement d'un banquier qui, dans le but de son profit, d'autre action que celle en

remboursement de la somme versée, avec les intérêts usuels. Il n'en va pas de même, en revanche, des fr. 5,770,000 dépensés par le Portugal. La Compagnie, portugaise ou anglaise — car, au point de vue financier, c'était pratiquement tout un — se trouverait, au moment où cette intervention se produirait, dans une situation extrêmement critique, même voisin de la faillite: son capital-actions était et avait toujours été nul, une dette consolidée et privilégiée de & 7,000,000 (fr. 187,000,000) n'avait pour toute contrevalue que des ouvrages incomplets et mal faits, estimés par les experts à moins de six millions de francs; à cela s'ajoutaient encore des dettes chirurgicales criardes et une caisse vide, à telles enseignes que les administrateurs auraient dû avancer de leurs deniers l'argent nécessaire au rapatriement des employés. Enfin, comme garantie à ajouter aux prêts en retour sur les millions nécessaires pour l'achèvement et la mise en état de la ligne, elle n'avait que le rendement, déjà hypothéqué d'ailleurs pour le moment très problématique si ce n'est négatif, d'un chemin de fer sans tracé local et non relié à son hinterland. Vrai est-il qu'on pouvait admettre que le raccordement avec le Transvaal était possible, il n'en demeurait pas moins assez probable que cet État, mal disposé envers la Compagnie concessionnaire et son directeur, continuerait à temporiser pour l'avoire à sa banque, qui est devenue une sous-préfecture de la ligne de la voie qui, sans être avantageuse, quant à elle, réclame une indemnité en argent, presque heureuses, semble-t-il, d'être débarrassées du souci de devoir expérimenter. Pourquoi n'est-ce pas que les obligations que cette exploitation leur coût imposées. Les demandeurs ont donc eux-mêmes assigné au Portugal un rôle autre que celui d'un simple gérant d'affaires, et il n'est pas permis de penser, au jourd'hui qu'à peine, à leur payer la valeur de la chose dont il possédait, il n'aurait que le droit d'en déduire ses dépenses utiles.

C'est ensemble de circonstances annexe la Tribu nal, que pour que le remboursement soit être "le plus juste", à traiter les 7,700,000 francs dépensés par le Portugal non comme une avance faite par un simple gérant d'affaires ou bailleur de fonds, mais comme qualité de gérant de la ligne, en se substituant à ce remboursement, par analogie aux principes de la communauté indemnisée. Le Tribunal attribue en conséquence à cet apport la part proportionnelle des bénéfices que, tout autre capitalisant la récession due aux circonstances données; ce faisant, il estime tenir un compte équitable d'une part de la faute concurremment imputable à la Compagnie en raison des vices graves de sa constitution, en second lieu du risque assumé par le Portugal et que les parties demanderesses ont toujours entendu laissée à sa charge, enfin aussi du service que le Portugal a rendu à l'entreprise en assurant ou, tout au moins, en avançant le raccordement avec le Transvaal.

L'application du système qui vient d'être exposé a, dans l'espèce, les conséquences suivantes:

1° Les fr. 10,000,000 dépensés ou à dépenser par le Portugal de 1897 à 1907 doivent être restitués sous forme de décalages successifs sur les bénéfices des exercices de ces dix années. Pour simplifier le calcul, on supposera que les fr. 10,000,000 ont été dépensés en bloc à la date moyenne du 31 décembre 1901, ce qui, raisonnablement, est un peu en dessous de l'escompte de 6%, donnera une décalage à opérer, sur les bénéfices de 1897 à 1906, de fr. 7,475,000.

2° Les fr. 5,770,000 dépensés par le Portugal de 1896 à 1899 ne doivent pas lui être restitués purement et simplement; cette somme doit, au contraire, être traitée, non comme une avance de fonds de sa part, mais comme un apport fait à la communauté indemnisée. Le gouvernement déten- deur partage à durée, au prorata de cet apport, au capital représentant la valeur du chemin de fer, lequel capital sera, par conséquent, réputé entre lui et les ayants droit de la Compagnie dépossédée dans la proportion de fr. 5,770,000 au Portugal et de fr. 5,000,000 auxdits ayants droit.

V. CALCUL DE L'INDÉMNITÉ DÉRIVÉE DU PRÊT DE LA COMPAGNIE DÉPOSÉE.

En application des principes exposés au chapitre qui précède l'indemnité due pour le chemin de fer de doit se calculer comme suit:

1. Calcul du prix de rachat au 31 décembre 1900.

Aux termes de l'article 28 de la concession, le prix de rachat est égal au produit net moyen des sept dernières années précédant le rachat (sous déduction des résultats des deux années les moins productives)... Ce produit moyen étant réputé égal au produit net de l'exercice de 1907, il y a lieu de déterminer d'abord ce dernier.

Les experts évaluent le rendement de l'année 1907 à fr. 3,210,000. Pour obtenir le produit net, il y a lieu de déduire de ce chiffre:

a. l'annuité pour amortissement,

b. le 5% revenant au gouvernement portu- 
guais.

l. l'annuité pour amortissement.

Aux termes des art. 25, § 1°, et 25 de la concession, la Compagnie devait céder au bout de 59 ans, gratuitement, sa ligne (matériel roulant non compris) au gouvernement portugais. Cette stipulation imposait théoriquement à la Compagnie l'obligation de mettre de côté chaque année une certaine somme pour amortissement du capital d'établissement avant l'expiration de la
Cette somme, capitalisée à 5% c'est-à-dire multipliée par 20, donne comme prix de rachat au 31 décembre 1890 la somme de 4,174,440.

2. Calcul de la valeur du chemin de fer au 31 décembre 1886.

On obtient la valeur du chemin de fer au 31 décembre 1886 en ajoutant au prix de rachat de fin 1890 le produit net des dix années intermédiaires, tel que l'ont établi les experts, le tout ramené par déduction de l'escompte au 31 décembre 1886. Puis de la somme ainsi obtenue, on déduit les fr. 10,000,000 de dépenses de construction présumées qui sont considérées comme remboursées au Portugal, sur le produit net de cette période, par un paiement de fr. 10,000,000 à la date moyenne du 31 décembre 1901.

Cette somme, ramenée à la date initiale du 31 décembre 1891 (escompte 6%*) représente une somme de 7,472,500.

Le taux de 6% pour le calcul de l'escompte ramenant les valeurs jusqu'en 1896 à une époque antérieure se justifie par le fait qu'il constitue une moyenne entre le taux de 7%* consenté aux obligations de la Compagnie anglaise et celui de 5%* admis pour le rachat concessionnel de la Compagnie portugaise.

L'opération qui vient d'être relatée donne les chiffres que voici:

Valeur de rachat au 31 décembre 1906 fr. 7,444,000

Ce capital ramené au 31 décembre 1896 (escompte 6%*) donne . . . 34,478,000

Produits nets annuels de 1897 à 1900:

<table>
<thead>
<tr>
<th>Année</th>
<th>Produits nets</th>
<th>Frais</th>
<th>Profit nets</th>
</tr>
</thead>
<tbody>
<tr>
<td>1897</td>
<td>34,478,000</td>
<td>4,478,000</td>
<td>30,000,000</td>
</tr>
<tr>
<td>1898</td>
<td>34,478,000</td>
<td>4,478,000</td>
<td>30,000,000</td>
</tr>
<tr>
<td>1899</td>
<td>34,478,000</td>
<td>4,478,000</td>
<td>30,000,000</td>
</tr>
<tr>
<td>1900</td>
<td>34,478,000</td>
<td>4,478,000</td>
<td>30,000,000</td>
</tr>
</tbody>
</table>

Total 1,028,000

Valeur au 31 décembre 1890 . . . 31,761,000

Ce capital ramené au 31 décembre 1889 équivalait à . . . 29,065,000

A déduire: Pertes sur l'exploitation de 1890 . . . 694,000

Valeur au 31 décembre 1889 . . . 29,371,000

Ce capital ramené au 25 juin 1889 . . . 28,418,000

A déduire: Pertes sur l'exploitation de 1889 . . . 626,000

Valeur au 25 juin 1889 . . . 28,156,000

4. Répartition.

Comme il a été exposé plus haut, la somme de fr. 28,156,000, représentant la valeur de la ligne ramenée à la date de la concession (25 juin 1889), doit être répartie entre la Compagnie concessionnaire et le Portugal au prorata de leurs apports de fonds respectifs, soit dans la proportion de fr. 5,579,000 pour la Compagnie, et de fr. 2,570,000 au Portugal.

Cette répartition doit donner pour la part revenant à la Compagnie concessionnaire, valeur au 25 juin 1889, la somme de fr. 13,980,000.

VI. indemnité pour les terrains.

Le fait que, de l'avis du Tribunal, la réception de la concession a eu lieu contrairement aux clauses de l'acte du 14 décembre 1883, implique pour le Portugal l'obligation de payer aussi une indemnité pour les terrains que l'entreprise concessionnaire avait choisis en vertu de l'article 21 de la concession ou qu'elle avait le droit de choisir à teneur dudit article.

Les experts ont estimé ces terrains (100,000 ha) en bloc à la somme de fr. 200,000, et ils ont maintenu cette appréciation très basse en dépit des critiques des parties demanderesses, en affirmant catégoriquement qu'en dehors du périmètre de 2 km - qui est expressément exclu de la concession - les terrains n'ont de valeur ni pour la construction ni pour l'exploitation minère.

Le Tribunal a, par ailleurs, fait établir le système d'évaluation qui, de la part française, a été examiné et convenu comme étant le plus juste: prendre d'abord la moyenne des séries de prix fournis par les experts des demandeurs, ce qui donne 1,140,00 ou fr. 42,50 l'hectare, soit en tout fr. 4,250,000; prendre ensuite la moyenne entre ce chiffre et celui de fr. 82,000, montant de l'estimation du major Machado. On arrive ainsi à une valeur de fr. 2,116,000 que le Tribunal, vu le caractère empirique du procédé, arrondit à la somme de deux millions de francs, valeur au 25 juin 1889.

Le Tribunal ne saurait allouer de ce chiffre une somme plus considérable, étant donné que les parties demanderesses elles-mêmes, dans leurs écritures, n'avaient traité la question des terrains comme un point purement secondaire et qu'elles ne lui ont attribué une importance maigre que dans une phase du procès où l'allégation de nouveaux faits n’était plus loisible.

VII. DÉCOMPTE.

Suivant les exposés (V et VI) qui précèdent, l'indemnité, arrêtée à la date du 25 juin 1889, se chiffrera comme suit:

Part à la valeur du chemin de fer . 13,980,000
Indemnité pour les terrains . 2,116,000
Total 15,996,000
Le Portugal a versé en juillet 1890 à valeur sur cette somme un acompte de £ 28,800, soit au cours de fr. 705,000. Ce paiement ramené, lui aussi, au 25 juin 1890, représente à la dite date un montant, à déduire de.

La somme reçue par le Portugal en vertu de la présente convention est donc de.

La Compagnie, ne saurait être accueillie, du moment qu’il n’a pas été jugé que la résiliation était justifiée par une inexécution de contrat de part de l’entreprise concessionnaire.

IX. INTÉRÊTS.

La somme de fr. 15,314,000 représentant la valeur du chemin de fer et des terrains à la date de la conclusion de la présente convention, dû au titre de dommages et intérêts, il est juste qu’elle soit productive d’intérêts jusqu’au jour du paiement, ceci d’autant plus que le Portugal a bénéficié dans l’inter-valle de la contre-valeur en nature dont la productivité considérable n’a pas à être démontrée.

Le taux de ces intérêts moratoires doit être fixé à 7 à 5% en conformité du code de commerce parisien du 28 juin 1888 art. 2, § 2 : « Lorsque des intérêts... sont dus en vertu d’une disposition de loi, ils seront de 7% en matière commerciale. »

Il ne peut d’ailleurs s’agir que d’intérêts simples, la loi portugaise n’admettant pas en pareil cas l’allocation d’intérêts composés. Au surplus, c’est là le mode de calcul généralement adopté en matière d’intérêts moratoires.

X. ATTRIBUTION ET RÉPARTITION DE L’INDÉMNIÉE.

Il a déjà été relevé que la seule personne qui, en droit strict, aurait qualité pour se porter démandeuse vis-à-vis du gouvernement portugais est la Compagnie concessionnaire du chemin de fer, car c’est elle qui a accompli la convention, et en relations contractuelles avec l’État défendeur et c’est elle qui a été dépossédée par la résiliation.

Le Gouvernement défendeur ayant, cependant, déclaré lui-même ne fonder aucune exception sur le fait que la personne réellement légitimée à l’action n’est pas partie au procès, le Tribunal arbitral doit prendre acte de ce que les parties ont convenu, d’un commun accord, de lui substituer la Delagoa Bay Company. Au reste, celle-ci avait, de fait, assumé à l’aide incomparable à la Compagnie portugaise, démembre concessionnaire en la forme, et devenu propriétaire de la critique totalité de ses actions, garantie, il est vrai, d’un droit de gage en faveur de ses créanciers obligataires. Aussi bien, le montant alloué par le présent jugement ne peut-il être attribué à la Compagnie portugaise que sous la condition que celle-ci l’affecte au paiement de ces créanciers obligataires et si, avec un surcroît, ils n’ont pas, selon leur rang.

Ces créanciers n’étant pas représentés directement dans ce procès et n’ayant pas, de conséquence pas eu l’occasion de formuler leurs moyens et conclusions, le Tribunal n’est pas en mesure d’opérer lui-même cette répartition, mais doit abandonner ce soin à qui de droit, en se bornant à ordonner, en principe, qu’il soit dressé un état de distribution.

C’est dans cet état de distribution que la partie américaine, comme tout autre créancier, devra faire valoir ses droits. Il est impossible de lui reconnaître un droit direct contre le Portugal, en concurrence avec la Compagnie angloise et au même titre que celle-ci. L’heurtoir de feu Mac Murdo est intervenue dans ce procès à titre de propriétaire d’actions et d’obligations de la Compagnie angloise, acquises en échange d’actions de la Compagnie portugaise, et, de plus, en qualité de titulaire du « droit de contrôle » qu’elle estime également être en mesure d’exercer dans la Compagnie angloise. Or, aucun de ces titres ne saurait lui conférer une action directe contre le Portugal ; elle ne possède, de ces différents chefs, que des prétextes à faire valoir contre la Compagnie angloise. C’est là des questions de ménage intérieur qu’il est matériellement impossible de trancher dans un procès lié entre la Compagnie angloise d’une part, comme ayant droit de la Compagnie concessionnaire, et le gouvernement du Portugal, d’autre part. On cherchera vainement un motif plausible qui permettrait juridiquement de faire une situation spéciale à l’encontre de la présente société, et sa qualité d’actionnaire la plus forte de la Compagnie angloise et de porteuse d’obligations de celle-ci, et de la traiter, en cette qualité, sur un pied que n’occupierait aucune actionnaire ou obligataire de la Compagnie angloise.

Tout ce qui est au pouvoir du Tribunal de faire à cet égard pour tenir compte de la situation spéciale face à la Compagnie angloise par le compromis arbitral, c’est d’ordonner que la somme qui lui reviendra suivant l’état de distribution à dresser sera versée directement au gouvernement du Portugal.

Il est bien entendu que le Portugal n’est point tenu d’attendre que l’état de distribution soit arrêté, mais que, en attendant de voir dans quelle conséquence la présente proposition du compromis arbitral pourraient se donner des garanties indiscutables.

XI. FRAIS.

Quant à la répartition des frais, le Tribunal croit devoir teur compte de ce que les parties demanderesses ont obtenu environ le tiers de ce qu’elles réclamaient et que le Portugal est canonné à payer environ le triple de ce qu’il offrait. Il n’y a donc, à proprement parler, aucune partie qui obtienne l’entier de ses conclusions. Aussi bien convient-il de compenser les dépens des parties, c’est-à-dire de laisser à la charge de chacune d’elles les frais extrajudiciaires qu’elles ont été appelées à faire, et de faire supporter par parts égales, savoir chacune un tiers, les frais de l’arbitrage.

Par ces motifs, le Tribunal dit et prononce :

1° Le Gouvernement du Portugal, partie défendeuse, est condamné à payer aux Gouverne-ments-Unis des Etats-Unis de l’Amérique du Nord et de la Grande-Bretagne, parties demanderesse, ensemble, en plus des £ 28,000 versées à compter en 1890, la somme de quinze millions trois cent quinze mille francs (15,314,000 F.), la somme étant exigible dans les six mois suivant le jour de l’acte de la Grande-Bretagne, parties demanderesse, à cet acte de la Grande-Bretagne, parties demanderesse, à cet acte de la Grande-Bretagne ; le montant de la somme sera divisé en deux, la moitié devant être payée dans les six mois qui suivent la date de cette convention, et la seconde moitié dans les six mois suivant ;

2° Cette somme, après déduction de ce qui sera nécessaire pour couvrir les frais de l’arbitrage incomblant aux parties demanderesses, et de plus, le reliquat des £ 28,000, versées à compter en 1890, sera affecté au paiement des créanciers obligataires, et autres, s’il y a lieu, de la Delegoa Bay Company, selon leur rang.

Les parties demanderesses dresseront à cet effet un état de distribution.

Le Gouvernement du Portugal aura à verser ces sommes au Gouvernement des États-Unis la somme qui, suivant le dit acte, reviendra à Madame Mac Murdo représentée par ce dernier gouvernement, en sa qualité de créancière obligataire en 1ère et en 2ème rang.

Il versera le surplus au gouvernement de la Grande-Bretagne pour le compte de tous les autres ayants droit.

3° Le délai de six mois fixé par le dernier alinéa de l’article IV du compromis arbitral courra à partir de cette décision.

4° Quant aux frais : Les dépenses des parties sont comprises. Les frais de l’arbitrage, suivant ce qui a été envisagé plus haut, ne se feront pas au profit du tiers de chacune des parties.

Les conclusions des parties, pour autant qu’elles différaient du dispositif ci-dessus, sont écrites.

Une expédition authentique de la présente décision sera délivrée par l’intermédiaire du Conseil fédéral suisse à chacune des trois parties en cause.

Ainsi délibéré en séance du Tribunal arbitral et expédié à Berne le 29 mars 1900.

Les motifs ont été approuvés à Berne le 30 mai 1900.

1 Source finale du Tribunal arbitral de Delagoa, p. 153-200.
Italy and United States Conciliation Commission

Mergé Case – Decision No. 55
Decision of 10 June 1955

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Mergé Case—Decision No. 55

10 June 1955

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CONCILIATION COMMISSIONS

Mergé Case—Decision No. 55
Of 10 June 1955

Nationality—Dual nationality—Right of a United Nations national, possessing also Italian nationality, to claim under paragraph 9 (a) of Article 78 of Peace Treaty—Absence in the Treaty of provisions concerning cases of dual nationality—Law to be applied—General principles of Internal Law governing cases of dual nationality—Test of dominant or effective nationality—Treaty interpretation—Principles of—Intention of the draftsmen—The spirit of the Treaty.

The Conciliation Commission composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Prof. José de Yanguas Messia, Professor of International Law at the University of Madrid, Third Member chosen by mutual agreement between the United States and Italian Governments.


I. THE FACTS

On October 26, 1949, the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic on behalf of Mrs. Florence Strunsky Mergé, a national of the United States of America, a claim based upon Article 78 of the Treaty of Peace with Italy for compensation for the loss as a result of the war of a grand piano and other personal property located at Frascati, Italy, and owned by Mrs. Mergé.

As the Italian Ministry of the Treasury had rejected the claim on the grounds that Mrs. Mergé is to be deemed, under Italian law, an Italian national by marriage, the Agent of the United States of America, on August 28, 1950, submitted to this Commission the dispute which had arisen between the two Governments with respect to the claim of Mrs. Mergé.

1 Collection of decisions, vol. III, case No. 3.
Following the Answer of the Italian Agent, the Conciliation Commission issued an Order on September 27, 1951, by which the dispute was limited to the consideration of the problem of Mrs. Merge's dual nationality, and all other questions regarding the right to compensation were reserved for subsequent consideration.

The following facts relating to the two nationalities, Italian and United States, possessed by Mrs. Merge are revealed by the record:

Florence Strunsky was born in New York City on April 7, 1909, thereby acquiring United States nationality according to the law of the United States.

On December 21, 1933, and at the age of 24, Florence Strunsky married Salvatore Merge in Rome, Italy. As Mr. Merge is an Italian national, Florence Strunsky acquired Italian nationality by operation of Italian law.

The United States Department of State issued a passport to Mrs. Merge, then Miss Strunsky, on March 17, 1931. This passport was renewed on July 11, 1933, to be valid until March 16, 1935.

Mrs. Merge lived with her husband in Italy during the four years following her marriage until 1937. Her husband was an employee of the Italian Government, working as an interpreter and translator of the Japanese language in the Ministry of Communications. In 1937 he was sent to the Italian Embassy at Tokyo as a translator and interpreter.

Mrs. Merge accompanied her husband to Tokyo, travelling on Italian passport No. 601609, issued on August 27, 1937 by the Ministry of Foreign Affairs in Rome. The passport was of the type issued by the Italian Government to employees and their families bound for foreign posts.

After her arrival in Japan, Mrs. Merge on February 21, 1940 was registered, at her request, as a national of the United States at the American Consulate General at Tokyo.

Mrs. Merge states that, when hostilities ceased between Japan and the United States of America, she refused to be returned to the United States by the United States military authorities, having preferred to remain with her husband.

On December 10, 1948, the American Consulate at Yokohama issued an American passport to Mrs. Merge, valid only for travel to the United States, with which she travelled to the United States. She remained in the United States for nine months, from December, 1946, until September, 1947. The American passport issued to her at Yokohama and valid originally only for travel to the United States, was validated for travel to Italy, and the Italian Consulate General at New York on July 31, 1947, granted Mrs. Merge a visa for Italy as a visitor, valid for three months.

On September 19, 1947, Mrs. Merge arrived in Italy where she has since resided with her husband.

Immediately after returning to Italy, on October 8, 1947, Mrs. Merge registered as a United States national at the Consular Section of the American Embassy in Rome. On October 16, 1947, Mrs. Merge executed an affidavit before an American consular officer at the American Embassy in Rome for the purpose of explaining her protracted residence outside of the United States. In this affidavit she lists her mother and father as her only ties with the United States, and states that she does not pay income taxes to the Government of the United States.

On September 11, 1950 Mrs. Merge requested and was granted by the Consular Section of the American Embassy at Rome a new American passport to replace the one which had been issued to her on December 10, 1946, by the American Consulate at Yokohama and which had expired. In her application for the new American passport, Mrs. Merge states that her "legal residence"

is at New York, New York, and that she intends to return to the United States to reside permanently at some indefinite time in the future.

So far as the record indicates, Mrs. Merge is still residing in her husband in Italy.

II. The Issue

It is not disputed between the Parties that the claimant possesses both nationalities. The issue is not one of choosing one of the two, but rather one of deciding whether in such case the Government of the United States may exercise before the Conciliation Commission the rights granted by the Treaty of peace with reference to the property in Italy of United Nations nationals (Articles 78 and 83).

The Commission, completed by the Third Member, called upon to decide this case, notes that the problem raised has the importance of a question of principle, also because of the frequency with which it is presented, in view of the difference between the municipal laws (conflict between interpretations of jure sanguinis and jus soli; diverse regulation of acquisition and loss of nationality by the woman who marries an alien, cases of automatic reacquisition of original nationality, etc.). The Commission has therefore deemed it advisable to take up the examination of the complex problem of dual nationality in all its aspects.

(1) Position of the Government of the United States of America:

(a) The Treaty of Peace between the United Nations and Italy provides the rules necessary to a solution of the case. The first sub-paragraph of paragraph 9 (a) of Article 78 states:

"United Nations nationals" means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

All United Nations nationals are therefore entitled to claim, and it is irrelevant for such purpose that they possess or have possessed Italian nationality as well.

(b) The intention of the drafters of the Peace Treaty was to protect both the direct and indirect interests of United Nations nationals in their property in Italy.

(c) The principle, according to which one State cannot afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses, cannot be applied to the Treaty of Peace with Italy because such principle is based on the equal sovereignty of States, whereas this Treaty of Peace was not negotiated between equal Powers but between the United Nations and Italy, a State defeated and obliged to accept the clauses imposed by the victors who at that time did not consider Italy a sovereign State.

(2) Position of the Italian Government:

(a) The text governing cases of dual nationality is not the first sub-paragraph of paragraph 9 (a) of Article 78 but the second sub-paragraph of the same paragraph: only in cases of treatment as enemy can the Italian national who is also a United Nations national request application of Article 78.

(b) A defeated State, even when it is obliged to undergo the imposition of the conqueror, continues to be a sovereign State. From the juridical point of view, the Treaty of Peace is an international convention, not a unilateral
act. In cases of doubt, its interpretation must be that more favourable to the debtor.

(c) There exists a principle of international law, universally recognized and constantly applied, by virtue of which diplomatic protection cannot be exercised in cases of dual nationality when the claimant possesses also the nationality of the State against which the claim is being made.

III. INTERPRETATION OF THE TREATY OF PEACE

(1). The letter of the Treaty of Peace (Paragraph 9 (a) of Article 78):

The first problem to be confronted by the Commission is that concerning whether this provision does or does not govern the problem of dual nationality.

(a) First sub-paragraph of the definition: “United Nations nationals” means individuals who are nationals of any one of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

In reality, the importance of this provision is confined to two points only (1) to explain the phrase, “United Nations nationals”, used in the preceding paragraphs of Article 78 itself—doubtless for the sake of brevity, by specifying that by such phrase it is intended to indicate “individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations”; (2) to require possession of such nationality of any of the United Nations on the date of the coming into force of the Treaty and on September 3, 1943, that is, when the Armistice was signed. Neither one of these two conditions refers to dual nationality.

Can it nevertheless be considered to be implicitly contained in the letter of the text? The same question was discussed during the Venezuelan Arbitrations (1903-1905). One of the claimants, Mrs. Brignone, a widow, possessed dual nationality, Italian and Venezuelan. The Italian Commissioner based his argument on the text of the Protocol. Mrs. Brignone, he stated, is Italian according to Italian Law. It does not matter that she is also Venezuelan. Article 4 of the Protocol of February 13, 1903, speaks of “Italian claims, without exception”. To exclude claims of Italian nationals because they simultaneously possess another nationality is to introduce an exception not contemplated by the text and is an infraction of the provisions of the Protocol. The Umpire did not accept this argument, nor did he follow a literal interpretation. He faced openly the problem of dual nationality.

The fact that there exists in the Treaty of Peace which we are discussing an apposite definition of persons who can invoke the benefits of Article 78 obliged its drafters even more, even to the extent of inserting it explicitly in the text of all the cases which it was desired to include within its contents. Therefore, it is clear that, in the first sub-paragraph, no reference, direct or indirect, is made to dual nationality. This is the surest indication that the problem did not enter the minds of the drafters of the Treaty. If it had, it seems most probable that it would have been included in the definition, even more so much more because this legal situation has previously given rise to numerous controversies and arbitrations on the international level.

(b) Second sub-paragraph of the definition: If dual nationality is not governed by the first sub-paragraph, is it perhaps governed by the second?

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1 Volume X of these Reports, p. 542.
and the Treaty, by its nature, is such—must be performed only within the limits of what has been agreed.

(3) **Principle of equality**:

Finally, let us see if the Treaty of Peace between the United Nations and Italy lacks the principle of legal equality and hence can have applied to it no principle of international law which is based on the equality between sovereign states.

To admit this argument it would be necessary that the Treaty of Peace not be a treaty. Prof. Rousseau writes and underlines: "Those between contracting parties at least one of which is not a direct subject of the Jus Gentium cannot be classified as treaties" (translated from Spanish) (Rousseau, Droit International Public, Paris, 1953, p. 17). Listz says: "The capacity to conclude treaties derives from sovereignty. Nevertheless, the custom exists of conceding to semi-sovereign States the right to conclude treaties, on condition that they do not have a political character (especially, commercial treaties)" (Listz, Derecho Internacional Publico (traducción española) Barcelona, 1929, p. 225). A treaty of peace, essentially political by nature, is subject to this rule.

The defeated State can, in the peace treaty itself, accept limitations, more or less temporary, on the exercise of its sovereignty. Such acceptances, however, as a manifestation of intention, presupposes possession of a personality on the international level as a subject of the Jus Gentium. The armistice is only an agreement of a military nature which recognises a situation of fact, leaving the juridical settlement for the subsequent treaty of peace.

Without the consent and the signature of the defeated State a treaty of peace does not exist. It may be a unilateral regulation on the part of the victor, but it is not a treaty of peace, Dupuis says:

> Whether one looks at it from the point of view of natural law or from the point of view of positive law, the fact that force intervened to dictate a treaty or a law is fatal to itself, to invalidate the treaty or the law. The State which accepts a treaty under the pressure of force is bound by the consent given. If it agrees reluctantly, it agrees, with full knowledge, in order to avoid the force, in order to avoid a worse evil or in order to obtain some advantage of which a refusal would deprive it. If force has a weight in its decision, it is not the only fact in that decision. If it did not agree, it would remain under a regime of force and of force only... The object of treaties is to replace the instability of force with the stability of conventions. (translated from French) (Dupuis, Recueil des COURS de L’Académie de Droit International de la Haye, 1924, vol. 2, pp. 346-7).

The inequality of every treaty of peace following a victory exists and is manifested, not in the capacity of the international subjects which conclude it, but rather in the very contents of the treaty. This inequality, consequence of the victory, has been translated into numerous clauses of the Treaty which we are discussing, and likewise could have been manifested—but it was not—by the express regulation of dual nationality within paragraph 9 (a).

**IV. Principles of international law**

As the Treaty contains no provisions governing the case of dual nationality, the Commission must turn to the general principles of international law.

In this connexion two solutions are possible: (a) the principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person also possesses; (b) the principle of effective or dominant nationality.

(1) **The Hague Convention of 1930**:

The two principles just mentioned are defined in this Convention: the first (Article 4) within the system of public international law; the second (Article 5) within the system of private international law.

Article 4 (approved in plenary session by 29 votes to 5) is as follows:

> A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

The same Convention, in Article 5, indicates effective nationality as the criterion to be applied by a third State in order to resolve the conflicts of laws raised by dual nationality cases. Such State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be most closely connected.

This rule, although referring to the domestic jurisdiction of a State, nevertheless constitutes a guiding principle also in the international system.

Certain of the replies sent by the Governments to the Preparatory Committee of the Hague Conference, charged with drawing up the Bases for Discussion, are interesting and are helpful to our study.

The Government of the United States, in its reply, set forth an instructive historical datum. It concerned a letter dated August 8, 1882, which the then Secretary of State of the United States, Mr. Frelinghuyzen sent to a member of Congress, Mr. O’Neill, with regard to a young man born in the United States of German parents and desirous of going to Germany to pursue his studies:

> The young man referred to, under the Constitution of the United States, having been born in this country, is, while subject to the jurisdiction of the United States, a citizen of the United States notwithstanding the fact of this father being an alien. As such citizen he is entitled to a passport. This, of course, would be a sufficient protection to him in every other country but that of his father’s origin—Germany. There, of course, as the son of a German subject, it may be claimed that he is subject to German military law, and that, not being then subject to the jurisdiction of the United States, he can not claim the rights secured to him by the 14th amendment to the Constitution. It is proper, therefore, that I should add, in the interest of young Mr. J, that it will be perilous for him to visit Germany at present. (143, MS. Dom. Let. 270; Moore, Digest of International Law, vol. III, p. 532)

To clarify the concept, there is added in the aforesaid reply the following comment, which connects the letter with the concrete aspect of protection:

> In any case, it is considered necessary to view the aforesaid mentioned statements as referring to the right of the interested parties to the protection of the Government of the United States abroad, rather than referring to the strictly legal question of their nationality. (translated from Spanish) (Bases for Discussion of the Preparatory Committee, Reply of the United States of America, vol. I, p. 27).

The Government of the United States added with reference to the principle of effective nationality:

> There exists presently no established rule which permits a determination, in the case of an alien who possesses the nationality of two other States, of which one is the nationality that must be recognized by the United States...
appear to be no obstacle to the regulation of this question by international agreement, and we consider that the domicile of the interested party should be taken into consideration in order to determine his nationality. (translated from Spanish) (op. cit., x. 32)

The Italian Government, in its Reply, declared itself in favour of the nationality which is accompanied by habitual residence (op. cit., p. 33)

The Hague Convention, although not ratified by all the Nations, expresses a commiss de nato juris, by reason of the near-unanimity with which the principles referring to dual nationality were accepted.

(2). Precedents:

Uniformity of precedents in this field does not exist, but it can be stated that the ratio of nearly all the arbitral and judicial decisions on the international level is either one or the other of the two afore-mentioned principles. We shall cite a few by way of example.

(a) The principle which bars diplomatic protection of the individual who is a national of the State against which the claim is made was applied by the United States-British Claims Commission established under the Treaty of Washington of May 8, 1871, in the Alexander Case between Great Britain and the United States (Moore, International Arbitrations, 1898, vol. III, p. 2529). Instead, the same Commission decided the Halley Case, between the same Powers, in another way (Moore, op. cit., p. 2239).

(b) In the Venezuelan Arbitrations, the British Agent himself, in the Mathison Case,1 maintained the view that, if a claimant were both a British subject and a Venezuelan national, his claim could not be heard by the Commission (Ralston, Venezuelan Arbitrations of 1903, 1904, p. 429 et seq.). The principle of effective nationality was indeed applied in the following cases: Miliani,2 Italy vs. Venezuela (Ralston, op. cit., pp. 754-761); Stevenson,3 Great Britain vs. Venezuela (Ralston, op. cit., p. 438 et seq.); Massiani,4 France vs. Venezuela (Ralston's Report of 1902, Washington, 1906, p. 211, 224).

(c) The case of Baron Canevaro, Italian jure sanguinis and Peruvian jure soli, is typical of those decided in favour of the effective nationality. The case having been submitted to the Permanent Court of Arbitration at the Hague, the motive which—according to the decision of May 3, 19121—caused the Peruvian nationality to prevail for the purposes of the disputed claim was the previous conduct of Canevaro, who was a candidate for election to the Senate where only Peruvian nationals are admitted and who had requested the Government of Peru, as its national, to grant authorization to perform the functions of Consul General of the Netherlands (Revue générale de droit international public, 1913, pp. 328-33).

(d) The Franco-German Mixed Arbitral Tribunal applied the principle of effective nationality in the case of Mrs. Barthaz de Monfort vs. Tiehander (Decision of July 10, 1926).6

(e) The Franco-Mexican Claims Commission (1924-1932) examined the problem of dual nationality in 1928 in the George Pinson Case.7 The decision

is based on the fact that the French nationality of Pinson was proved, but not the Mexican nationality, so that, in reality, contrary to Mexico’s claim, there did not exist a case of dual nationality.

Nevertheless, it is important to examine the reasoning of the President of the Commission, Mr. Verzijl, who states that the Mexican argument was based on the theory, generally enough admitted in the jus gentium, according to which a State is not permitted to take advantage of its right to provide diplomatic protection in the event that the nationals to be protected simultaneously possess the status of nationals of the State against which the right of protection is to be exercised. Mr. Verzijl continues:

While recognizing the well-foundedness of that theory for the cases in which the person in question is effectively considered and treated as a national by each of the two States in the case, and this by virtue of legal rules which do not overstep the bounds set out for them by public or customary international law, I nevertheless believe I must make certain reservations with regard to its admissibility in the case in which one or the other of these two conditions might not be fulfilled. (translated from French) (La réparation des dommages causés aux étrangers par des mouvements révolutionnaires. Jurisprudence de la Commission franco-mexicaine des réclamations. 1924-1932, Paris, A. Pedone.)

Although the word “effectively” seems to refer to the principle of effective, in the sense of dominant, nationality, this is not so, because the case which Prof. Verzijl is considering is not that of choosing one of two nationalities but rather that of ascertaining that each of the two contesting States effectively considers and treats the person in question as its national.

(f) The International Court of Justice, in its Advisory Opinion of April 11, 1949, refers to “The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national” (International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1949, p. 186).

The same International Court, in the interval between the meeting of this Commission in Paris and the meeting in Rome, issued a decision in the Nettelsbohm Case (Lichtenstein vs. Guatemala) which is not a case of dual nationality; but it is interesting for our purposes to note that is set forth in the reasoning of the decision in regard to the problem of dual nationality when such problem arises because of the simultaneous possession of the nationality of two States involved in the dispute:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country, etc., a native by birth or by adoption, etc., abroad.

(3). Legal literature:

(a) The institute of International Law, during its meeting at Cambridge in 1931, discussed an excellent report of Professor Borchard. It was entitled "Diplomatic Protection of Citizens Abroad". Its purpose was explained by
Borchard himself: “This report shall be confined to a study of the conditions for protection when a formal international request for damages can be submitted, either through diplomatic channels or before an international tribunal in conformity with the existing or appropriate rules of law” (translated from Spanish) (Annuaire de l’Institut de droit international, Session de Cambridge 1931, vol. I, p. 274).

Borchard’s proposal was to make a compilation of the existing positive law, so as to avoid uncertainties and controversies. Therefore, he refused (Annuaire, 1931, vol. II, p. 203) to accept an amendment of Mr. Politis, supported by Messrs. de la Barra and James Brown Scott, in favour of the admissibility of diplomatic protection whenever there had been a change of nationality, because it meant an innovation. And this faithfulness of Mr. Borchard in adhering to the existing law and in not accepting any innovation was precisely the cause of the suspension of the discussion and its postponement to a later meeting (Annuaire, 1931, vol. II, p. 212).

Within the framework of positive law and of simple compilation within which the Yale Professor kept himself, he is to be nestered of assertion of his: “It is a well established rule of international law that a person who possesses two nationalities cannot demand that one of the countries of which he is a national appear as defendant before an international tribunal” (translated from Spanish) (Annuaire, 1931, vol. I, p. 289).

Of the members of the XIXth Commission consulted by Borchard, only one, Prof. Kraus, proposed a change in wording, formulated as follows: “The protection of a national in international law can be exercised in favor of individuals as well as of legal persons who possess the nationality of the protecting State if, according to the law of the defending State, they do not simultaneously or exclusively possess the nationality of the latter State” (translated from Spanish) (Annuaire, 1931, vol. I, p. 481).

In the plenary discussion (Annuaire, 1931 vol. II, pp. 201 et seq.), no comment was made on the principle declared in this respect by Mr. Borchard. It should be noted that jurists representing the most varying legal systems in the world participated in the meeting.

(1) The writers of treaties on international law recognize the two principles which we are expounding. Two excellent contemporary authors, Rousseau and Batiroll, attest their existence in books of recent publication date.

Rousseau writes: “In case of dual nationality, the claimant State in general refuses to protect a person against a State of which he is simultaneously a national; a claimant is not protected against his own State” (translated from Spanish) (Rousseau, Droit international privé, Paris, 1933, p. 233).

In the same order of ideas, Batiroll says: “Nevertheless, a positive limit is recognized to this liberty of the States (in the field of nationality): States may not exercise diplomatic protection on behalf of their nationals against other States which consider the latter as their own nationals” (translated from Spanish) (Batiroll, Droit international privé, 2nd edition, Paris, 1955, p. 87).

However, both authors also mention the theory of effective nationality (Rousseau, op. cit., p. 364; Batiroll, op. cit., p. 92).

The same theory, on the other hand, has not only been recognized but has also been adopted by jurists of such universal authority as A. de la Pradelle and Basdevant.

La Pradelle defends effective nationality even when the nationality of the defendant State is involved (Dictionnaire Diplomatique, under the heading Nationalité), and Basdevant, in an interesting comment on the Venezuelan Arbitrations of 1903-1905, emphasizes and explains the idea which predominates in those decisions according to which “the conflict between two nationalities must be resolved by giving prevalence to the law which with the real nationality of the person in question corresponds” (translated from French) (Confis de nationalités dans les arbitrages vézuéliens, Revue de droit international, 1909, p. 41 et seq.).

V. Considerations of law

(1) The rules of the Hague Convention of 1930 and the customary law manifested in international precedents and in the legal writings of the authors attest the existence and the practice of two principles in the problem of diplomatic protection in dual nationality cases.

The first of these, specifically referring to the scope of diplomatic protection, as a question of public international law, is based on the sovereign equality of the States in the matter of nationality and bars protection in behalf of those who are simultaneously also nationals of the defendant State.

The second of the principles had its origin in private international law, in those cases, that is, in which the courts of a third State had to resolve a conflict of nationality Laws. Thus, the principle of effective nationality was created with relation to the individual. But decisions and legal writings, because of its evident justice, quickly transported it to the sphere of public international law.

(2) It is not a question of adopting one nationality to the exclusion of the other. Even less when it is recognized by both Parties that the claimant possesses the two nationalities. The problem to be explained is, simply, that of determining whether diplomatic protection can be exercised in such cases.

(3) A prior question requires a solution: are the two principles which have just been set forth incompatible with each other, so that the acceptance of one of them necessarily implies the exclusion of the other? If the reply is in the affirmative, the problem presented is that of a choice; if it is in the negative, one must determine the sphere of application of each one of the two principles.

The Commission is of the opinion that no irreconcilable opposition between the two principles exists; in fact, to the contrary, it believes that they complement each other reciprocally. The principle according to which a State cannot protect one of its nationals against a State which also considers him its national and the principle of effective, in the sense of dominant, nationality, have been accepted by the Hague Convention (Articles 4 and 5) and by the International Court of Justice (Advisory Opinion of April 11, 1949 and the Nottebohm Decision of April 6, 1955). If these two principles were irreconcilable, the acceptance of both by the Hague Convention and by the International Court of Justice would be incomprehensible.

(4) The International Court of Justice, in its recent decision in the Nottebohm Case, after having said that “. . . international law leaves to each State to lay down the rules governing the grant of its own nationality”, adds: “On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connexion with the State which assumes the defence of its citizens by means of protection as against other States.” . . . “Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connexion with the State which has made him its national.” (Judgment of April 6, 1955, p. 23).

For even greater reason, this theory must be understood to be applicable
to the problem of dual nationality which concerns the two contesting States, in view of the fact that in such case effective nationality does not mean only the existence of a real bond, but means also the prevalence of that nationality over the other, by virtue of facts which exist in the case.

(5). The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved because the first of these two principles is generally recognised and may constitute a criterion of practical application for the elimination of any possible uncertainty.

(6). The question of dual nationality obviously arises only in cases where the claimant was in possession of both nationalities at the time the damage occurred and during the whole of the period comprised between the date of the Armistice (September 3, 1943) and the date of the coming into force of the Treaty of Peace (September 15, 1947). In view of the principles accepted, it is considered that the Government of the United States of America shall be entitled to protect its nationals before this Commission in cases of dual nationality, United States and Italian, whenever the United States nationality is the effective nationality.

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.

(7). It is considered that in this connexion the following principles may serve as guides:

(a) The United States nationality shall be prevalent in cases of children born in the United States of an Italian father and who have habitually lived there.

(b) The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have reacquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy.

(c) With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

(d) In case of dissolution of marriage, if the family was established in Italy and the widow transfers her residence to the United States of America, whether or not the new residence is of an habitual nature must be evaluated, case by case, bearing in mind also the widow’s conduct, especially with regard to the raising of her children, for the purpose of deciding which is the prevalent nationality.

(8). United States nationals who did not possess Italian nationality but the nationality of a third State can be considered “United Nations nationals” under the Treaty, even if their prevalent nationality was the nationality of the third State.

(9). In all other cases of dual nationality, Italian and United States, when, that is, the United States nationality is not prevalent in accordance with the above, the principle of international law, according to which a claim is not admissible against a State, Italy in our case, when this State also considers the claimant as its national and such bestowal of nationality is, as in the case of Italian law, in harmony (Article 1 of the Hague Convention of 1900) with international custom and generally recognized principles of law in the matter of nationality, will reacquire its force.

VI. DECISION

Examining the facts of the case in bar, in the light of the aforementioned criteria, especially paragraph 6, in relation to paragraph 7 (c), the Commission holds that Mrs. Merge can in no way be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, because the family did not have its habitual residence in the United States and the interests and the permanent professional life of the head of the family were not established there. In fact, Mrs. Mergé has not lived in the United States since her marriage, she used an Italian passport in travelling to Japan from Italy in 1937, she stayed in Japan from 1937 until 1946 with her husband, an official of the Italian Embassy in Tokyo, and it does not appear that she was ever interned as a national of a country enemy to Japan.

Inasmuch as Mrs. Merge, for the foregoing reasons, cannot be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America is not entitled to present a claim against the Italian Government in her behalf.

The Italian-United States Conciliation Commission, having noted the statement made during the deliberations by the Italian Representative in the name of his Government, according to which Mrs. Mergé, as an Italian national, will be able to submit a suitable claim to the competent Italian authorities, under domestic law, for the damages in question, even though the time-limit for such claims has expired, unanimously,

DECIDES:

1. The Petition of the Agent of the United States of America is rejected.
2. This Decision is final and binding.


The Third Member
José de Yanguas Messi

The Representative of the
United States of America
J. Matturri

The Representative of the
Italian Republic
Antonio Sorrentino
United States-United Kingdom Claims Arbitration Tribunal

Robert E. Brown
Award of 23 November 1923

*Reports of International Arbitral Awards*, vol. VI
by the existing land lines and specified by the Spanish military superior authorities. It was, therefore, according to that report, "indispensable to meet this necessity by replacing the land telegraph lines by submarine cables, which will permit the maintenance at all times of connexion and communication between the strategic points of the island"; and among them, those situated on the south coast between Cienfuegos and Santiago de Cuba were mentioned as being of less need and importance.

In these circumstances the right of the United States to take measures of admittedly legitimate defense against these means of enemy communication was fully justified; if some compensation was due to the Company for the damage done to the cable, it was for the Spanish Government to make it, always supposing that such compensation had not been already considered in the terms agreed upon under the concessions. In our opinion, not only is there no ground of equity upon which an award should be made against the United States, but equity appears to us to be on the side of the United States in their refusal to pay the damages claimed.

Now, therefore:

The Tribunal decides that the claim be disallowed.

ROBERT E. BROWN (UNITED STATES) v. GREAT BRITAIN

(November 23, 1923. Pages 187-202.)

INTERPRETATION OF MUNICIPAL LAW BY INTERNATIONAL TRIBUNAL. DENIAL OF JUSTICE. EXHAUSTION OF LOCAL REMEDIES. EQUITY. Proclamation issued on June 18, 1895, by President of South African Republic designating certain tract of land, called Witfontein, as public gold field beginning July 19, 1895. Suspension of proclamation on July 18, 1895, by Executive Council at Pretoria. Application for 1,200 prospecting licences, made under the proclamation by Mr. Robert E. Brown, United States citizen, on July 19, 1895. Licences refused on the ground of suspension of proclamation. Pegging out of 1,200 mining claims by Brown who, notwithstanding refusal of licences, asserted title. Second proclamation issued on July 20, 1895, by State President adjoining opening of Witfontein until August 2, 1895. Suit brought on July 22, 1895, before High Court of the South African Republic by Brown demanding licences to cover 1,200 claims already pegged off. Resolution adopted on July 26, 1895, by Second Volksraad approving withdrawal of first proclamation and issuance of second one, and declaring that no person who had suffered damage should be entitled to compensation. Third proclamation issued on July 31, 1895, by State President further adjoining opening until August 30, 1895. New government distributing many of mining claims by lot drawn up on August 15, 1895, and made applicable to Witfontein on August 20, 1895. Alternative claim for damages in the original action filed by Brown in October, 1895. Judgment in Brown’s favour on January 22, 1897, the Court setting aside resolution of July 26, 1895, as unconstitutional. Ordering issuance of licences, and inviting Brown to pursue alternative claim for damages by motion in the event of his being unable to peg off 1,200 mining claims. Licences for 1,200 mining claims of no practical value issued on February 9, 1897. Damages sought by Brown by motion, notice of which given on December 10, 1897. Chief Justice dismissed from office by State President on February 16, 1898, under so-called testing law of February 26, 1897. Judgment delivered on March 2, 1898, denying motion, with leave to start new action. No further attempt by Brown to get relief in Courts. Held that Brown acquired rights of substantial character under laws and regulations in force on July 19, 1895, and that numerous steps taken by Executive Department, Volksraad and Judiciary with obvious intent to defeat Brown's claims constitute denial of justice. No failure to exhaust local remedies—merely a matter of equity and never a bar under terms of submission—since futility of further proceedings demonstrated.

CONQUEST, ANNEXATION, SUCCESSION OF STATES: PRIVATE RIGHTS ACQUIRED PREVIOUS TO—PENDING CLAIMS. LIQUIDATED DEBTS. SUZERAINITY. CONQUEST by Great Britain of territory of South African Republic, annexation on September 1, 1900. Held that for wrongs done to Brown by former State Great Britain not liable, neither as a succeeding State (no undertaking to assume such liability, pending claim instead of liquidated debt; no obligation to take affirmative steps to right those wrongs), nor as a former suzerain over South African Republic. Claim disallowed.


Bibliography: Nielsen, pp. 162-186.

The United States claims £390,000, with interest, from Great Britain on account of the alleged denial of certain real property rights contended to have been acquired in 1895, by one Robert E. Brown in the territory of the South African Republic which was conquered and annexed by Great Britain on September 1, 1900.

The material facts are as follows:

Brown, an American citizen, and a mining engineer by profession, went to South Africa in the year 1894. He became interested in gold mining prospects, and in 1895 devoted particular attention to a piece of property known as the Witfontein farm through which, in his judgment as well as in that of many others, the principal gold-bearing reef of that region was supposed to run. Under the prevailing system governing the disposal and acquisition of mining rights, the State, being the owner of all minerals, subject to certain preferential rights of the land proprietors, was accustomed from time to time by proclamation to throw open for the prospecting and location of mining claims specified tracts of land. Such tracts were thereby formally designated as public gold fields and, in accordance with the terms of the proclamations, any and all persons were privileged to apply for prospecting licenses to be issued by an official designated as the Responsible Clerk of the district in which the land lay.

On June 18, 1895, a proclamation was duly issued by the State President declaring the eastern portion of the Witfontein farm public digging under the administration of the Responsible Clerk at Doornkop, such proclamation to take effect on July 19, 1895 (memorial, p. 54). There was apparently wide interest among the State authorities in the development of this field, and several companies were then formed to promote mining activity. The claims were based on the fact that the Witfontein farm was a public digging at the time of the proclamation and that the claimants were entitled to be granted licenses to prospect and mine.
10 o'clock of the same morning, stating that he was awaiting definite advices from the seat of government. Brown thereupon handed to the Clerk a written demand for 1,200 licences (memorial, p. 88). Shortly thereafter, and before 10 o'clock, the Clerk received a telegram from the seat of government announcing the withdrawal of the proclamation under which Witfontein had been thrown open as a public digging. Brown again protested and made a tender of the money for the licences, which was refused. He then héliographed his agents at Witfontein to go ahead and peg out the claims (memorial, p. 61), himself proceeding to the scene where he arrived about noon.

Pursuant to his instructions, 1,200 mining claims were in fact pegged, and Brown subsequently asserted title to them on the ground that the withdrawal of the original proclamation was invalid and that the Clerk had no right to refuse issuance of the licences. Other parties acted in the same manner (memorial, p. 64).

It appears that on the day preceding the opening of Witfontein under the proclamation, to wit: on July 18, 1895, the Executive Council at Pretoria, by resolution, provided for the suspension of the proclamation (memorial, p. 83); and on July 20, 1895, the State President, on the advice of the same Council, caused a second proclamation to be published in the Official Gazette, adjourning the opening of Witfontein for the period of fourteen days. To wit: until August 2, 1895 (memorial, pp. 81-82).

On July 22, 1895, Brown began a suit in the High Court of the South African Republic demanding the licences to cover the 1,200 claims which he had in fact already pegged off (memorial, p. 52).

On July 26, 1895, the Second Volksraad, one of the two legislative chambers of the Republic having jurisdiction over these matters, adopted the following resolution: approving the action of the Executive Department in withdrawing the original proclamation and in issuing the second proclamation (memorial, p. 56):

"The Second Volksraad, regard being had to the communication of the Government dated July 26, 1895, in the matter of the provisional suspension of the proclamation of Witfontein, No. 572, district Krugersdorp, Limpopo Vlei, No. 682, district Krugersdorp, and Palmeifontein, No. 697, district Potchefstroom, and regard being further had to the Executive Council resolution, article 516, of today's date, whereby a certain draft resolution is submitted by the Executive Council to the Honourable the Second Volksraad for approval and acceptance:

"Resolves to agree to the proposal of the Executive Council contained in the said resolution and further resolves to accept the said draft resolution as submitted by the Executive Council as the resolution of the Second Volksraad."

On July 31, 1895, a third proclamation was issued by the State President further adjourning the Witfontein opening until August 30, 1895 (memorial, p. 86).

Meanwhile an entirely new plan, for distributing mining claims by lot, was drawn up on August 15, 1895 (memorial, p. 165; answer, p. 213); and on August 20, 1895, the regulations for drawing by lot were made specifically applicable to Witfontein (memorial, p. 168). The claims of Witfontein were accordingly disposed of under the lottery plan.

The defendants in the suit begun by Brown, being the State Secretary and the Responsible Clerk, answered on August 14, 1895, setting up the resolutions and proclamations referred to (memorial, p. 53). In October, 1895, Brown filed in the same action, a claim in the alternative for damages amounting to £372,400. He also filed a replication asserting the invalidity of the proclamations and resolutions relied upon by the defendants (memorial, p. 58). The defendants then interposed a formal answer to the alternative claim. The case came on for trial November 15, 1895 (memorial, p. 60); and on January 22, 1897, judgment was given in Brown's favour in the following terms:

"BE IT HEREBY ORDERED

That judgment be and is hereby granted in favour of the plaintiff with the costs of this action."

"The Responsible Clerk at Doornkop is ordered to issue prospecting licenses to the plaintiff on payment of the necessary moneys, in order to be enabled thereunder to peg 1,200 claims on the eastern and proclaimed portion of the farm Witfontein" (memorial, pp. 74-75).

The opinion of the Court was delivered by Chief Justice Kotze (memorial, p. 20). A separate opinion reaching the same conclusion was filed by one of the other members of the Court, Justice Morice (memorial, p. 40). Briefly, the Court held: that the original proclamation was valid and duly published according to law; that it could not be withdrawn or set aside save by a new proclamation duly published in the same manner; that the order suspending the operation of the proclamation not being published in the Official Gazette until the day after the date fixed for the opening, was ineffectual; and that there was consequently no legal warrant for refusing the licenses on July 19, 1895. The concluding paragraph of the opinion by the Chief Justice was as follows:

"The plaintiff is entitled to be placed by the Court in as nearly as possible the same position in which he would have been on the morning of the 19th July, 1895. He has framed his claim, by means of a subsequent amendment, in the alternative, that the Responsible Clerk at Doornkop shall be ordered, upon receipt of the necessary moneys, to issue to the plaintiff a licence for 1,200 prospecting claims upon the proclaimed portion of Witfontein, or otherwise that the sum of £372,400 shall be paid to him as and by way of damages. Plaintiff is clearly entitled thereto. The plaintiff is able to peg off 1,200 prospecting claims on the eastern portion of Witfontein. Nothing definite was said in the argument about the measure of damages, and no special grounds have been submitted to us on behalf of the Government, why, in the event of the Court deciding in favour of the plaintiff, it would be impossible for him to proceed to peg off the 1,200 claims, which he has already informally pegged off. The evidence, so far as it relates to this point, leaves no doubt that if the plaintiff had obtained the licence to which he was entitled, he would have been able to have properly pegged off the 1,200 prospecting claims, which as a matter of fact he did peg off. That certain persons also lay claim to some of these 1,200 prospecting claims by virtue of vergunningen, is a question which can at some future time be settled between them and the plaintiff and, if need be, decided by the Court. It cannot affect our judgment in this case. Should it appear that it has become impossible for the plaintiff to peg off under the prospecting licence the 1,200 specific claims, either he has obtained the licence to which he is entitled, or the Court, on the 19th of July, 1895, it will become necessary for the Court to determine the amount of damages. We can do no more at present, for although the plaintiff is entitled to compensation against the State, by reason of the unlawful conduct of an official acting upon instruction of the Government, the onus of showing, with more or less definiteness and as nearly as possible the amount of the damages lies upon him, and the evidence, which he has submitted on this point, is too vague and uncertain to enable us to base any satisfactory calculation thereon. In the event of the Court being called upon to fix the damages later on, further and more satisfactory evidence with respect thereto will, after notice served upon the Government, have to be laid before us. For the present there must be judgment
in favour of the plaintiff, with costs. The Responsible Clerk at Doornkop is ordered to issue to the plaintiff upon due payment of the necessary amount, a prospecting licence for 1,200 claims on the eastern and proclaimed portion of the farm Witfontein" (memorial, pp. 39-40).

Justice Morice, while concurring in the judgment, took the position that Brown acquired no right to specific claims by reason of the actual pegging after the licences had been refused him on July 19, 1895 (memorial, p. 48).

At the time the judgment was rendered, Brown was not in South Africa, and his interests were in the hands of one Oakes, who, in his behalf, proceeded on January 23, 1897, to tender £300 for 1,200 licenses (memorial, p. 95), whereupon, after some delay in order to permit the Responsible Clerk to receive final instructions, on February 9, 1897, the licences for 1,200 prospecting claims good for one month were issued, bearing, however, the following endorsement:

"These claims cannot be removed, as they encroach upon the ‘owners’ and ‘vergunning’ cls." (memorial, p. 97).

Under this licence, though the evidence on the point is doubtful, it would seem that the 1,200 claims pegged in the first instance were repegged (memorial, pp. 94-95; further British memorandum, pp. 12, 15).

The customary privilege of renewal being denied, Brown’s representative found the licence of no practical value, and was obliged to fall back upon the alternative claim for damages.

At this point it becomes necessary to note the wider significance of the decision in Brown’s case. It will have been observed that the resolution of the Second Volksraad above quoted not only approved the second proclamation of the State President, but declared in effect that all peggings under the original proclamation were unlawful and that no person who had suffered damage in the circumstances could be entitled to compensation. It was opposed by the defendants that this resolution of a single chamber has the legal force of law, and in this connexion article 32 of Law No. 4 of 1890 was invoked, reading as follows:

"The legal force of a law or resolution published by the State President in the Gazette may not be disputed saving the right of the people to make petitions with regard thereto." (answer, p. 263).

In answer to this contention it was pointed out that under the Grundwet or Constitution of the Republic the terms of the Gold Law under which the original proclamation had been issued could not be altered except by legislative enactment. The issue was thus sharply raised as to whether the High Court had the duty and power to uphold the Constitution by setting aside legislative enactments and resolutions in conflict therewith.

In the previous case of McCorkindale’s Executors v. Bok (answer, p. 263), Chief Justice Kotze himself had denied the power of the Court in this respect, but in subsequent decisions (memorial, p. 25), he had stated that the views expressed in the McCorkindale case would no longer be supported. He now undertook, in an opinion which exhibits great industry and ability, to deal with this constitutional question at length, and reached the conclusion, which accords with American practice, that the Constitution was supreme and that acts in conflict therewith must be declared void by the Court. Even before this decision, and while the case was pending, the President of the Republic had interviewed the Chief Justice and threatened to suspend him from office in the event of his failure to uphold the right of the Executive and Legislative Departments to override the Constitution (memorial, p. 143). There now ensued an amazing controversy between the Court and the Executive. We do not propose to examine the details of this unique judicial crisis. It is sufficient to note that the result was the virtual subjection of the High Court to the executive power. An obedient legislature immediately enacted, at the demand of the Executive, the so-called testing law, dated February 26, 1897, and effective March 1 of that year, the terms of which were as follows:

"1. As long as the People has not clearly made it known to the satisfaction of the first Volksraad that it desires to alter the existing condition the existing and future laws and Volksraad resolutions shall be recognized and respected by the Judiciary in agreement with article 80 of the Grundwet (Constitution) of 1896, and the Judiciary has not the competency to refuse to apply a law or Volksraad resolution because such law or resolution is, in the opinion of the Judge, either in form or substance in conflict with the Grundwet, in other words the Judiciary shall not have the competency for the want of it, either by the Grundwet (Constitution) or by any other law to arrogate to itself the so-called testing right.

"2. The Judges, Landdrost and other members of the Judiciary shall, in future, take the following oath before accepting office:

"I solemnly and swear solemnly to act faithfully for the people and the laws of this Republic, in my position and office to act justly, equitably, without respect of persons in accordance with the law and Grundwet resolution and to the best of my knowledge and conscience; not to arrogate myself to any so-called testing right; not to accept from anyone any gift or favour if I have reason to suspect that it was made or shown to me to persuade me in my judgment or action in favour of the person so giving or favouring, and that in my other capacities than as Judge I shall obey according to law the commands of those placed over me, and, in general, my only object shall be the maintenance of law, justice, and order to the furtherance of the prosperity, welfare, and independence of law and people. So truly help me God almighty.

"The Members of the High Court and the Landdrosts shall take the oath before the President and Members of the Executive Council.

"3. The Judge who does not act in accordance with article 1 of this law shall be considered to have committed an official offence as mentioned in article 86 of the Grundwet of 1896.

"4. The President is hereby authorized to ask the present Members of the Judiciary, or to cause them to be asked, if they consider it to be in accordance with their oath and their duty to decide in accordance with the existing and future laws and Volksraad resolutions, and not to arrogate to themselves the so-called right of testing, and further instructs the President to discharge from their office those Members from whom he has received either a negative or, in his opinion, an insufficient, or within a specified time, no answer at all.

"5. Volksraad resolution shall, in this law, be understood to mean both resolutions of the old Volksraad and resolutions of the First and also of the Second Volksraad, which are in force in virtue of article 31, Law No. 4, 1890, now article 79 of the Grundwet of 1896. ’People’ shall be understood to mean the fully enfranchised Burgers of the South Africa Republic.

"6. This law shall not impair rights which may have been obtained by sentences of the High Court before the passing of this law.

"7. This law shall come into operation immediately after publication in the Staatscourant." (answer, pp. 313-315).

The enactment of this law was the prelude of the state of so-called legal anarchy, which endured for approximately a year, and eventually led to the armed intervention of Great Britain and the ultimate annexation of the South African Republic. In this period a vigorous but vain fight for the independence of the
judiciary was made by the bench, the bar, and the press (memorial, p. 103-145).

The Executive authority pursued its main object relentlessly and on February 22, 1800, the resolution of the Senate of the United States passed the case to the House of Representatives. The House of Representatives appointed a committee to probe into the matter. The committee's report was forwarded to the Senate, and the Senate concurred in the appointment of the committee.

One of the charges made against Brown was that effective guarantees of personal liberty were not adequately established, and that the protections which the executive branch held there had been neglected. The Senate, in a letter to the President, expressed its concern that the executive branch had not been taking sufficient action to ensure the protection of personal liberty.

James Madison, in his response to the Senate, stated that the claim of personal liberty was not adequately established. He argued that the government had not been taking sufficient action to ensure the protection of personal liberty. Madison further stated that the government had not been taking sufficient action to ensure the protection of personal liberty.

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lawfully held by third persons under the Gold Law, and any interference with the title of the present holders would give rise to a general feeling of insecurity. If Mr. Brown considers he has any legal right to obtain possession of the claims, or that he is entitled to damages, the Supreme Court is open to him and he may take any proceedings he may be advised to" (memorial, p. 158).

The Government of the United States took up the question with the British Government, and on November 14, 1903, Lord Landsdowne from the Foreign Office wrote to the American Ambassador as follows:

"With reference to my note of the 23rd May last I have the honour to inform you that His Majesty's Government have given their most careful consideration to the claim of the late Mr. R. E. Brown, a United States citizen, against the Government of the late South African Republic.

"This claim appears to be based in the first instance on an alleged liability of the late Government of the Transvaal in damages for not granting a concession to Mr. Brown. The Court of the late Government refused redress and Mr. Brown's claim seems in the second instance to be based on an alleged wrong by reason of the corrupt or illegal action of the Court at the dictation of the Executive.

"As regards the first ground, His Majesty's Government are unable to find that it has ever been admitted that a conquering State takes over liabilities of this nature, which are not for debts, but for unliquidated damages, and it appears very doubtful to them whether Mr. Brown's claim could be substantiated at all or in any case for any substantial amount.

"As regards the second ground, it has never so far as His Majesty's Government are aware been laid down that the conquering State takes over liabilities for wrongs which have been committed by the Government of the conquered country and any such contention appears to them to be unsound in principle. Furthermore, His Majesty's Government are unable to find that the late Mr. Brown has any claim under international law against that Government of the Transvaal as successor to the Government of the South African Republic" (memorial, p. 159.)

The claim was included in the schedule for submission to arbitration by this tribunal under clause 1, as a claim based on the denial in whole or in part of the real property rights.

Two main questions arise on these facts: First, whether there was a denial of justice in any event; and Second, whether in case a denial of justice is found, any claim for damages based upon it can be made to lie against the British Government.

On the first point we are of opinion that 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 by the Government of the South African Republic in such manner and under such circumstances as to amount to a denial of justice within the settled principles of international law. We therefore appreciate the force of the argument to the contrary which has been made on technical grounds. It may well be said that at no time did Brown acquire and hold any title or right to specific mining claims; that at most he was entitled to a licence under which he might have located and become the owner of particular claims; that the actual pegging of claims in his behalf on July 19, 1895, was unsupported by any licence, and therefore had no legal effect; that the judgment of January 22, 1897, established merely his right to a licence and gave him no title to particular claims; that the alternative demand for damages was never liquidated; and that his legal remedies were not completely exhausted inasmuch as he never followed up the claim for damages by taking out a new summons in accordance with leave granted by the order of March 2, 1898. 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 fact 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. And in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the State itself. Annexation by Great Britain became an act of political necessity if those principles of justice and fair dealing which prevail in every country where property rights are respected were to be vindicated and applied in the future in this region.

We do not regard as a decisive factor Brown's failure or inability to acquire specific claims, nor are we inclined to refine over a possible distinction between a right to specific real property, and the right to acquire such a right. We prefer to take a broader view of this situation, and we hold that through compliance with the laws and regulations in force on July 19, 1895, Brown acquired rights of a substantial character, the improper deprivation of which did constitute a denial of justice. Certainly the High Court, in its decision, so regarded them.

We are not impressed by the argument founded upon the alleged neglect to exhaust legal remedies by taking out a new summons. At best this argument would, under the Terms of Submission which control us here, be merely a matter to be taken into account as one of the equities, and could not be considered as in any sense a bar. In the actual circumstances, however, 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" (Moore's International Law Digest, vol. VI, p. 677).

On this branch of the case we are satisfied, therefore, that there was a real denial of justice, and that if there had never been any war, or annexation by Great Britain, and if this proceeding were directed against the South African Republic, we should have no difficulty in awarding damages on behalf of the claimant.

Passing to the second main question involved, we are equally clear that this liability never passed to or was assumed by the British Government. Neither in the terms of Annexation granted at the time of the surrender of the Boer Forces (answer, p. 192), nor in the Proclamation of Annexation (answer, p. 191), can there be found any provision referring to the assumption of liabilities of this nature. It should be borne in mind that this was simply a pending claim for damages against certain officials and had never become a liquidated debt of the former State. Nor is there, properly speaking, any question of State succession here involved. The United States plants itself squarely on two propo-
sitions: first, that the British Government, by the acts of its own officials with respect to Brown's case, has become liable to him; and, secondly, that in some way a liability was imposed upon the British Government by reason of the peculiar relation of suzerainty which is maintained with respect to the South African Republic.

The first of these contentions is set forth in the reply as follows:

"The United States reaffirms that Brown suffered a denial of justice at the hands of authorities of the South African Republic. Had it not been for this denial of justice, it may be assumed that a diplomatic claim would not have arisen. But it does not follow that, as is contended in His Majesty's Government's answer, it is incumbent on the United States to show that there is a rule of international law imposing liability on His Majesty's Government for the proceedings of the South African Republic. Occurrences which took place during the existence of the South African Republic are obviously relevant and important in connexion with the case before the Tribunal, but the United States contends that acts of the British Government and of British officials and the general position taken by them with respect to Brown's case have fixed liability on His Majesty's Government." (reply, p. 2.)

Again on page 8 of the reply it is said:

"The succeeding British authorities to whom Brown applied for the licences to which he had been declared entitled by the Court also refused to grant the licences, and therefore refused to carry out the decree of the Court which the United States contends was binding on them. And they have steadfastly refused to make compensation to Brown in lieu of the licences to which the Court declared Brown to be entitled, failing the granting of the licences."

The American Agent quoted these passages in his oral argument (transcript of 17th sitting, November 9, 1923, pp. 357-368) and disclaimed any intention of maintaining "that there is any general liability for torts of a defunct State" (a case more was exceptional than usual); the record for any indication that the British authorities did more than leave this matter exactly where it stood when annexation took place. They did not redress the wrong which had been committed nor did they place any obstacles in Brown's path, they took no action one way or the other. No British official nor any British court undertook to deny Brown justice or to perpetrate the wrong. The Attorney General of the Colony, in his opinion, declared that the courts were still open to the claimant. The contention of the American Agent amounts to an assertion that a succeeding State acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former State. We cannot endorse this doctrine.

The point as to suzerainty is likewise not well taken. It is not necessary to trace the vicissitudes of the South African State in its relation to the British Crown, from the Sand River Convention of 1852, through the annexation of 1877, the Pretoria Convention of 1881, and the London Convention of 1884, to the definitive annexation in 1900. We may grant that a special relation between Great Britain and the South African State varying considerably in its scope and significance from time to time, existed from the beginning. No doubt Great Britain's position in South Africa imposed upon her a peculiar status and responsibility. She repeatedly declared and asserted her authority as the so-called paramount Power in the region; but the authority which she exerted over the South African Republic certainly at the time of the occurrences here under consideration, in our judgment fell far short of what would be required to make her responsible for the wrong inflicted upon Brown. Concededly, the general relation of suzerainty created by the Pretoria Convention of 1881 (reply, p. 26), survived after the concluding of the London Convention of 1884 (reply, p. 37). Nevertheless, the specific authority of the suzerain power was materially changed, and under the 1884 Convention it is plain that Great Britain as suzerain, reserved only a qualified control over the relations of the South African Republic with foreign powers. The Republic agreed to conclude no "treaties or engagements" with any State or nation other than the Orange Free State, without the approval of Great Britain, but such approval was to be taken for granted if the latter did not give notice that the treaty was in conflict with British interests within six months after it was brought to the attention of Her Majesty's Government. Nowhere is there any clause indicating that Great Britain had any right to interest herself in the internal administration of the country, legislative, executive or judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way. Indeed, the only remedy which Great Britain ever had for maladministration affecting British subjects and those of other Powers residing in the South African Republic was, as the event proved, the resort to war. If there had been no South African war, we hold that the United States Government would have been obliged to take up Brown's claim with the Government of the Republic and that there would have been no ground for bringing it to the attention of Great Britain. The relation of suzerain did not operate to render Great Britain liable for the acts complained of.

Now, therefore:

The decision of the Tribunal is that the claim of the United States Government be disallowed.

RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED
(GREAT BRITAIN) v. UNITED STATES
(November 28, 1923. Pages 336-346.)

Preliminary Motion: Procedure. — Jurisdiction: Power of Tribunal to Decide on Own. — Applicable Law, Interpretation of Municipal Law. — Private Interest in Claim. — Presentation of Claim: Procedure. Lease on May 30, 1896, by American company to English company of irrigation undertaking in New Mexico. Preliminary motion to dismiss claim for absence of British interest and breach of rules of procedure in presentation of case. British objection that no written application made for motion and no written agreement existed between Agents. Held that Tribunal has inherent power, and indeed duty, to entertain and, in proper cases, to raise for itself preliminary points going to its jurisdiction. Held also that according to applicable American law lease of undertaking not valid and that English company possesses no interest on which claim can be founded. Held further that defects in British memorial not such as to furnish adequate ground for preliminary motion. Claim dismissed.


Bibliography: Nielsen, pp. 332-335.

This is a claim preferred by His Britannic Majesty's Government on behalf of the Rio Grande Irrigation and Land Company, Limited, and founded upon an alleged denial of real property rights.
Request for interpretation of Article VII, paragraph 1, of the Claims Settlement Declaration in regard to whether the Tribunal has jurisdiction over claims against Iran by persons who are, under United States law, citizens of the United States of America and are, under Iranian law, citizens of the Islamic Republic of Iran.

II. Issue Presented

The question now before the Tribunal is whether the Claims Settlement Declaration grants the Tribunal jurisdiction over claims against Iran by persons who, during the relevant period which is from the date the claim arose until 19 January 1981, were Iranian citizens under the law of Iran and United States citizens under the law of the United States.

The relevant provisions of the Claims Settlement Declaration which the Tribunal must interpret are Article II, paragraph 1, and Article VII, paragraph 1 (a).
An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States, the United States and nationals of Iran against Iran and claims of nationals of Iran against the United States, including claims against the United States, as provided in section 178 of the United States Claims Settlement Act of 1979 (22 U.S.C. 1781). The Tribunal shall not have jurisdiction over payments made to claimants as a result of the settlement of claims by the United States or Iran under the Claims Settlement Declaration (see below).

III. Contentions of the Two Governments

A. Contentions of the Islamic Republic of Iran

Iran takes the position that persons, who under Persian law are Iranian citizens, may not bring before this Tribunal claims against Iran, irrespective of whether they may also be United States citizens. Iran's argument is summarized in the following paragraphs.

The jurisdiction of the Tribunal in this case is to be determined by reference to the Claims Settlement Declaration (the “Declaration”). The Tribunal has jurisdiction over all claims arising under the Declaration and by reference to the United Nations Security Council Resolution 498. The Tribunal has jurisdiction to award compensation of any nature to all persons who have suffered property losses as a result of the Islamic Republic of Iran's nationalization of foreign property.

The Tribunal is not a court of law but a body for the purpose of settling private international disputes. The Tribunal is not a court of law but a body for the purpose of settling private international disputes. The Tribunal is not a court of law but a body for the purpose of settling private international disputes. The Tribunal is not a court of law but a body for the purpose of settling private international disputes. The Tribunal is not a court of law but a body for the purpose of settling private international disputes.

The international law pertaining to the exercise of diplomatic protection clearly prohibits claims by a “national” of a State against a State, if such claims are based on the exercise of diplomatic protection. Therefore Article VII, paragraph 1 (a), must be interpreted in accordance with rules of international law, must be read in a manner consistent with the terms of the General Declaration and the United States, Iran and the United Nations Security Council.

The Tribunal has jurisdiction over claims of a United States citizen against Iran whether or not that person is a citizen of Iran. The definition of “national” by reference to citizenship under international law was intended to make that clear. The United States submits that only if it is determined that the Claims Settlement Declaration is in any way ambiguous on this point should there be resort to international law as a guide to interpreting the language of the Declaration. In the event the Tribunal deems it necessary to resort to international law to interpret such language, any domestic definition of “citizen” is irrelevant as the issue before the Tribunal is one of international law, not domestic law.

Any domestic definition of “citizen” is irrelevant as the issue before the Tribunal is one of international law, not domestic law. This textual interpretation is supported by several other points. Article VII, paragraph 1 (b), through its requirement of ownership and control of corporations, forecloses the possibility of the dual nationality of corporations. This indicates an intention which should apply to natural persons according to that State's internal laws. In addition, the ordinary meaning of the term “national” is not accorded the same bankruptcy and other benefits under the Treaty of Amity. The Tribunal has jurisdiction over claims of a United States citizen against Iran whether or not that person is a citizen of Iran. The definition of “national” by reference to citizenship under international law was intended to make that clear. The United States submits that only if it is determined that the Claims Settlement Declaration is in any way ambiguous on this point should there be resort to international law as a guide to interpreting the language of the Declaration. In the event the Tribunal deems it necessary to resort to international law to interpret such language, any domestic definition of “citizen” is irrelevant as the issue before the Tribunal is one of international law, not domestic law.
The ordinary meaning of "national" and "citizen" in international legal usage are different. "Nationality" stresses the international aspect of state membership and is determined with reference to international law. "Citizenship" stresses the application of municipal law. Under United States law, a United States citizen may also be a national of another country. Therefore, Article VII, paragraph 1 (a), for United States claimants means that "a national of the United States (without regard to whether the claimant is also an Iranian national) would be unjustified.

As regards the practice of the parties, when Iran and the United States intended to exclude dual nationals, the wording of the 1943 Agreement on Nationality submitted to the Mixed Arbitral Tribunal was qualified, except that the United States had agreed to include dual nationals. Thus, the interpretation of Article VII, paragraph 1 (a), by the United States is supported by the Algiers Declarations in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The United States argues that the text is clear and unambiguous in that by defining "nationals" as "citizens", a term of municipal law, it makes clear that all nationals of the United States and of Iran, including dual nationals, are entitled to bring claims in this Tribunal.

Iran also asserts that the text is clear and unambiguous in that the ordinary meaning of the word "nationals" is confined to citizens of the United States or of Iran. According to Iran, dual nationals are not "nationals of the United States" and are therefore not entitled to bring claims in this Tribunal.

Since the express language of the Claims Settlement Declaration supports the United States position, resort to international law is not necessary. Iran, however, argues that Article VII, paragraph 1 (a), of the Claims Settlement Declaration is ambiguous with respect to the determination of effective nationality. The United States response is that the text is clear and unambiguous in that the ordinary meaning of "nationals" includes "citizens" and all nationals of the United States are entitled to bring claims in this Tribunal.

The United States argues that the text is clear and unambiguous in that by defining "nationals" as "citizens", a term of municipal law, it makes clear that all nationals of the United States and of Iran, including dual nationals, are entitled to bring claims in this Tribunal.
"national" excludes dual nationals, as does the use of the disjunctive article "or". Moreover, Iran argues that a treaty text can confer jurisdiction on an international tribunal only to the extent that it reflects the "converging will" of the two States and that Iran, not recognizing dual nationality, could not be presumed to have accepted such jurisdiction when the Claims Settlement Declaration was signed.

Neither of these arguments can be accepted. The Tribunal cannot agree that the text is so clear and unambiguous as to make further analysis unnecessary. Moreover, definition of "nationals" as "citizens" in the Claims Settlement Declaration was an inadequate way to raise the issue of dual nationality. In view of the formal, recorded position of the United States with respect to claims by dual nationals, that is, a State is not required to recognize a claim asserted against it by another State on behalf of an individual possessing the nationality of both States, unless such individual has a closer and more effective bond with the claimant State [6], it would be expected that, if the United States wished to propose a different rule which ignored the relative closeness of ties, it would have done so more clearly. With respect to the additional Iranian argument, the Vienna Convention does not require any demonstration of a "converging will" or of a conscious acceptance by each Party of all implications of the terms to which it has agreed. It is the "terms of the treaty in their context and in the light of its object and purpose" with which the Tribunal is to be concerned, not the subjective understanding or intent of either of the Parties.

Paragraph 3(c) of Article 31 of the Vienna Convention directs the Tribunal to take into account "any relevant rules of international law applicable in the relations between the parties." There is a considerable body of law and legal literature, analyzed herein, which leads the Tribunal to the conclusion that the applicable rule of international law is that of dominant and effective nationality.

1. The 1930 Hague Convention

On 12 April 1930, a convention was concluded at The Hague "Concerning Certain Questions relating to the Conflict of Nationality Laws" (the "Hague Convention"). As Article 1 of that Convention makes plain, a determination by one State as to who are its nationals will be respected by another State "in so far as it is consistent" with international law governing nationality. International law, then, does not determine who is a national, but rather sets forth the conditions under which that determination must be recognized by other States.

Article 4 of the Convention provides: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." But this provision must be interpreted very cautiously. Not only is it more than 50 years old and found in a treaty to which only 20 States are parties, but great changes have occurred since then in the concept of diplomatic protection, which concept has been expanded. See Sirot, Juris-Classeur Droit International, La Protection Diplomatique, Fasc. 250-B, No. 20 (1965); Kiss, Repertoire de Droit International, Dalloz, Protection Diplomatique No. 14. This concept continues to be in a process of transformation, and it is necessary to distinguish between different types of protection, whether consular or claims-related.

Moreover, the negotiating history of Article 4 of the Hague Convention suggests that its application is doubtful in a case, such as the present one, where a dual national, by himself, brings before an international tribunal his own claim against one of the States whose nationality he possesses. Such a proposal was made during the Conference, but it was rejected. See Kosters, XXV Rev. de Droit Intern. Prive 412, 424 (1930).

Another reason why the applicability of Article 4 to the claims of dual nationals before this Tribunal is debatable is that it applies by its own terms solely to "diplomatic protection" by a State. While this Tribunal is clearly an international tribunal established by treaty and while some of its cases involve disputes between the two Governments and involve the interpretation and application of public international law, most disputes (including all of those brought by dual nationals) involve a private party on one side and a Government or Government-controlled entity on the other, and many involve primarily issues of municipal law and general principles of law. [7] In such cases it is the rights of the claimant, not of his nation, that are to be determined by the Tribunal. This should be contrasted with the situation of espousal of claims in international law which the Permanent Court of International Justice described as follows: "...in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. [8] Moreover, the object and purpose of the Algiers Declaration was to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in the normal sense. It seems clear that a major obstacle to the resolution of that crisis was the existence of much litigation in the courts of the United States brought against Iran by citizens of the United States, often involving judicial attachments of Iranian assets. In order to overcome that obstacle and permit the return of these assets and the termination of that litigation, a new substitute forum -- this Tribunal -- was established.

It is also noteworthy that Article 5 of the Hague Convention recognized the principle of the stronger link for purposes of decisions by third States in cases of dual nationality. Although this Tribunal is not an organ of a third State, [9] it is also not, as noted above, a tribunal where claims are espoused by a State at its discretion and decided solely by reference to public international law.

2. Precedents

In this field, there is a considerable number of relevant judicial and arbitral decisions, most of them prior to the Second World War, supplemented and interpreted by the writings of scholars. The writing of at least one scholar, Professor E.B. Borchard [10], apparently had a considerable effect, not only because of the later writers who have echoed his views which favored the rule of nonresponsibility, but also because of his influence on the Hague Conference that adopted the 1930 Convention discussed above. In fact, the precedents on which Borchard relied did not generally support his conclusion [11], and the Parties in the present case have acknowledged that the law prior to 1930 was uncertain. Iran, however, considers the conclusion of the 1930 Convention a decisive turning point that crystalized the rule of non-responsibility. The United States, on the other hand, points to the limited number of parties to that Convention and the practice of States, particularly in the conclusion and interpretation of claims settlement agreements since the Second World War. The Tribunal, having had the benefit of extensive written and oral argument of these issues by eminent counsel, does not believe it would be worthwhile for it to recite and comment upon the many precedents cited by the Parties, for the Tribunal is satisfied that, whatever the state of the law prior to 1945, the better rule at the time the Algiers Declarations were concluded and today is the rule of dominant and effective nationality.

The two most important decisions on the subject in the years following the Second World War have had a decisive effect. First, the International Court of Justice, in the Nottebohm Case, on 6
April 1955, stated the following: in his Children, etc.

Similarly, the courts of third States, when they have before them an individual whom two other

countries consider as their national, will be more likely to apply the real and effective nationality

criteria and their prevailing tendency is to prefer the real and effective nationality.

A few months later, on 10 June 1955, the Italian-U.S. Conciliation Commission set up by

the Peace Treaty of 1947, decided in the Merge Case that the principle... which accorded with the

facts, that based on stronger factual ties between the person concerned, his family ties, his participation in public life, attachment shown by him for a given country and

his nationality. The Franco-Italian Conciliation Commission also decided several claims of dual

nationals according to the "link theory". See Rambaldi Claim (France v. Italy) 13 R.I.A.A. 786 (1957; 181

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nationals. The Franco-Italy...
Dated, The Hague 6 April 1984

Gunnar Lagergren
(President)

Nils Mangard
Concurring Opinion

Willem Riphaagen
Concurring Opinion

Howard M. Holtzmann
Concurring Opinion

George H. Aldrich
Concurring Opinion

Richard M. Mosk
Concurring Opinion

The members of the Tribunal make the following Declaration:

IN THE NAME OF GOD

The present Decision is yet another clear manifestation of a bad faith interpretation rendered by this Tribunal. The composition of the so-called neutral arbitrators, itself the result of the imposed mechanism of the UNCITRAL Rules, is so unbalanced as to have made the Tribunal lose all credibility to adjudicate any dispute between the Islamic Republic of Iran, as a Third World revolutionary country, and the United States, as the symbol of the world capitalism. The Tribunal is now composed of two Swedish arbitrators, one of whom persists in staying on despite the fact that he was rightly disqualified by the Islamic Republic prior to the commencement of the Tribunal's judicial proceedings over two years ago, and of an agent of the Dutch Government's Ministry of Foreign Affairs, the NATO military ally of the United States.

The doctrine of non-responsibility of States vis-à-vis their nationals before international tribunals is based on the principle of the equal sovereignty of States and is supported, inter alia, by the 1930 Hague Convention, the 1949 Opinion of the International Court of Justice, the 1965 Resolution of the Institute of International Law, and by the practice of States. Its validity cannot be affected by the present Decision rendered merely to demonstrate loyalty to the United States and to damage the prestige of the Islamic Republic and the Third World.

The adherence of the Islamic Republic of Iran to the Algiers Declarations was based on the principle of equal sovereignty of States and on the United States' commitment not to further intervene in the internal affairs of Iran. The Islamic Republic shall never allow the infringement of its sovereign rights by a number of Iranian nationals who by resorting to the protection offered to them by the United States seek to evade the relevant Iranian law and jurisdiction and to resurrect a system of 'capitulation' that was defeated by the long-lasting struggle of the Third World nations and particularly the Moslem nation of Iran.

As will be discussed in our Dissenting Opinion, the present Decision is void of any credibility.

Mahmoud M. Kashani
Shafta Shahidi
Parviz Ansari

CONCURRING OPINION OF MEMBERS HOLTZMANN AND ALDRICH

While we concur in the decision of the Tribunal in this case, we would have preferred a decision that the Tribunal has jurisdiction over claims against Iran by all persons who were at the relevant times citizens of the United States, including those who were also citizens of Iran. We believe it would have been justifiable to conclude that the text of the Claims Settlement Declaration, by defining "nationals" as "citizens", a term of municipal law, makes clear that all nationals, including dual nationals, are entitled to bring claims to this Tribunal. Our reasoning is as follows.

By defining a "national" as a "citizen" in Article VII, paragraph 1, the Parties have thus provided that, for purposes of this agreement, the term "national" shall have the same meaning as the term "citizen" under the national law of the country in question. It is indisputable that the term "citizen" under the laws of the United States includes all citizens, including those who retain another nationality. Thus, the definition in Article VII of national as coextensive with citizen can only be understood as meaning that the Tribunal has jurisdiction over claims against Iran by all United States citizens, including those who also retain Iranian nationality.

Iran has argued that the disjunctive "or" in Article VII, paragraph 1 precludes this interpretation, but we find that argument unpersuasive. The structure of that provision, particularly the phrase "as the case may be", makes it clear that under Article VII, paragraph 1, a national of Iran is defined as a natural person who is a citizen of Iran and that a national of the United States is defined as a natural person who is a citizen of the United States.

This analysis of the meaning of "national" is also the interpretation that is most consistent with the object and purpose of the Algiers Declarations. As the Tribunal notes, it seems clear that a major obstacle to the resolution of the crisis then existing in the relations between Iran and the United States was the existence of litigation in United States courts, brought against Iran by citizens of the United States and often involving judicial attachments of Iranian assets. As is stated in General Principle B, that obstacle was overcome by the creation of a new, substitute forum -- this Tribunal -- to which the American claimants could have access in lieu of the courts of the United States. This object and purpose would have been partially frustrated if the claims of some United States citizens (those who were dual nationals) were left in United States courts. It cannot be assumed that "nationals" has a different meaning in General Principle B from its meaning in Articles II and VII of the Claims Settlement Declaration. If dual nationals cannot bring their claims to this Tribunal, then they could have remained, with their attachments, in the courts of the United States, and such a result would have interfered with the return of Iranian assets and the termination of litigation in American courts, which was the object and purpose of these treaty provisions.

This conclusion is strengthened by the fact that certain claims and claims have been specifically excluded from the jurisdiction of this Tribunal. Examples are certain claims by or on behalf of the 52 United States nationals referred to in paragraph 11 of the General Declaration and claims arising under certain contracts referred to in Article II, paragraph 1 of the Claims Settlement Declaration. If there remained any doubts about jurisdiction over claims by dual nationals, application of the maxim expressio unius est exclusio alterius would dispel them.

The subsequent practice of the two Parties is consistent with this interpretation in that the United States suspended litigation in the United States by all United States citizens, including dual nationals, and the lawyers representing Iran in at least one such case involving dual nationals urged dismissal or suspension of the proceedings on the ground that the Declarations required the claimants to come to this Tribunal. Although it is unclear whether the dual nationality of the claimants in that case was apparent at the time, the Iranian surname must have suggested the possibility.
We deeply regret the tone and content of the "Declaration" which the three Iranian arbitrators have inserted above their signatures on the Decision. Such libelous and baseless invective has no place in an international arbitral tribunal, and merits no reply. A factual error relating to the Tribunal's Rules does, however, require correction: the choice of the thirdcountry arbitrators was not the result of an "imposed mechanism of the UNCITRAL Rules." The UNCITRAL Rules were not "imposed"; they were mutually agreed upon by both Governments in the Claims Settlement Declaration. Nor are the Rules unfair; they were recognized by the General Assembly of the United Nations as being "acceptable in countries with different legal, social and economic systems" and were unanimously recommended by that body. [16]

The Hague 6 April 1984
Howard M. Holtzmann
George H. Aldrich

CONCURRING OPINION OF RICHARD M. MOSK TO DECISION IN CASE NO. A 18

I believe that, because the plain language of the Claims Settlement Declaration [17] gives the Tribunal jurisdiction over so-called "dual nationals" (that is, nationals of the United States and Iran), the Tribunal's discussion of customary international law concerning the rights of "dual nationals" is not necessary. If such international law is deemed to be applicable, I believe the Tribunal, for the most part, correctly states international law as it applies to claims of "dual nationals." There is no majority for either the position that the Tribunal has no jurisdiction over any "dual nationals" or the position that the Tribunal has jurisdiction over all "dual nationals." Accordingly, in order to aid in the formation of a majority opinion so that the numerous "dual national" cases that have been stayed can progress, I concur in the Tribunal Decision. [18]

Article II, paragraph 1, of the Claims Settlement Declaration expressly provides for Tribunal jurisdiction over claims of "nationals" of the United States against Iran and of "nationals" of Iran against the United States. Article VII, paragraph 1, of the Claims Settlement Declaration states as follows:

"A 'national' of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States . . . .

Nationality and citizenship are not identical. "Every citizen is a national, but not every national is necessarily a citizen of the State concerned . . . ." P. Weis, Nationality and Statelessness in International Law 5-6 (2d ed. 1979). Citizenship is a term of municipal law, not of international law. Id. at 6; I. L. Oppenheim, International Law 650 (H. Lauterpacht, 8th ed. 1955). The Parties to the Algiers Declarations [19] thus provided, in effect, that the term "national" as applied to individuals, shall have the same meaning as the term "citizen" under the municipal law of the country in question. Therefore, only persons who are citizens of the United States or Iran may assert claims before this Tribunal. Other persons who are nationals, but not citizens, may not present claims, even though their claims might have been presentable under customary international law.

A United States "citizen" under the law of the United States may be a national of another country. Perkins v. Elg, 307 U.S. 325, 329 (1939); 8 M. Whiteman Digest of International Law 64 et seq. (1967). The Parties to the Algiers Declarations, by defining nationality in terms of citizenship, have provided for Tribunal jurisdiction over claims against Iran by all United States citizens, including those who also retain Iranian nationality. I cannot understand how the Tribunal concludes that the "definition of 'nationals' as 'citizens' in the Claims Settlement Declaration was an inadequate way to raise the issue of dual nationality."

There is no indication in the Algiers Declarations that the Parties intended to exclude from the Tribunal's jurisdiction the claims of United States citizens who also happen to be nationals of Iran. Indeed, when the Parties did intend to exclude from the Tribunal's jurisdiction claims of certain United States citizens they provided so expressly. For example, Article II, paragraph 1, of the Claims Settlement Declaration excludes certain claims of United States citizens, including claims related to the seizure of the 52 United States citizens on November 4, 1979. That the Governments would have expressly provided for the exclusion of claims by "dual nationals", if that were their intent, is further indicated by the fact that they did so in another agreement between them. See Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, entered into force June 16, 1957, 284 U.N.T.S. 93, 8 U.S.T. 899 (Article XVII excludes "dual nationals" from the benefits of certain exemptions).

The issue of dual nationality has long been a major subject of public international law (see, e.g., M. Katz & K. Brewster, The Law of International Transactions and Relations 40 et seq. (1960)) and is, according to both Iran and the United States, expressly covered in various treaties to which they are Parties. If, as Iran contends, this issue were such a sensitive one, Iran might have been expected to have ensured that "dual nationals" were expressly excluded from the Tribunal's jurisdiction.

Among the purposes of the Algiers Declarations was to shift litigation by United States nationals as that term is defined in the claims settlement Declaration against Iran in United States courts to the Tribunal, and to terminate attachments of Iranian assets in the United States obtained by such United States nationals. See General Principle B of the General Declaration and Article VII, paragraph 2, of the Claims Settlement Declaration. [20] It appears from the efforts by Iran to obtain dismissals of cases in the United States that Iran did not wish to permit "dual nationals" to maintain actions and attachments against Iran in United States courts. As the Algiers Declarations link the termination of litigation in United States courts to the settlement and resolution of claims through binding arbitration by the Tribunal [21] (General Principle B of the General Declaration) it follows that the Tribunal has jurisdiction over the claims of persons who have been United States citizens at the relevant times and whose claims were suspended or terminated pursuant to the General Declaration, as long as the Tribunal has subject matter jurisdiction over such claims.

Indeed, in arguing for the dismissals of cases brought by "dual nationals" in United States courts, Iran itself asserted that the Tribunal had jurisdiction over such cases. [22]

It has been suggested that to interpret "nationals" to include all "dual nationals" would enable a "dual national" to bring a claim to this Tribunal against either Iran or the United States, or both - a result which would be "absurd." Espahanian v. Bank Tejarat. Award No. 31-157-2 (29 March 1983). Such a theoretical possibility should be accorded little weight. There is no indication that any claimant has asserted before this Tribunal a claim against both the United States and Iran.

Moreover, States by agreement can, and have, granted their nationals rights directly enforceable in a designated international tribunal, rather than a national court, if such rights are validly reserved to its citizens by the other state. (a) acquisition of nationality at birth (ius sanguinis versus ius soli); or (b) the effect of change of family status (such as marriage, in which case municipal law automatically attaches new nationality). 7. The relevance - for the purpose of determining the most relevant nationality in a particular context - of such rights are validly reserved to its citizens by the other state.

1. I concur in the Decision in rejecting both contentions. See the attached remarks. [23] To assist the Tribunal in issuing a majority opinion, so that cases brought by "dual nationals" can be distinguished at the outset.

CONCURRING OPINION OF WILLEM RIPHAGEN

Dated, The Hague 10 April 1984
Richard M. Mosk
The Algiers Declarations adhered to by the Government of the Islamic Republic of Iran and the Government of the United States on January 19, 1981, did not include a provision of political relations between the two countries. Following a period of indirect negotiations, the Government of the Islamic Republic of Iran and the Government of the United States, through the mediation of the government of the Democratic and Popular Republic of Algeria, concluded on January 19, 1981, following a period of indirect negotiations, the Government of the Islamic Republic of Iran and the United States agreed to establish a framework for the resolution of the claims of nationals of each country against the other, and the claims were to be filed within three months, from October 19, 1981, to January 19, 1982. Among these were a number of claims filed against the Iranian Government, holding that the effective and dominant nationality of the claimant is that of the United States. The Philippines claimed itself as having served, at the request of the two countries, as the intermediary in seeking a “mutually acceptable” solution to the crisis. The second declaration, entitled the “Claims Settlement Declaration,” provides for the establishment of an arbitral tribunal, the jurisdiction of which is defined under Article II, paragraph 1 of the Claims Settlement Declaration. The tribunal’s mandate is founded upon the common intent of the two governments to bring about settlement of the claims of nationals of each country against the other, and the claims were to be decided either by the Full Tribunal or by a panel of three members of the Tribunal. In the present case, the Algiers Declarations were concluded on January 19, 1981, and the two governments, having concluded the agreements, presented their respective claims to the tribunal. The tribunal’s decision was to be final and binding. The majority decision was not founded upon a good faith interpretation of the Algiers Declarations, nor is it an adequate expression of substantive international law. The decision is deplorable, as are the reasons inspiring it.

B. The Issue Presented

The jurisdiction of this tribunal is defined under Article II, paragraph 1 of the Claims Settlement Declaration:

The claims of nationals of the United States against Iran and of those of nationals of the Islamic Republic of Iran against the United States, and any counterclaims which arise out of the same, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and are out of debts, contracts (including transactions or occurrences that constitute the subject matter of that national’s claim), letters of credit or bank guarantees, expropriations or other measures affecting property rights. The claims of nationals of the United States against Iran and of those of nationals of the Islamic Republic of Iran against the United States, and any counterclaims which arise out of the same, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and are out of debts, contracts (including transactions or occurrences that constitute the subject matter of that national’s claim), letters of credit or bank guarantees, expropriations or other measures affecting property rights.
nationals of Iran against the United States;[28]
(2) ratione materiae, "and arise out of debts, contracts, expropriations or other measures affecting property rights"; and
(3) ratione temporis. A stipulation whereby claims must be "outstanding" on the date of the agreement.

The first criterion raises an issue particularly pertinent to the claims of natural persons holding dual Iranian-United States nationality. These individuals are actually asserting their United States nationality, acquired through naturalization and concealed up to now, so that they may present claims against the Iranian Government which objects to the jurisdiction of the Tribunal over these claimants' claims.

Provisions of the Algiers Declarations pertinent to this issue were submitted to the Full Tribunal. The proper legal solution must therefore be sought through interpretation of the relevant provisions of the Declarations, in light of their object and purpose and of their context. Examination of customary international law also plays a helpful, if supporting role. In the following discussion, therefore, the problem of interpretation shall be studied first (Part I), followed by a consideration of the present position of international law on the issue (Part II).

Part I: INTERPRETATION OF THE ALGIERS DECLARATIONS WITH RESPECT TO ADMISSIBILITY OF DUAL NATIONAL CLAIMS

The question here is whether the Algiers Declarations confer jurisdiction upon the arbitral tribunal established thereunder over claims by certain Iranians asserting United States nationality in order to claim against Iran. Specifically, it is a question of determining the meaning and bearing of relevant contractual provisions: the provisions of Articles II(1) and VII(1-a) of the Claims Settlement Declaration. Interpretation of these provisions is subject to the customary rules of interpretation found in substantive international law (Point 1); and it is in reference to them that the question of jurisdiction must be resolved (Point 2).

1. The general rule of interpretation is provided under Articles 31 and 32 of the Vienna Convention on the Law of Treaties of May 23, 1969 (the Vienna Convention).[29] The Vienna Convention in fact embodies customary rules derived from jurisprudence and international doctrine. These articles provide:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.
These provisions give rise to a few observations:
(a) It would be a grave error in judgment to believe that these articles would bar an examination of the common intent of the parties to the treaty from the process of interpretation in order to determine the meaning and bearing of a disputed provision. Generally considered to be declarative of customary law, these articles in fact specify how the common intent of the States party to the treaty regarding a point at issue shall be determined. For this purpose it suggests a method lying on the text to determine the meaning and the bearing of the contractual provisions. However, in reality, "To use the text as the starting point is thus not to minimize the importance of the common intent of the parties: but rather, to reveal it through examination of the instrument in which it is expressed."[30] It is therefore a question of discerning the common intent of the States party to the treaty. The terms, taken in their ordinary meaning and context and in light of the object and purpose of the treaty, are relied on because they are the most certain means for expressing the common intent. To this end, the above articles also prescribe recourse to the preamble and preparatory work of the treaty and circumstances of its conclusion, as well as other instruments facilitating disclosure of the common intent of the States party to the treaty with respect to the point at issue. Indeed, this reasoning finds specific support in the last paragraph of Article 31 of the Vienna Convention, whereby "A special meaning shall be given to a term if it is established that the parties so intended."

(b) The terms "object", "purpose", and "aim", are also frequently used in international jurisprudence. It is established in international practice that these terms are held to be, if not synonymous, then at least largely inseparable in so far as matters of interpretation are concerned. It is important to note that, "The object and purpose of a treaty are actually a matter of a subjective object and purpose intended by the parties. It is not a matter of an objective, independent and specific object and purpose based on which it would be possible to indicate that which the parties should have done: to interpret it in light of that object and purpose would perhaps not be interpreting the treaty, but rather to revise it."[31] On the other hand, customary international law furnishes other, complementary means of interpretation for the Tribunal, when the provisions of the Vienna Convention are not in themselves sufficient to clearly discern the intent of the contracting parties, such as the rule of restrictive interpretation of clauses conferring jurisdiction...
claims of nationals of one State, and only one State. Sovereignty, dual nationality, or more specifically, the concept of the "national", has become an important issue in international law.

The term "national" has been defined by the Algiers Agreement: "For the purposes of this Agreement, the term "national of the United States" means a citizen of the United States or a corporation or other legal entity organized under the laws of the United States, any of whose shareholders or members are citizens of the United States, or any other legal entity of which more than 50% of the outstanding stock or beneficial interest is owned, directly or indirectly, by citizens of the United States."

This definition is also reflected in the Claims Settlement Declaration: "ARTICLE III. For the purpose of this Agreement, the term "national of the United States" means any citizen of the United States, or any corporation or other legal entity organized under the laws of the United States, any of whose shareholders or members are citizens of the United States, or any other legal entity of which more than 50% of the outstanding stock or beneficial interest is owned, directly or indirectly, by citizens of the United States."
The General Declaration states that:

"It is the purpose of both parties to terminate all litigation as between the Government of each party and the nationals of the other to bring about the settlement and termination of all such claims through binding arbitration." (Emphasis added)

The purpose thus stated, the General Declaration further clarifies the scope of the dispute by the disjunctive "or" in Article VII, paragraph 1. As already mentioned, a crisis of extreme complexity was created by the Iranian revolution of 1979. Iran's decision to withdraw its assets and deposits from the United States, and at the same time expressing its willingness to clear up its legitimate debts with Americans. In this context, there is no need to speculate on the resolution of any possible dispute between the Iranian Government and Iranian nationals.

In short, it was not the purpose of the parties to terminate all litigation between the nationals of one State and that of the other.

(f) The final point to consider concerns the rule of restrictive interpretation of clauses conferring jurisdiction upon an international tribunal, and the reasons justifying the application of this rule to the present case. A study of international practice shows that when the meaning of a clause is ambiguous, jurisdiction must be restrictedly interpreted. The Permanent Court of International Justice has interpreted strictly. (Free Zones Case, Series A/B, No. 46, pp. 138-139)

(d) It remains to examine the two arguments advanced by the United States Government in support of the admissibility of claims of dual Iranian-United States nationals against Iran. The first argument, as mentioned before, is drawn from the definition of "citizen", according to which a "United States citizen" includes a citizen who is a "dual national". By this it is contended that any dual national who is considered both Iranian and American is American and thus a "United States citizen". However, this assertion does not resolve the difficult issue of the admissibility of a claim by dual nationals. In this respect, it is important to recall the distinction made by the Permanent Court of International Justice with regard to the use of the word "citizen" in relevant provisions of the 1976 agreement concluded by the Governments of the United States and Egypt. In that agreement, the discrimination against dual nationals was not in itself adequate to resolve the issue raised by dual nationality.

The second argument, to which the majority decision implicitly alludes, is drawn from the fact that the United States Government undertook to terminate the legal proceedings lodged in United States courts against Iran, and to lift the attachment orders concerning Iranian public assets subject to the Algiers Declarations. For its part, the Federal Reserve Bank of New York, which in the course of the hostage crisis had placed a total of $3.667 billion in deposits to cover claims against Iran, withdrew these deposits in early 1980.

(e) On the basis of the evidence submitted to the Tribunal, the situation must be regarded as an established fact that the United States administration and municipal law cannot impose itself upon the Tribunal, whose jurisdiction is defined by inter-State agreement and which cannot be reviewed by any other United States court. The United States Government is therefore under no obligation to lift the attachment orders or to return the deposits.

The rule is thus justified by the simple reason that as Charles Beardsley pointed out, "Having had the opportunity to draft it more explicitly, the drafting State must itself bear the consequences of its negligence. This has frequently been applied to ambiguous provisions by international jurisprudence."

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The rule of restrictive interpretation is equally applicable to arbitration cases, for identical reasons. As the sole arbitrator indicated in the Kronprins Gustaf Adolf case:

"...considering the natural state of liberty and independence which is inherent in sovereign States, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting Parties to a Treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and, ... those provisions, in case of doubt, are to be interpreted in favor of the natural liberty and independence of the Party concerned" (Sweden/U.S.A., 18 July 1932, II R.I.A.A. p. 1254).

The same rigidity of restrictive interpretation is found in the jurisprudence of claims commissions. As stated by the umpire in the Colombian Bonds case:

"...in all cases in which reasonable doubt exists as to its competence, and especially in those now under consideration which interest directly the credit and the good faith of one of the contracting parties, the commission is bound to decline to entertain them, and to construe its powers in a limited and not in an extensive sense." [34]

From the foregoing it would follow that the provisions of Articles II(1) and VII(1) of the Claims Settlement Declaration, taken in their ordinary meaning and interpreted in the context of the Algiers Declarations and in light of their object and purpose, do not confer jurisdiction upon the Tribunal for the claims of dual Iranian-United States nationals against the Iranian Government. That is the single and sole interpretation in good faith "...which is in harmony with the natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court..." (I.C.J. Reports 1952, Judgment of July 22, 1952, Anglo-Iranian Oil Co., P. 104.)

In any event this conclusion is supported by the exigencies of restrictive interpretation of arbitral clauses as well as by application of the customary rule of contra proferentem.

However, under Section IV, entitled "Reasons for Decision", the majority devotes merely two pages to interpretation of the contractual provisions of the Algiers Declarations concerning the admissibility of the claims of dual Iranian-United States nationals before the Tribunal. The majority decision rejects both the United State's argument contending that the text was clear on its face, and the Iranian argument contending that, "Iran, not recognizing dual nationality, could not be presumed to have accepted such jurisdiction when the Claims Settlement Declaration was signed."

Having declared that the text is not clear, the majority then goes on to deal with the customary rules of interpretation whereby a treaty must be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Astonishingly, however, it stops there. In short, the majority chooses not to comprehend the elementary point that it was required, given the various facts at issue, to elucidate the meaning of contractual provisions and their bearing on the disputed issue submitted for its examination. It also had the duty to respond to the arguments of the Iranian Government. In fact the memorials submitted to the Tribunal by Iran devote a lengthy section to the ordinary meaning attributable to the terms of the provisions of the Algiers Declarations concerning the Tribunal's jurisdiction, the preamble, their context, the circumstances under which they were concluded, and other facts concerning the issue, facilitating the Tribunal's determination of the meaning of the provisions relevant to dual nationals. Other general rules of interpretation, such as restrictive interpretation of clauses conferring jurisdiction upon an international court and particularly the rule of contra proferentem were extensively treated by Iran. A simple reading of the two above-mentioned pages (pages 15 and 16 of the majority decision) is sufficient to establish that the majority remains entirely mute on every point which would have clearly led to a declaration of lack of jurisdiction. Following this suspicious silence, the majority by-passes all the relevant issues and goes on to deal with Article 31, paragraph 3(c) of the Vienna Convention to interpret the provisions submitted before it.

Article 31, paragraph 3 stipulates:

"3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties."

(Emphasis added)

The terms of paragraph 3(c), to which the majority refers, are clear enough. However, the point is that paragraph 3(c) could never alone impose a conclusion the treaty itself did not sanction. Paragraph 3(c) could act as support for a solution drawn from interpretation of the treaty. Thus, the essential elements for determining the meaning of a disputed provision are the terms in their ordinary meaning and in their context, the object and purpose stated in the treaty preamble, the preparatory work and the circumstances under which the treaty was concluded, and other instruments stated in the first and second paragraphs of the above-mentioned Article 31. The solution dictated by these instruments can, as a final resort, be confirmed by a relevant rule of international law.

The majority interpretation must be deplored in that it is in manifest contradiction with elementary rules of logic, does not adhere to good faith, and above all, is contrary to solutions generally accepted in public international law.

Part II: INTERNATIONAL LAW AND THE ISSUE OF DUAL NATIONALS

Article 31, paragraph 3 of the Vienna Convention offers several subsidiary elements to the Tribunal which it may take into consideration when determining the meaning of the disputed provision. In particular, paragraph 3(c) refers to "any relevant rules of international law applicable in the relations between the parties." Of course paragraph 3(c) cannot be the source for any particular solution not sanctioned by the treaty itself. Aided by all the facts of the issue, the solution is dictated by research into the meaning of relevant contractual provisions. International law thus constitutes a complementary source of interpretation; within this framework must be regarded the general solutions found in international law for the issue of dual nationality when it is a condition for admissibility of a claim before an international tribunal. It is therefore highly regrettable that the majority relies exclusively upon paragraph 3(c) to impose upon Iran a solution not derived from interpretation of the Algiers Declarations.

The question is thus to determine what solution is found in international law for the problem of dual national claims before an international tribunal against a State of which the individual concerned is a national.

Two principles have been maintained before the Tribunal: namely, non-responsibility and effective nationality, respectively invoked by the Islamic Republic of Iran and the United States.
Government. According to the first, a dual Iran-United States national (in other words, a person having the nationality of the two States which established this Tribunal) may not assert his United States nationality in order to bring an international claim against the Iranian Government; such a claim is inadmissible. On the other hand, the second principle permits such a claim to be brought, on condition that the claimant have predominant ties with the United States. It is thus a matter of determining, through examination of conventions and jurisprudence, the value which may be accorded each of these two principles.

A. The Solutions Found in International Conventions

The Hague Convention of April 12, 1930 concerning Certain Questions relating to the Conflict of Nationality Laws (the Hague Convention), constitutes an essential source available to the Tribunal in its consideration of the present jurisdictional issue. However, application of the Hague Convention is linked to the character of the Tribunal and the claims brought before it. It is therefore important first to look into that character (Section 1) and then to go on to consider the provisions of the Hague Convention and its application to the present issue (Section 2).

Section 1.

Without expressly stating so, the majority seems to recognize the international character of the Tribunal (Point 1), but it casts doubt on whether the claims the Tribunal is called upon to decide are also inter-State in nature (Point 2).

1. (a) The international character of the Tribunal is unquestionable. The Tribunal's very creation springs from an international source; its existence, powers, function and jurisdiction are drawn from a political act related to public international law, concluded between the Iranian and United States Governments. Two-thirds of the Tribunal's members are appointed by the two governments party to the Declarations, and the remaining one-third are neutral members. In accordance with Article VI(2), each State designates an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities or entities in connection with proceedings before the Tribunal. Further, Article VI(3) stipulates: "The expenses of the Tribunal shall be borne equally by the two governments." The Tribunal also is to apply international law. These traits attest to the international character of this Tribunal, as established by inter-State agreement.

1. (b) It is of particular importance to discern the exact bearing of Article V of the Claims Settlement Declaration. A superficial reading might lead one to believe that the Tribunal is not to apply international law and thus would cast certain doubt on the international character of the Tribunal. Article V provides: "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." Still, it would be well to state first that an international tribunal which, due to its nature, must apply principles of public international law, is not barred from applying municipal law or resorting to a conflict of laws mechanism found in private international law. Recourse by an international tribunal to municipal laws and rules of private international law is rather common and occasionally even indispensable. International tribunals refer to pertinent rules of municipal law to settle preliminary or incidental issues such as the nationality of natural or juridical persons, the status of heirs, or the conditions of validity of a contract, as well as other formalities which must be resolved at an early stage. It should be pointed out that the function of an international adjudicator applying municipal law in connection with an international issue is radically different from that of a municipal one; the institutions of municipal law thus transposed by the international adjudicator form elements of international law. The main issue which an international tribunal is called upon to decide is whether the respondent State has respected its international responsibility towards the rights of foreign nationals. That issue must be settled in light of principles of international law. On these points may be cited the Serbian and the Brazilian Loans cases decided by the Permanent Court of International Justice in 1929. The two cases are similar. The issue submitted for the court's decision was that of determining whether the payment of loans issued in France by the Serbian and Brazilian Governments should have been effected "at gold value" or in "paper francs". To settle the question, the court referred to rules of private international law and municipal statutes of the Serbian and Brazilian States. The contractual obligations of these latter having thus been defined, the main task of the court was to establish whether or not the disputed practices by these States constituted a violation of public international law. (P.C.I.J., Series A, Nos. 20/21, pp. 16-49 and pp. 101-126).

In light of the foregoing, it can be declared that the provisions of Article V of the agreement creating the Tribunal do not depart from the usual practice of international courts. Actually, the first sentence of Article V, stating that "The Tribunal shall decide all cases on the basis of respect for law," is nothing extraordinary. In fact it is essentially based on Article 37 of the Hague Convention of October 18, 1907, on the Pacific Settlement of International Disputes, whereby "International arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law." In other words, the Tribunal shall base its decisions on law, not equity, and that law can be no other than international law. Equal reference in Article V to choice of law rules and commercial law, as well as other provisions and elements, appears fully justifiable due to the nature and diversity of the claims brought before the Tribunal. The claims and counterclaims filed with the Tribunal are diverse and result from contracts of sale, construction and technical assistance, as well as from expropriations, nationalizations, banking operations, tax and social security premiums, etc. The preliminary issues raised in these claims must of course be settled with reference to contractual provisions, applicable laws, and banking and commercial usages. The contractual obligations of the concerned State thus determined, it remains to resolve the main issue: whether practices by the Iranian or United States Government is a- provides for foreign nationals conform to their international responsibility and whether the minimum standard of justice or the "equitable treatment" to which foreign nationals are entitled has been observed by the Iranian or the United States Government. These issues must be assessed with respect to international law.

Chamber Two unanimously so decided the issue of a clause designating applicable law invoked by a claimant for evaluation of damages and interest. The case was between a United States company (CMI) and the Iranian Ministry of Roads and Transportation and concerned a contract of sale subject to the laws of the State of Idaho. According to Chamber Two:

"It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it. Such freedom is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which include not only contracts of a commercial nature, such as the one involved in the present case, but also claims involving alleged expropriations or other public acts, claims between the two Governments, certain claims between banking institutions, and issues of interpretation and implementation of the Algiers Declarations. Thus, the Tribunal may often find it necessary to interpret and apply treaties, customary international law, general principles of law and national laws, "taking into account relevant usages of the trade, contract provisions and changed circumstances", as Article V directs."

Although convinced that the laws of the State of Idaho would lead to the same result in
the Algiers Declarations and the mechanism for the settlement of claims, which confirm the President’s constitutional authority to settle international claims to bind American national claims. Second, the United States has agreed to settle claims through the establishment of arbitration mechanisms, and has made that arbitration binding, exclusive and non-reviewable.

Typically, rather than renounce claims of American nationals, the Executive has utilized two primary methods to settle such claims and has offered to do so through Executive Agreement. First, the Executive has utilized arbitration which fixes claims arising out of political events, and second, by reference to the Code as incorporated in the statutory law of Idaho. (Award No. 99-245, p. 9).

The Tribunal is thus, by its source and function, a true international tribunal. It remains to demonstrate that the claims the Tribunal is called upon to decide are inter-State claims brought before it by reference to the procedure of diplomatic protection as the agreement is called and final settlement of these claims, even without the approval of the individual whose claim has been brought before it. The Executive has exercised this discretion as to whether to present a claim, and when he does, in determining time, extent and means of pressure in presenting it.

The Permanent Court of International Justice ruled in that way in the Mavrommatis case when the dispute between a private person and a foreign power -- i.e. between Mr. Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States. (P.C.I.J., Series A, No. 2, p. 12)

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against the government of another country are "sources of friction" between the two sovereigns.
United States v. Pink 315 U.S. 203, 225 (1942). To resolve these difficulties, nations have often
entered into agreements settling the claims of their respective nationals. As one treatise writer puts
it, international agreements settling claims by nationals of one state against the government of
another "are established international practice reflecting traditional international theory." L.
Henkin, Foreign Affairs and the Constitution 262 (1972). Consistent with this principle, the United
States has repeatedly exercised its sovereign authority to settle the claims of its nationals against
foreign countries. Though those settlements have sometimes been made by treaty, there has also
been a longstanding practice of settling such claims by executive agreement without the advice
and consent of the Senate. Under such agreements, the President has agreed to renounce or
extinguish claims of United States nationals against foreign governments in return for lump sum
payments or the establishment of arbitration procedures. To be sure, many of these settlements
were encouraged by the United States claimants themselves, since a claimant is only hope of
obtaining any payment at all might lie in having his government negotiate a diplomatic settlement
on his behalf. But it is also undisputed that the "United States has sometimes disposed of the
claims of citizens without their consent, or even without consultation with them, usually without
exclusive regard for their interests, as distinguished from those of the nation as a whole." Henkin,
supra at 263. Accord, The Restatement (Second) of Foreign Relations Law of the United States
213 (1965) (President "may waive or settle a claim against a foreign state ... even without the
consent of the [injured] national"). It is clear that the practice of settling claims continues today.
Since 1952, the President has entered into at least 10 binding settlements with foreign nations,
including an $80 million settlement with the People's Republic of China.

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice
of claim settlement by executive agreement. (453 U.S. 654 at 679-680) 2. (d) The majority in vain tries to cast doubt upon the inter-State nature of the claims before the
Tribunal. These claims are true inter-State claims brought before an international tribunal by means
of the classic method of diplomatic protection. The fact that Article III(3) of the Claims Settlement
Declaration permits claims of more than $250,000 to be presented directly to the Tribunal by the
claimants themselves in no way affects the inter-State nature of the Tribunal and the claims it is
called upon to decide. Actually, a government may choose to espouse its nationals' claims against
another government and arrange by political agreement for an international arbitration to settle
those disputes -- whether or not it authorizes its nationals personally to present their claims in no
way affects the nature of the diplomatic protection the government is extending. It is merely a
matter of a simple procedural technique justified by the convenience it affords in view of the great
number of claims (see: Brownlie, Principles of Public International Law, 3rd edition, 1962, p. 576).
This procedural technique has precedents in international practice. Direct recourse was allowed
before the Central American Court of Justice 1908-1918 and the Mixed Arbitral Tribunals
established under the Peace Treaties of 1919. It is also allowed before the European Court of
Human Rights and the Arbitral Commission against the German Government established by the
1952 Convention on the Settlement of Matters Arising out of the War and the Occupation (332

2. (e) And finally, the substantially significant evidence of the Single Article Act adopted by the
Iranian Parliament authorizing the Iranian Government to agree to an arbitration with the United
States Government leaves no doubt as to the inter-State nature of the disputes brought before the
Tribunal:

"Bill Concerning the Settlement of Financial and Legal Disputes of the Government of the Islamic
Republic of Iran with the Government of America

Single Article - The Government is authorized by observing the provisions approved by the Islamic
Consultative Assembly (the Majlis) to take steps by means of consensual arbitration to settle the
financial and legal disputes between the Government of the Islamic Republic of Iran and the
Government of America, which did not arise out of the Islamic Revolution of Iran and the seizure
of the Center of American plotting.

Note: With respect to those disputes the settlement of which in competent tribunals of Iran has
been provided for in the respective contract, they are excluded from being subject to this Single
Article."

This law, which was notified to the United States Government and to which Article II(1) of the
Claims Settlement Declaration makes express reference, constitutes unequivocal proof establishing
the inter-State nature of the claims brought before the Tribunal by means of intervention and
diplomatic protection.

The foregoing leads to the conclusion that the Iran-United States Claims Tribunal is an
international tribunal which was created by diplomatic intervention, and that the claims brought
before it are inter-State claims. The character of the Tribunal and the nature of the claims having
been thus defined, it follows that the admissibility of dual national claims is thus subject to the
classic rules of diplomatic protection, in particular to the provisions of Article 4 of the Hague
Convention of 12 April 1930.

Section 2.

1. Article 4 of the Hague Convention provides that:

"A State may not afford diplomatic protection to one of its nationals against a State whose
nationality such person also possesses."

At the same time, Article 5 of the same Convention provides:

"Within a third State, a person having more than one nationality shall be treated as if he had only
one. Without prejudice to the application of its law in matters of personal status and of any
conventions in force, a third State shall, of the nationalities which any such person possesses,
recognize exclusively in its territory either the nationality of the country in which he is habitually
and principally resident, or the nationality of the country with which in the circumstances he
appears to be in fact most closely connected."

The conflict of nationality raised before a court of a third State (where nationality is a criterion for
application of municipal law) should not be confused with the conflict of nationality before an
international court (where nationality is the criterion for admissibility of the claim of a dual
national against his own government). In fact, the Hague Convention sets forth two different
solutions for the conflict of nationalities as it arises in two distinctly separate domains: that of
private international law and that of public international law. It thus intentionally dispels any
confusion as to the domain of application of the theory of effec tive nationality. The concept of
effective nationality is embodied in Article 5 to resolve a conflict of nationality before a court or
administrative authority in a third State where the determination of nationality is necessary for the
application of a municipal law or an administrative measure. It is entirely another matter when
nationality is a precondition for the jurisdiction of an international tribunal. The solution for the
conflict of nationality raised under these circumstances before the Tribunal is dictated by the principle embodied in Article 4 of the Hague Convention.

The majority, however, tries to avoid applying the Hague Convention to the issue before the Tribunal. Under the heading "The 1930 Hague Convention" (p. 17), it declares:

"But this provision must be interpreted very cautiously. Not only is it more than 50 years old and founded in a treaty to which only 20 States are parties, but great changes have occurred since then in the concept of diplomatic protection, which concept has been expanded..."

Next, and without any indication of what those changes are which have allegedly occurred in the concept of diplomatic protection, or what direction those changes have taken, the majority adds:

"Moreover, the negotiating history of Article 4 of the Hague Convention suggests that its application is doubtful in a case, such as the present one, where a dual national, by himself, brings before an international tribunal his own claim against one of the States whose nationality he possesses. Such a proposal was made during the Conference, but it was rejected."

From the fact that this proposal was rejected, it appears that the majority wishes to deduce that direct recourse to an international tribunal by a dual national is not barred by Article 4 of the Hague Convention. That deduction cannot be accepted. The spirit of bad faith in which the majority proceeds to such an approach for the sole purpose of avoiding application of the Hague Convention to the present issue is deplorable. Such a spirit is not worthy of an international tribunal and does not favor the development of international institutions.

Actually, long before the Hague Convention, Borchard expressed the state of public international law on the issue before us as the following:

"The principle generally followed has been that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal. In other words, a person cannot sue his own government in an international court, nor can any other government claim on his behalf." (The Diplomatic Protection of Citizens Abroad, 1916, p. 588)

It is to be noted that during the First Committee's discussion of the Project for the Hague Convention, the Yugoslav delegate moved that the following additional provision be added to Article 4: "a person possessing two or more nationalities may not plead that he is a national of one State, in order to bring a personal action through an international tribunal or commission in respect of another State of which he is also a national." This proposal was viewed as a restatement of the obvious and as such the First Committee did not consider it expedient to add any supplementary precision to Article 4 of the Convention. The Rapporteur of the First Committee, J. Gustavo Guerrero, stated that the Committee did not incorporate this proposal into the text of the Convention,"since it deals with a case that is so rare as to be of little interest to the majority of States..."

One year later, the British-Mexican Commission expressed the bearing of the principle embodied in Article 4 of the 1930 Hague Convention in the decision it rendered in the Honey case on March 26, 1931:

"The Commission must therefore regard Mr. Richard Honey as a man possessing dual nationality, and it is an accepted rule of international law that such a person cannot make one of the countries to which he owes allegiance a defendant before an international tribunal..." (Further Decisions and Opinions of the Commissioners, p. 14)

The principle embodied in Article 4 bars admission of an international claim by or on behalf of a dual national against one of the States of which he is also a national.

4. Whatever the character of the Tribunal and the nature of the claims filed therewith, the Tribunal is obliged to respect the principle contained in Article 4 of the Hague Convention. Actually, the Convention embodies two fundamental principles. The first principle is set forth under Articles 1, 2 and 3 of the Convention:

"Article 1. It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

Article 2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

Article 3. Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

Article 4, containing the second principle, provides:

"Article 4. A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."
International law thus recognizes the right of each State to determine the conditions whereby its nationality is granted and to determine through its own laws who its nationals shall be. However, in the establishment of order...

A priori it might be assumed that international arbitrators faced with the problem of dual nationality, existing under circumstances defined as above, would tend to follow the same pattern of decisions; the sovereignty of States is recognized and is not compromised by the presence of a dual nationality. The result of such an assumption is the same as the result of any other assumption, if it is only of marginal importance to the practice of international arbitration, which is not necessarily the case. Nevertheless, a positive limit is recognized to this liberty of States: as is the explanation (Section 2).

5. The issue of dual nationality was taken up again by the Institute of International Law at its 1946-1948 meeting. A draft resolution, new in the field of public international law, was prepared by a commission established under the Treaty of Washington concluded May 8, 1871 between the United States and the United Kingdom.

This solution raised heated criticism, notably that of R.L. Bindschedler (Id., Vol. 51-I, p. 176) and of the presiding commissioner, Count Corti, concurred:

"The practice of nations in such cases is believed to be for their sovereigns to leave the person who possesses at the same time the nationalities of both States to decide for himself in which State he will reside. The principle of non-responsibility for instances where the person asserting protection had the active nationality of the claimant State is that of the claimant State."

During the course of these debates, the Rapporteur, Professor Herbert H. Briggs, declared that the text finally adopted was as follows:

"Article 4. An international claim presented by a State (or by an individual who possesses at the same time the nationalities of both claimant and respondent States) to obtain a decision of the Court concerning any question or matter under its jurisdiction, shall be inadmissible, unless it can be established that the claimant State is inadmissible, unless it can be established that there is any sense in which the claimant State is inadmissible, unless it can be established that there is any sense in which the claimant State has a valid ground for its claim."

Of course, the text adopted was as follows:

"Article 4. An international claim presented by a State (or by an individual who possesses at the same time the nationalities of both claimant and respondent States) to obtain a decision of the Court concerning any question or matter under its jurisdiction, shall be inadmissible, unless it can be established that there is any sense in which the claimant State has a valid ground for its claim."

The practice of nations in such cases is believed to be for their sovereigns to leave the person who possesses at the same time the nationalities of both claimant and respondent States to decide for himself in which State he will reside. The principle of non-responsibility for instances where the person asserting protection had the active nationality of the claimant State is that of the claimant State.
The Italian-Venezuelan commission also rendered similar decisions in four cases of dual nationality: the Brignone case, the Giacopini case, the Poggioli case, and the Canevaro case. These claims were all declared inadmissible and deemed unmeritorious.

3. The Canevaro case (Italy/Peru) decided May 3, 1912 by the Permanent Court of Arbitration is frequently cited. It concerned a claim by Canevaro, of whom one, Rafael Canevaro, was Italian and the other, Rafael Canevaro, was Peruvian. The claim was that Rafael Canevaro had voluntarily acquired Peruvian nationality, thereby losing his Italian citizenship. The court held that Canevaro was the subject of both Italian and Peruvian law and that the claim was inadmissible. The same reasoning is found again in a similar case concerning a dual Austrian-United States national, Max Fox (Id., pp. 289-50).

4. The issue of dual nationality was again raised before the Tripartite Claims Commission established by the United States, Austria and Hungary in 1928. The claim of Alexander Telch was the subject of the court's decision. The court determined that citizenship under the municipal laws of Austria was conferred upon Telch at birth, and that he was not a French subject, having merely evinced his intention to regard himself as a French subject. (Moore, III International Arbitrations pp. 2529-31).

5. The Mixed Arbitral Tribunals (T.A.M.) were established by the United States, Austria and Hungary in 1928. The claim of Alexander Telch was again raised before the court. The court decided that Telch was a citizen of both Austria and Hungary, and that his status as a national may have been in Italy, the government of which had a right to protect him. The court held that the claim was inadmissible and that Telch was not entitled to the protection of the municipal laws of Austria.

6. The Mixed Claims Commission, established under the various agreements between Mexico and other countries, was also considered. The theory of non-responsibility was invoked there and claims by dual nationals were subsequently dismissed. In the Carlos L. Oldenbourg case decided December 19, 1929 by the British-Mexican Commission, the Mexican agent contended that, "...even if the British nationality of the claimant and his sisters were established, they possessed at the same time Mexican citizenship; in other words, that the Commission was faced by a case of dual nationality. In such cases, the principle generally followed has been that a person having dual nationality..."
A simple reading of the international precedents cited above leaves the initial impression that the principle of non-responsibility, with respect to claims before international tribunals by dual nationals against a State of which the claimant is a national, finds its justification in the principle of the sovereign equality of States. It is based on the principle of equal rights with respect to the systems by which independent and sovereign States attribute nationality.

7. It is important to refer to the decision rendered on March 29, 1933 in the Central Rhodope Forests case between Greece and Bulgaria wherein it was established that, "[Given that the
national, and consequently the relations between a State and its national with respect to the legal
system of that State are of no concern in public international law. These are the same basic
corollary of the principle of non-responsibility. The United States commissioner, Frazer, was the first to express the principle
in the Alexander case decided in 1872."

8. Within the framework of the Treaty of Peace with Italy signed February 10, 1947 in Paris, several
mixed conciliation commissions were established to settle the claims of nationals of the victorious
powers against Italy. It occurred that these commissions were called upon to decide cases
involving dual nationality. The Strasbourg case is decided by the Italian-United States
Commission established to consider the claims of nationals of the United States
against a State which regards him as its own national (C.I. Reports 1999, p. 186).

9. It is not possible to estimate the extent to which the principle of non-responsibility has been
applicable in practice, but it is known that it has been applied in several cases where the
claimant was a dual national against his own government. The same commission applied the jurisprudence of Mergue to other cases of dual nationality. The
claim was presented to the commission established under the Treaty of Paris of May 30, 1864, to
examine and liquidate the claims of the British Majesty against the Government of France. It was established before the commission that James Lewis Drummond, "might be a British subject and might also be a French subject; and if he were a French subject, then no act done towards him by the Government of France could be considered an illegal act..." The claim was rejected for the reason that, "...the act of violence that was done towards him was done by the French Government in the exercise of its municipal authority over its own subjects." It is clearly apparent that the decision was inspired by the same concepts as the decision in Alexander was, "for no government would recognize the right of another to interfere thus on behalf of one whom it regarded as a subject of its own."

2. It is particularly important to determine the exact bearing of the jurisprudence of the Venezuelan arbitrations, so frequently cited in support of the existence of the theory of "effective nationality" in international law. It is true that various criteria of effective nationality, particularly domicile, were raised by the arbitrators when rejecting the claims of dual nationals. Nevertheless, a careful analysis of the reasoning followed by the arbitrators indicates that the basic concept leading the arbitrators to reject dual national claims was that of the need for according due respect to the principle of sovereign equality of States. This is clearly apparent in the cases of Narcisa de Hammer and Amelia de Brissot wherein the Venezuelan arbitrator made the following observations before referring to the claimant's domicile:

"Every independent State has the right to determine who is to be considered as citizen or foreigner within its territory, and to establish the manner, conditions and circumstances, to which the acquisition, or loss of citizenship, are to be subject. But for the same reason that this is a right appertaining to every sovereignty and independence, no one can pretend to give an extraterritorial authority to its own laws regarding citizenship, without violence to the principles of international law, according to which the legislative competence of each state does not extend beyond the limits of its own territory." (Moore, op. cit., p. 2457).

The two other arbitrators concurred with the Venezuelan arbitrator and they declared the claims inadmissible. Recourse to domicile therefore was completely superfluous. The guiding concept was to resolve a conflict of nationalities based solely on the primacy of the nationality of the defendant State, in that instance Venezuela. On this point in particular, several passages from Professor Basdevant's article written just shortly afterwards are very interesting and shed a great deal of light on the weight of the jurisprudence of the Venezuelan arbitrations of 1903-1905:

In all claims involving a conflict of nationality, the practical solution was to uphold the Venezuelan nationality and declare the mixed commission as not having jurisdiction. On what legal grounds was this solution based? It appears that several reasons inspired the umpire when he made his decision, and these not always in concurrence. [42]

"In order to justify the mixed commissions' lack of jurisdiction, on several occasions it was declared that the conflict of nationality ... implied this lack of jurisdiction, or yet, (the same concept in another form) that the nationality determined by the law of the responsible State must prevail over that determined by the law of the claimant State. This concept was deemed significant by the British-Venezuelan Commission. In the Mathison case, the British agent contended, and the umpire concurred, that if a claimant was both a British subject and a Venezuelan citizen, the claim could not be heard by the Commission. This event dates the emergence and development of a practice by which Great Britain would refrain from protecting British subjects against a foreign State considering them its own nationals. Of a more or less established British practice, some of our judgments would like to form a general rule. Umpire Ralston in the Miliani case, the Venezuelan commissioner in the cases of the Maninat heirs and the Massiani heirs and Umpire Plumley in the Maninat heirs case, declared that an individual in that position would be considered as Italian (or French) by Italy (or by France) with respect to all other countries with the exception of Venezuela. From the weight given in this instance to the law of Venezuela, attempts have been made to justify the British practice as a precedent, which is not decisive. [43]

It is pointless to elaborate on explanations already so clearly stated by Professor Basdevant. In essence, it is clear that the rationale inspiring the Venezuelan jurisprudence on the issue of dual nationality was respect for the sovereignty of the defendant State -- in that instance Venezuela -- and the desire to hold the laws of that defendant State as prevailing over any other law permitting a dual national to claim against Venezuela when he also held that nationality.

These ideas were expressed in more specific terms in the Heirs of Jean Maninat case. The umpire first declared that the agreement establishing the tribunal was silent on the problem of dual nationality and then he stated:

"This process of reasoning seems to dispose of all genuine doubt as to what is meant by this term as used in the protocol, yet were there room for doubt the ordinary rules of interpretation would be efficient aids. Among others, there is the rule of interpretation that where the agreement is susceptible of two interpretations that interpretation is to be taken which is least onerous upon the party who must render the service or suffer the loss under the agreement.


He next defined the framework for reasoning in all cases of dual nationality as the following:

"When by the law of the respondent Government the claimant is a Venezuelan, France may not intervene, as to do so would make her law superior to the law of Venezuela, which is not permissible as between two sovereign nations. The right of Venezuela, as the respondent Government, to regulate her own internal affairs and to determine who are her citizens, involving mutual protection and support, is too essential an attribute of sovereignty to be invaded or disturbed. If the treaty bore unmistakable evidence that this attribute of sovereignty had been abdicated, it would be the duty of this tribunal to act accordingly, but it bears no such evidence." (X R.I.A.A. pp. 78-79)

In the case the French commissioner referred to the Protocol of 19 February 1902 which provided for "claims for compensation presented by the French" [44] and declared that this term therefore covered the French, and that "The protocol says in no way that it is indispensable to prove that the nationality of the claimants was solely and exclusively French." (id., p. 73). Nevertheless, Umpire Plumley observed that:

"In this protocol France is permitted to intervene only on behalf of Frenchmen who are recognized as such by the laws of Venezuela, and whatever equities may exist between the claimants and Venezuela, none can be considered by this tribunal except those which are thus presented." (Ibid., p. 79)

The same reasoning was upheld again by Umpire Plumley in the Heirs of Massiani case:
The principle of non-responsibility of a State in vis-à-vis its own nationals is at the international level of equal sovereignty of States, or at least of national laws and its adherence to international law, according to which the defendant State does not conform to the principles of public international law. It is in accordance with the principle of effective nationality and its harmonization with public international law, that the defendant State must treat its own nationals as citizens of the state on the basis of, and in accordance with, the laws of the country of origin, on principle out of respect for the sovereignty of that State. It must be noted that the defendant State does not have to take into account the laws of the country of origin, on principle out of respect for the sovereignty of that State.

The Permanent Court of Arbitration also essentially confirmed the principle of non-responsibility in the Canevaro case of 1911. The Court noted that Canevaro, on several occasions, had acted as a Peruvian citizen and stated that under those circumstances, no matter what his status as a national might be in Italy, it was his duty to deny his status as an Italian citizen. The decision in this case was not determinant for the purposes of the defendant State, as there was no question of holding the nationality of the defendant State as prevailing. Rather, it was a matter of holding the nationality of the respondent State as prevailing, on principle out of due respect for the sovereignty of that State.

With the exception of this one case which stands out by its own very special context, all dual national claims against their own State were declared inadmissible. As so well stated by Ralston, the general rule of the courts may be summed up as being, as indicated, that where a claimant is a citizen of the respondent State, non-responsibility shall prevail, even when the claimant has stronger or more intense links with the country of origin. The decision in this case also had to be interpreted in the same sense.

This principle, based on the principle of equal sovereignty of States, was derogated from by the jurisprudence of the Georges Pinson decision. In response to invocation of the theory of non-responsibility by the Mexican agent, the President of the Commission, J.H.W. Verzijl, held: "The principle of non-responsibility is a self-evident conclusion of the sovereignty of States. It results from this decision that in cases of dual nationality, from the moment the respondent State establishes that the claimant has actually acted as its own national, the principle of non-responsibility shall prevail, even when the claimant has stronger or more intense links with the country of origin. The decision in this case also had to be interpreted in the same sense."

The decision in the Pinson case decided by the Paris-Mexican Commission was agreed upon in the Mexican arbitral commissions which declared inadmissible the claims of dual nationals against their own Government.

In the Brignone case decided by the Italian-Venezuelan Commission, the entire passage from the Pinson decision thus does not deviate from the jurisprudence of the Mexican arbitral commissions which declared inadmissible the claims of dual nationals against their own Government.
benefit from the peace treaties signed with the former enemy States. That fact established, no significance was attached to the fact that a claimant might also be holding the nationality of one of the defeated States. This attitude is conspicuous in the Hein decision rendered by the Anglo-German commission (II T.A.M. pp. 71 et seq.). The Tribunal confined itself to skirt the objection to its jurisdiction in the following manner:

"The Tribunal find as a fact that the money was in the current account of the Creditor with the Debtor Bank. They do not think it necessary to decide in this case the effect of Article 278. The Creditor had become a British national, and, as he was residing in Great Britain on January 10th, 1920, he has acquired the right to claim under Article 296 through the British Clearing Office, and, apart from Article 278, it is immaterial whether he has or has not lost his German nationality." (II T.A.M. p. 72).

The Oskinar case was decided in the same way by the French/German Tribunal on October 29, 1924. The case concerned a Frenchwoman by birth who acquired Turkish nationality through her marriage to a Turkish national. The Tribunal declared:

"...it is sufficient to state that even if Mrs. Oskinar were perhaps considered an Ottoman by Turkey, she has certainly retained, in the eyes of France, her original nationality; this sole fact in itself is sufficient for the claimant to benefit from the provisions of the Treaty of Versailles concluded in favor of the nationals of the allied and associated Powers (Cf. the Daniel Blumenthal v. the German State decision of 24 April 1925, T.A.M., Vol. III, pp. 618 and 619)." [46]

In each case preference was given either to the nationality of origin or to a nationality subsequently acquired, in order to declare the nationality of the Allied Powers as prevailing. The reasoning which led the Tribunal to its decisions appears blatantly discriminatory. In this connection two decisions are particularly significant: the Grigoriou decision of January 28, 1924 rendered by the Greek-Bulgarian commission and the Apostolidis decision of May 23, 1928 rendered by the French-Turkish commission. The first decision concerned a claim against Bulgaria by Dimitri Hadji, a naturalized Bulgarian of Greek origin. The Greek law of December 31, 1913 in fact permitted Greeks to acquire a foreign nationality on condition that prior authorization by the Greek Minister of Foreign Affairs be obtained. Absent that authorization, the individual would continue to be considered Greek. The Tribunal upheld Grigoriou's nationality of origin in declaring:

"Whereas the essential condition for a naturalization acquired abroad to be valid in the country of origin is that [the naturalization] conform not only to the laws of the country where it took place but also to national laws;

"Whereas the Tribunal, not having to appreciate the moral side of the question and having to confine itself to rendering a strictly legal solution, is obliged to reject the plea made by the defendant in light of the fact that the claimant, not having lost his Greek nationality, is entitled to invoke the provisions of the Treaty of Neuilly, Articles 51, 52 and 158, as a Hellenic national..." [47]

Contrast the grounds for the decision rendered May 23, 1928 by the French-Turkish Commission. The case involved a claim against Turkey by Demetrius Apostolidis, a Turk by origin who had been naturalized French. Given a situation identical to that of the preceding case, this commission reasoned along totally opposite lines and upheld the acquired nationality despite the fact that the naturalization had been obtained without the prerequisite authorization of the Ottoman Empire.

The plea of lack of jurisdiction was denied:

"Whereas in the instance where the law of a State exceptionally requires that prior Government authorization be obtained in order for naturalization of its nationals to be considered valid, such provision would bind only the authorities of said State;

"Whereas it follows that if in the present case the administrative and judicial authorities of Turkey can refuse to recognize the naturalization of the principal claimant, all other judicial authorities, among them the Mixed Arbitral Tribunal which, in matters concerning public international law is not bound by the municipal legislation of one of the contracting States, are obliged to recognize the validity of the change of nationality and to recognize the claimants as French nationals;[48]

How then may this contradiction in the two decisions be reconciled? In the first case the tribunal upheld the nationality of origin, because it was that of an Allied power. In the second case, where the nationality of origin was that of a defeated State, the Tribunal chose to uphold the acquired nationality, again that of an Allied power.

7. The jurisprudence of the Strunsky-merge case falls within the same historical context. That case was decided by the Italian-United States Conciliation Commission established by Article 78 of the Peace Treaty concluded in Paris on February 10, 1947.

It is true that Merge constitutes a very special reasoning, which shall be dealt with hereinafter. It is nonetheless true that it was inspired by the same concept inspiring the Mixed Arbitral Tribunals established after the First World War: to extend as far as possible the responsibility of the States which had launched the war of aggression and especially to make them pay reparations to the victims of that war.

8. A pertinent passage from the celebrated decision rendered in Berlin on June 8, 1932 in the Salem case clearly illustrates that the principle of non-responsibility is the single exact expression of international law and shows that the theory of effective nationality is far from constituting a principle of international law. An arbitral tribunal was established by virtue of the agreement concluded between the United States and Egypt on January 20, 1931, and presided over by Dr. Walter Simon, to adjudicate a claim presented on behalf of George J. Salem by the United States Government against the Egyptian Government. Salem had been naturalized a United States citizen on December 18, 1908 but the Egyptian Government maintained, in order to contest the claim, that Salem held both United States and Egyptian nationality and that the latter one was his effective nationality. The Tribunal stated:

"The principle of the so-called 'effective nationality' the Egyptian Government referred to does not seem to be sufficiently established in international law. It was used in the famous Canevaro case, but the decision of the Arbitral Tribunal appointed at that time has remained isolated. In spite of the Canevaro case, the practice of several governments, for instance the German, is that if two powers are both entitled by international law to treat a person as their national, neither of these powers can raise a claim against the other in the name of such person (Borchard, Lc., p. 588). Accordingly the Egyptian Government need not refer to the rule of 'effective nationality' to oppose the American claim if they can only bring evidence that Salem was an Egyptian subject and that he acquired the American nationality without the express consent of the Egyptian Government. (II R.I.A.A. 1163 at 1187)

The Egyptian Government was unable to bring proof establishing Salem’s Egyptian nationality; had it been so able, the Tribunal would have rejected the claim regardless of whether his Egyptian
nationality was effective or not. Actually, it was determined that besides his United States nationality, Salem held Persian, and not Egyptian, nationality, although that fact was held to be irrelevant. It is now permissible to question on what basis the majority states: “There is a considerable body of law and legal literature, analysed herein, which leads the Tribunal to the conclusion that the applicable rule of international law is that of dominant and effective nationality.”

Section 3: Post World War II Decisions

Have the solutions of substantive international law, such as those expressed in Article 4 of the Hague Convention of 1930 and in the 1965 Resolution of the Institute of International Law, been contradicted by recent judicial practice? Two precedents from the interim period have sometimes been cited as doing so. They both date from the same year: the Nottebohm judgment rendered by the International Court of Justice on 6 April 1955 (Point 1), and the Merge decision rendered by the Italian-United States Conciliation Commission on 10 June 1955 (Point 2). These precedents merit separate examination.

a. The Nottebohm Judgment

The Nottebohm judgment, rendered 6 April 1955, has been cited in the majority decision in support of the theory of effective nationality. There exists one statement in Nottebohm which, taken out of context, could lead one to believe that the International Court of Justice was turning away from the Advisory Opinion it had rendered six years earlier and was now advocating the principle of effective nationality when the dual nationality involves one of the two States referring to the international tribunal.

The passage to which the majority decision refers is the following: “International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts...” (I.C.J. Reports, 1955, p. 22). However, on the following page of the same judgment, the Court explicitly refers to Article 5 of the Hague Convention, thus confirming that the arbitral practice alluded to is not the situation referred to in Article 4, i.e., a situation where the two nationalities in conflict are those of the two States establishing the international tribunal. Excluding that situation, there are indeed instances when arbitrators have shown preference for the effective nationality: for example, when a claimant has held both the nationality of the State concluding the treaty on behalf of its nationals and the nationality of a third State. As well known as the Nottebohm case is, it is still worthwhile to recall the facts which led the International Court of Justice to render its judgment of 6 April 1955.

Friedrich Nottebohm was German by birth, had long had his domicile in Guatemala, and had been naturalized by the Principality of Liechtenstein on 13 October 1939. In 1951, the Government of Liechtenstein instituted proceedings against the Government of Guatemala on behalf of its national, Nottebohm. The claim was for property damage and moral injury suffered as a result of wartime measures imposed on him by Guatemala. Liechtenstein had granted its nationality to Nottebohm following an accelerated and almost-overnight administrative procedure. Nottebohm’s petition for naturalization obviously lacked sincerity and did not correspond to any factual link with the people of Liechtenstein. He sought the naturalization “to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations – other than fiscal obligations – exercising the rights pertaining to the status thus acquired.” (Id. at 26). The elements of fraud in the petition for naturalization and of abuse in its granting were conspicuous. It was therefore in light of these circumstances that the Court relied upon the theory of effective nationality to declare inadmissible the claim brought against the Government of Guatemala by the Government of Liechtenstein on Nottebohm’s behalf. The concept of effectiveness operates as a measure of restraint upon a principle requiring international law to recognize the legality of a nationality granted by a State. This role of acting as a restrainer was attributed to the concept of effectiveness for the purpose of averting obvious instances of abuse and was even expressed as such in the Court’s judgment. Far from superseding the principle of non-responsibility, the concept of effective nationality creates, in the Nottebohm judgment, supplementary grounds – and, according to some authors, new grounds – of non-responsibility.

It should perhaps be pointed out that Nottebohm was not a case involving dual nationality. Nottebohm did not hold, and never had held, the nationality of Guatemala, the defendant State, and he had lost his original German nationality when he became naturalized. He held solely the nationality of Liechtenstein. The principle of effective nationality was perceived in this case as an exigency of international morality: a State may not offer diplomatic protection to one of its naturalized citizens, when that naturalization was granted in the absence of any real and effective ties. If the solution applied in the Nottebohm judgment were to be generalized without extending its facts, it could only be said that for any claim brought before an international tribunal, the tribunal must verify whether the claimant has an effective link with the claimant State. In accordance with the Nottebohm judgment, this should be done even when no conflict of nationalities has arisen: in other words, even when the claimant has no other nationality but that of the claimant State (which was Nottebohm’s position; it was never considered that he had retained his original nationality which was that of a third State). Given the foregoing, how could the principle of effectiveness ever be expected to play any other role – i.e., that of rendering nugatory the nationality of the defendant State, deemed ‘less’ effective?

The solution thus handed down by the International Court of Justice in 1955 to deal with abuse in granting nationality, as raised in Nottebohm, was confirmed by Article 4(c) of the Resolution adopted by the Institute of International Law at its Warsaw session in 1965:

“(c) An international claim presented by a State for injury suffered by an individual may be rejected by the respondent State or declared inadmissible when, in the particular circumstances of the case, it appears that naturalization has been conferred on that individual in the absence of any link of attachment.” (Annuaire de l’Institut de droit international, 1965, Vol. 51-II, p. 262)

Nevertheless, the majority states that Nottebohm “demonstrated the acceptance and approval of the International Court of Justice of the search for the real and effective nationality based on the facts of a case...” (Majority Decision, pp. 21-22). This statement does not withstand an examination of the facts of Nottebohm.

b. The Merge case

In the Strumsky-Merge case, the Italian-U.S. Conciliation Commission (established under Article 78 of the peace treaty signed between the two States in Paris on 10 February 1947) was called on to adjudicate damages suffered through Italian acts during World War II by a person holding the nationalities of both States. The defendant State, Italy, invoked the principle of non-responsibility for the claim.

The Commission, presided over by Don Jose de Yanguas Messia, declared the co-existence of two
principles in international law: (a) the principle of diplomatic protection to one's nationalities against States whose nationals are also nationals of the United Nations, or corporations, or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty on March 3, 1943 (treated with the Amistad with Italy).

(c) The principle, according to which one State cannot afford diplomatic protection to one of its nationals against another State of which he is also a national, including the United Nations, or corporations, or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty on March 3, 1943 (treated with the Amistad with Italy).

The principle is thus one of public international law, and it is relevant for the purpose of the present case, viz., the protection of the United Nations nationals in their property in Italy.

(b) The intention of the drafters of the Peace Treaty was to protect both the direct and indirect interests of the United Nations nationals in the property in Italy.

Thus far from contesting the principle by which a State cannot afford diplomatic protection to one of its nationals against another State of which he is also a national, the United Nations Congress concluded that the two principles were neither contradictory nor irreconcilable and it explained its reasoning as follows: 'The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such nationality is not proved.' The Commission finally decided that as the claimant could not be considered as having presented a claim on behalf of its nationals, the Government of the United States was not bound to afford diplomatic protection to such person.

The historical context in which the United Nations Peace Treaty was concluded was such that the two principles were not applicable. The precedent was to be set by the United States of America, and the Congress was therefore bound to decide on the basis of that precedent.

2. The two principles are complementary. The first principle, embodied in Article 4 of the Hague Convention, is based on the principle of public international law, and it leads to the conclusion that effective nationality prevails. The second principle, embodied in Article 5 of the Hague Convention, is based on the principle of private international law, and it leads to the conclusion that diplomatic protection is afforded. The two principles are thus complementary, and they are not contradictory. The Commission decided that they were not irreconcilable, and it explained its reasoning as follows: 'The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such nationality is not proved.' The Commission finally decided that as the claimant could not be considered as having presented a claim on behalf of its nationals, the Government of the United States was not bound to afford diplomatic protection to such person.

The principle of non-responsibility, accepted by international law, is supported by the law of nations. See, for example, Oppenheim, International Law, Vol. I, p. 67. In the case of the present Treaty, the question arises whether the claimant State would be bound to afford diplomatic protection to one of its nationals against another State of which he is also a national.

The Commission concluded that the two principles were not contradictory, and it explained its reasoning as follows: 'The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such nationality is not proved.' The Commission finally decided that as the claimant could not be considered as having presented a claim on behalf of its nationals, the Government of the United States was not bound to afford diplomatic protection to such person.

In the position adopted by the United States Government, which is not supported by the law of nations, the claimant State would be bound to afford diplomatic protection to one of its nationals against another State of which he is also a national. Sir Gerald Fitzmaurice observes that: 'The State of one of his nationalities can never give him, or his interests, diplomatic protection or bring an international claim on his behalf, against the State of his other nationality, given he is not a resident of that State at the time of the claim or during the term of the claim.' (XIV R.I.A.A. p. 238). Other authorities have made the same criticism (see, for example, Blaser, La Nationalite et la protection juridique international, pp. 62-63).

The distinction between the two situations -- i.e., the conflict between the nationalities of the two claimants, the United Nations Government, and the conflict between the two claimants when one of the claimants is a third State -- has already been made very accurately by the Italian-United States Conciliation Commission in its Report on Multiple Nationality (U.L.D., N. 66, 1948, p. 30). The Commission concluded that the two situations are different, and it explained its reasoning as follows: 'The two situations are different, and they are not contradictory. The Commission decided that they were not irreconcilable, and it explained its reasoning as follows: 'The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such nationality is not proved.' The Commission finally decided that as the claimant could not be considered as having presented a claim on behalf of its nationals, the Government of the United States was not bound to afford diplomatic protection to such person.'
Convention of May 23, 1969.

There shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties.

Judicial decisions have suggested that there are tests provided by international law for establishing the priority of one nationality claim over another. Actually the cases establish that one state may not assert a claim of "...” (A Modern Law of Nations - An Introduction, Archon Books, 1968, p. 100).

First, as has already been stressed, paragraph 3(c) can never by itself create jurisdiction for an ad hoc tribunal, especially when that tribunal would expand the obligations of only one party to the agreement. Paragraph 3(c) simply permits a court to take into account any relevant rules of international law that pertaining to the tribunal, to interpret the agreement between the parties.

It is equally important to stress that in Award No. A-2 rendered on 26 January 1982, the Tribunal stated that "...". The Tribunal was acting under the Algiers Declarations, and that its jurisdiction in interpreting paragraph 3(c) was to be determined by the provisions of the Declaration of 1969. It is interesting to note that the Tribunal in that case, by interpreting, paragraph 3(c) of the Vienna Convention on Diplomatic Relations, 1961, determined that the claim of the United States against the Argentine Government was not admissible. In that case, the Tribunal declared that: "...". It can easily be seen that the Tribunal preferred the interpretation of paragraphs 3(c) and 3(d) of the Vienna Convention on Diplomatic Relations, 1961, to any other interpretation, no matter how well founded it might be.

Furthermore, having looked at the provisions of the Algiers Declarations, the Tribunal declared that the secondary nature of the state is free under international law to treat its own nationals as it pleases, despite the fact that it has been the practice of states to recognize the nationality of another state of a person who is of that state, by the fact of his birth or adoption. The practice of states is, however, contrary to the spirit of the Algiers Declarations. The Tribunal was, therefore, correct in interpreting the situation in conformity with the spirit of the Declaration, and not in implementing the provisions of paragraph 3(c).

a) The sole duty of the Tribunal in the present case was to determine whether or not the Algiers Declarations of January 1969, the Article 31 paragraph 3(c) of the Vienna Convention had been interpreted in conformity with the Algiers Declarations. The Tribunal was interpreting the same legal provisions, which it had been granted jurisdiction under the Algiers Declarations, to interpret the same legal provisions. Therefore, the Tribunal was exercising the same jurisdiction it had been given under the Algiers Declarations.

b) The Tribunal in the present case interpreted the provisions of Article 31 paragraph 3(c) of the Vienna Convention as follows: "...". The Tribunal declared that the United States could not be held liable for the acts of its own nationals, as its own nationals were not within the jurisdiction of the Tribunal.

c) The Tribunal in the present case interpreted the provisions of Article 31 paragraph 3(c) of the Vienna Convention as follows: "...". The Tribunal declared that the United States could not be held liable for the acts of its own nationals, as its own nationals were not within the jurisdiction of the Tribunal.

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The Tribunal in the present case interpreted the provisions of Article 31 paragraph 3(c) of the Vienna Convention as follows: "...". The Tribunal declared that the United States could not be held liable for the acts of its own nationals, as its own nationals were not within the jurisdiction of the Tribunal.
The international law recognizes the right of the United States Government to determine its own foreign policy. The positions taken by the highest-ranking officials of the United States Government are, of course, perfectly binding on the United States. This does not mean, however, that the International Court of Justice in The Hague has no jurisdiction over the case. The Court has jurisdiction over the case, and the United States can be heard if it so desires. The United States is not bound by the decision of the Court, but the decision of the Court is binding on the United States. The United States can appeal to the United Nations. The United States is not bound by the decision of the United Nations. The United States can appeal to the United Nations. The United States is not bound by the decision of the United Nations. The United States can appeal to the United Nations. The United States is not bound by the decision of the United Nations. The United States can appeal to the United Nations.
In the absence of any mandate in this regard, the majority’s ultra vires assumption of jurisdiction renders its decision void and unenforceable.

2. International arbitration has been defined and advocated as a peaceful and equitable means for settlement of inter-State disputes by neutral and mutually agreed-to arbitrators. Experience, however, has shown that the majority’s ultra vires assumption of jurisdiction for the purposes of the resolution of intrastate disputes is often not respected, the United States nationals having been accepted as validly invoking their rights under the Acts of 1980 and 1981 on grounds that they are more American than Iranian because they have their domicile in the United States and that their personal ties with the United States are stronger than their ties with Iran.

Against this overwhelming evidence, the majority in the present case has concluded that the Tribunal does have jurisdiction to entertain claims presented by certain Iranian nationals against their own Government, provided that such nationals establish that they also hold United States nationality and that the latter is their effective nationality. The United States Government has itself on occasion invoked excess of power as a ground for its refusal to execute decisions which have been rendered against it.

The present Dissenting Opinion may not be a convenient place for a detailed examination of the legal issues. Two points of particular importance must be mentioned:

1. Present doctrine unanimously holds as null and void any decision in which an arbitrator exceeds his powers, or which is rendered in violation of a procedural rule. An arbitrary decision is null in the event of annullamemnis or the proven refusal to execute decisions which have been rendered against it.

2. Present doctrine unanimously holds as null and void any decision in which an arbitrator exceeds his powers, or which is rendered in violation of a procedural rule.

The United States Government has itself on occasion invoked excess of power as a ground for its refusal to execute decisions which have been rendered against it. Present doctrine unanimously holds as null and void any decision in which an arbitrator exceeds his powers, or which is rendered in violation of a procedural rule. An arbitrary decision is null in the event of annullamemnis or the proven refusal to execute decisions which have been rendered against it.
jurisdiction over a claim by a "dual national," the claim cannot be maintained in United States courts.

As stated in the Memorandum of State Department Assistant Legal Adviser George Spangler dated 19 February 1962 which was submitted by the United States at the Hearing.

In spite of the surnames of the claimants in those cases, Iran contends it did not necessarily know of the "dual nationality" of such claimants. Nevertheless, Iran's failure at that time to suggest a distinction between United States citizens and United States citizens who were "dual nationals" and those who were not was more indicative of the Tribunal's position in United States litigation than in the possibility that "dual nationals" could bring claims before the Tribunal.

Article V of the Claims Settlement Declaration provides:
The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

The word "majority" is used merely for convenience. As revealed in our statement attached to the Award, this "majority" is composed of three American arbitrators and three so-called "neutral" arbitrators, one of whom was challenged for cause and another of whom was not even assigned by the Tribunal's president. The only one was imposed on the Tribunal by the United States. Members Holtzmann and Aldrich in dissent write this separate opinion for the purpose of informing the parties and the arbitral community of the Tribunal's work. The other one was imposed on the Tribunal without the consent of one of the arbitrating parties.

The apparent reciprocal nature of the clause should not be allowed to distort the reality. While thousands of claims have been brought before this Tribunal by American nationals and corporations against the Government of the Islamic Republic of Iran, not more than a few insignificant claims have been brought by the nationals of Iran against the Government of the United States. For more details, see our Dissenting Opinion in Case A/2.

Claims Settlement Declaration and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran. Article VII, paragraph 2 provides: "Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court."


The question is whether the United States was acting as a party to the related Undertaking of the Government of the United States of America and the Government of the Islamic Republic of Iran.

see 5 IUSCR page 275 and 428

See Griffin, "International Claims of Nationals of Both the Claimant and Respondent States - The Case History of the Panama-Saldutiskis Railway Case, PCIJ, Series A/B, No. 76 (1939) 4, 16.


See Basdevant, "Conflits de Nationalites dans les Arbitrages Venezueliens de 1903-1905", Rev. de Droit Intern. Prive et Commerciel, Vol. 151 (1976-III), pp. 25-26. Translated from the original French: "Prendre le texte comme point de depart, ce qui n'est pas le cas, l'instrument est a la fois un instrument de droit, mais son interpretation doit etre basée sur l'intention des parties, mais procedure a as declarer par l'arbitre de droit et de fait on repond, court d'arbitrage est sur le moyen de l'arbitrage.

"Il s'agit en effet de l'object et du but du trait6, donc d'un objet et d'un but subjectifs voulu par les parties : il ne s'agit pas d'un objet et d'un but objectifs, independants et intrinses, sur la base desquels il serait possible d'indiquer ce que les parties auraient du faire.

Article VII, paragraph 2 provides: Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.


General Principle B states: "It is the purpose of both parties, within the framework of the Agreement and pursuant to the Objectives of the Agreement, to settle the claims of the United States and of the United States Government with the United States Government with the United States.

Agreed, "International Claims of Nationals of Both the Claimant and Respondent States - The Case History of the Panama-Saldutiskis Railway Case, PCIJ, Series A/B, No. 76 (1939) 4, 16."
Interpréter à la lumière d'un tel objet et d'un tel but serait peut-être non pas interpréter le traité, mais le réviser."

Il devrait être noté que l'Accord entre les États-Unis et l'Egypte a été conclu près de vingt ans après la Révolution égyptienne. De plus, l'Accord n'offrait pas de solution pour la résolution des conflits par un forum international, comme les déclarations d'Alger, mais pour un paiement d'un montant d'un seul écart à l'État égyptien. Sinon, l'Egypte n'aurait pas accepté d'être responsable de ses citoyens.

En principe du droit international public, Pedone, | 443. Traduction de l'édition originale en français :
"Etat redacteur ayant la possibilité de la formuler d'une manière plus explicite, il ne doit s'en prendre qu'à... de sa négligence."

United States / Colombien Mixed Commission, 18 May 1866. Moore, IV International Arbitrations, p. 3614; De La Pradelle et Politis, II Recueil arbitrages internationaux, p. 488.

Emphasis added.

Minutes of the First Committee, p. 305; Weis, Nationality and Statelessness in International Law, 1956, p. 184.

"Une réclamation internationale en faveur d'un individu qui possède en même temps, les nationalités de l'État requérant et... irrecevable, sauf lorsqu'il peut être établi que la nationalité 'active' de cet individu est celle de l'État requérant."

V R.I.A. p. 27-28. 1. Traduction de l'édition originale en français :
"Les demandes d'indemnités ont été présentées par les Français..."
"Att. que dans le cas ou exceptionnellement la legislation d'un Etat exige pour la validite de la naturalisation de ses nationaux une autorisation gouvernementale prealable, une telle disposition ne saurait lier que les autorites dudit Etat. Att. qu'il s'en suit que si dans l'espece les autorites administratives et judiciaires turques pourront refuser de reconnaître les effets de la naturalisation de l'auteur des demandeurs, toutes les autres autorites judiciaires, et parmi elles le Tribunal arbitral mixte qui, en ce qui concerne le droit international public, n'est pas lie par la legislation interieure de l'un des Etats contractants, sont tenues d'admettre la validite du changement de nationalite et de reconnaître les demandeurs comme ressortissants francais;"

The last paragraph before the section entitled 'The 1930 Hague Convention,' pp. 16-17 of the majority decision.

See further, article 139 of the Constitution of the Islamic Republic of Iran, in accordance with which:

"Article 139. The settling of litigation relating to public and state property and the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the ppproval of the Assembly must also be obtained. Law will specify the important cases intended here."


See, for example: The case of the Northeastern Boundary Dispute between the United States and Great Britain in 1831. The King of the Netherlands was chosen as the arbitrator and was requested to decide between two lines demarcating the border of the State of Maine and the Canadian province of Nova Scotia. He chose a third line of his own devising. The United States Government refused execution of the decision because the arbitrator had exceeded his power. The case was resolved 11 years later, in 1842, following conclusion of another treaty. (Hyde, II International Law, 2nd edition, 1945, p. 1636).

-- In the case concerning the border of Chamizal (Mexico/United States) decided in 1911, the United States abstained from execution of the arbitral decision for the reason that the arbitrators had exceeded their powers. The dispute was finally settled in 1964, i.e., 52 years later, by a treaty (T.J.A.S. 5515) concluded between the two States concerned (Hackworth, I Digest of International Law, pp. 409-418; Whiteman, III Digest of International Law, pp. 680-693.)
International Centre for Settlement of Investment Disputes

The Loewen Group, Inc. and Raymond Loewen
v. the United States of America
Award of 26 June 2006

ICSID Case No. ARB(AF)/98/3
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.


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 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

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

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.

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 LGH 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. 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 Mississippian (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*.

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
genetrated 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):

- 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
- Wilful and malicious 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

Total: $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 today. 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.

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 those 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 “pulpable 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 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 v United States (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 discrepable, 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”); Ade, 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.
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

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

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.

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 “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

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
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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 Garcia-Amador, Sohn and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974) pp 143, 129-132; see also Garcia-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); Blumberg 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 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. J.Intl. Law 339 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 Naftanco - a play on the words NAFTA and Canada). It would appear that the NAFTA claim is the only asset of Naftanco, 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 unavowed benefit to the defendant would produce a result so unjust that it could be sustained only by irresistible 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 Nafanco 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 Nafanco, 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 Nafanco ring. Claimants insist that Respondent is asking the Tribunal to “pierce” the corporate veil
of Nafanco 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
England and Wales Court of Appeal (Civil Division)

The Queen on the Application of Abbasi & Anor. v. the Secretary of State for Foreign Affairs and Commonwealth Affairs & Secretary of State for the Home Department,
Judgement of 6 November 2002

[2002] EWCA Civ 1598
Neutral Citation No: [2002] EWCA Civ 1598

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE AND DIVISIONAL COURT
The Hon. Mr Justice Richards

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th November, 2002

B e f o r e :

LORD PHILLIPS, MR
LORD JUSTICE WALLER
and
LORD JUSTICE CARNWATH

The Queen on the application of Abbasi & Anor. Claimants

- and -

Secretary of State for Foreign and Commonwealth Affairs Defendants
& Secretary of State for the Home Department

Mr N Blake QC; Mr Philippe Sands and Mr Ben Cooper (instructed by Messrs Christian Fisher Khan for the Claimants)
Professor C Greenwood QC; Mr Philip Sales (instructed by The Treasury Solicitor for the Defendants)

Hearing Dates: 10, 11 and 12 September 2002

JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

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Abbasi and another

-v-

Secretary of State for Foreign and Commonwealth Affairs
& Secretary of State for the Home Department

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Lord Phillips:

This is the judgment of the Court to which all members have contributed.
Introduction

1. Feroz Ali Abbasi, the first claimant, is a British national. He was captured by United States forces in Afghanistan. In January 2002 he was transported to Guantanamo Bay in Cuba, a naval base on territory held by the United States on long lease pursuant to a treaty with Cuba. By the time of the hearing before us he had been held captive for eight months without access to a court or any other form of tribunal or even to a lawyer. These proceedings, brought on his behalf by his mother, the second claimant, are founded on the contention that one of his fundamental human rights, the right not to be arbitrarily detained, is being infringed. They seek, by judicial review, to compel the Foreign Office to make representations on his behalf to the United States Government or to take other appropriate action or at least to give an explanation as to why this has not been done.

2. On 15 March 2002 Richards J. refused the application for permission to seek judicial review. However, on 1 July 2002 this court granted that permission, retained the matter for itself, and directed that the substantive hearing commence on 10 September 2002. It did so because the unusual facts of this case raise important issues. To what extent, if at all, can the English court examine whether a foreign state is in breach of treaty obligations or public international law where fundamental human rights are engaged? To what extent, if at all, is a decision of the executive in the field of foreign relations justiciable in the English court? More particularly, are there any circumstances in which the court can properly seek to influence the conduct of the executive in a situation where this may impact on foreign relations? Finally, in the light of the answers to these questions, is any form of relief open to Mr Abbasi and his mother against the Secretary of State for Foreign and Commonwealth Affairs?

Mr Abbasi’s predicament

3. Mr Abbasi was one of a number of British citizens captured by American forces in Afghanistan. He was, with others, transferred to Guantanamo Bay. Those currently detained there include seven British citizens. As soon as she learned what had happened to her son, Mrs Abbasi made contact with the Foreign Office. Through lawyers, she pressed the Foreign Office to assist in ensuring that the conditions in which her son was detained were humane. She has also pressed the Foreign Office to procure from the United States authorities clarification of her son’s status and of what is to be done with him in the future.

4. Evidence of action taken by the United Kingdom Government in relation to Mr Abbasi and the other British detainees in Guantanamo Bay has been provided in a witness statement by Mr Fry, a Deputy Under-Secretary of State for Foreign and Commonwealth Affairs. He speaks of close contact between the United Kingdom Government and the United States Government about the situation of the detainees and their treatment and of the consistent endeavour of the government to secure their welfare and ensure their proper treatment. To that end, we are told, the circumstances of the British detainees have been the subject of regular representations by the British Embassy in Washington to the United States Government. They have also been the subject of direct discussions between the Foreign Secretary and the United States Secretary of State as well as ‘numerous communications at official level’.

5. The government was able to obtain permission from the United States Government to visit detainees at Guantanamo Bay on three occasions, between 19 and 20 January, between 26 February and 1 March and between 27 and 31 May. These visits were conducted by officials of the Foreign and Commonwealth Office and members of the security services. The former were able to assure themselves that the British prisoners, including Mr Abbasi, were being well treated and appeared in good physical health. By the time of the third visit, facilities had been purpose built to house detainees. Each was held in an individual cell with air ventilation, a washbasin and a toilet. It is not suggested by the claimants that Mr Abbasi is not being treated humanely.

6. The members of the security services took advantage of these visits to question Mr Abbasi with a view to obtaining information about possible threats to the safety of the United Kingdom. Initially this was the subject of independent complaint by the claimants, but before us the argument has focussed on the allegation that the Foreign and Commonwealth Office is not reacting appropriately to the fact that Mr Abbasi is being arbitrarily detained in violation of his fundamental human rights.

7. The position of the Foreign and Commonwealth Office is summarised by Mr Fry in the following terms:

“In cases that come to us with a request for assistance, Foreign and Commonwealth Ministers and Her Majesty’s diplomatic and consular officers have to make an informed and considered judgement about the most appropriate way in which the interests of the British national may be protected, including the nature, manner and timing of any diplomatic representations to the country concerned. Assessments of when and how to press another State require very fine judgements to be made, based on experience and detailed information gathered in the course of diplomatic business.

In cases where a person is detained in connection with international terrorism, these judgements become particularly complex. As regards the issue of the detainees now at Guantanamo Bay, as well as satisfying the clear need to safeguard the welfare of British nationals, the conduct of United Kingdom international relations has had to take account of a range of factors, including the duty of the Government to gather information relevant to United Kingdom national security and which might be important in averting a possible attack against the United Kingdom or British nationals or our allies; and the objectives of handling the detainees securely and of bringing any terrorist suspects to justice.”

8. In or about February 2002 the claimants initiated habeas corpus proceedings in the District Court of Columbia. As we shall explain, rulings in proceedings brought by other detainees in a similar position demonstrate that Mr Abbasi’s proceedings have, at present, no prospect of success.

The position according to the United States Government and the United States Courts

9. On 2 July 2002 the First Secretary at the American Embassy in London wrote to solicitors acting for the claimants in the following terms:

“The United States Government believes that individuals detained at Guantanamo are enemy combatants, captured in connection with an on-going armed conflict. They are held in that capacity under the control of U.S. military authorities. Enemy combatants pose a serious threat to the United States and its coalition partners. Detainees are being held in accordance with the laws and customs of war, which permit the United States to hold enemy combatants..."
10. The Third Geneva Convention 1949 relates to Prisoners of War. The United States has not, however, accepted that prisoners held at Guantanamo have the status of prisoners of war. The United States has not, however, accepted that prisoners held at Guantanamo have the status of prisoners of war under the Third Geneva Convention. The Department of Defense has stated that it does not consider the United States to be a party to the Third Geneva Convention. The position of the United States is that the prisoners held at Guantanamo are not entitled to the protections afforded by the Third Geneva Convention. The United States has not accepted that the prisoners held at Guantanamo have the status of prisoners of war under the Third Geneva Convention.

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What received less attention until recently was the Administration’s plan to detain the men for as long as it deemed necessary. The Administration’s plan to detain the men for as long as it deemed necessary to protect American security. The White House is now pressing for an amendment to the Justice Against Sponsors of Terrorism Act, which would allow the administration to detain enemy combatants who cannot be prosecuted or deported. The amendment would also allow the administration to hold enemy combatants for an indefinite period of time.

The material parts of this response can be summarised as follows:

Hamdi’s detention is lawful since he has been seized by the military and is detained as an enemy combatant.

There is no obligation under the law and customs of war for captors to charge combatants with an offence.

Prisoners of war have no right to counsel.

Combatant, “the executives’ determination that someone is an enemy combatant and should be detained as such” [being] one of the most fundamental military judgments of all.

In essence, the submission is that the war on terrorism is at least the equivalent to a conventional war, and that the military has the right to go before a court to challenge the legality of its own actions. In this connection, the Commission must emphasize the importance of ensuring the availability of effective and fair mechanisms for determining the status of individuals who are captured in the military’s operations.

The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, must be determined by a competent authority according to the provisions of Article 4 of the Geneva Conventions of 1949.

The United States wishes to inform the Commission that the legal status of the detainees is clear, that the Commission does not have jurisdictional competence to apply international humanitarian law, that the precautionary measures are neither necessary nor appropriate in this case, and that the United States lacks the authority to request precautionary measures of the United States.

Expressions of concern

There have been widespread expressions of concern, both within and outside the United States, in respect of the United States government’s resort to the military in cases such as Hamdi. On 16 January 2002, the US Department of Justice, in accordance with the provisions of Article 5 of the Third Convention, issued the following assertions:

"The detention of the detainees, and their entitlement to prisoner-of-war (POW) status, must be determined by a competent authority according to the provisions of Article 4 of the Geneva Conventions of 1949."

In this connection, the Commission must emphasize the importance of ensuring the availability of effective and fair mechanisms for determining the status of individuals who are captured in the military’s operations. Furthermore, whereas there is the possibility that they may be released at the end of their detention, there is the possibility that they will remain in detention for an indefinite period of time.

The United States wishes to inform the Commission that the legal status of the detainees is clear, that the Commission does not have jurisdictional competence to apply international humanitarian law, that the precautionary measures are neither necessary nor appropriate in this case, and that the United States lacks the authority to request precautionary measures of the United States.

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Against the First Respondent [Defendant]:

(i) That the government of the United Kingdom has the right to protect the interests of its nationals, within the limits permitted by international law;
(ii) That acts or omissions with respect to the said right are exercises of jurisdiction and/or acts of sovereignty over the said nationals;
(iii) That in the exercise of such sovereignty or jurisdiction, the United Kingdom government should act compatibly with the Convention rights of such nationals;
(iv) That in the exercise of such sovereignty or jurisdiction, the Second Claimant is subject to acts or omissions which must be interpreted and applied so as to be given practical effect. Partly for this reason, human rights are being respected. In light of the principle of efficacy, it is not sufficient for a detaining power to simply assert its view as to the status of a detainee to the exclusion of any proper or effectual procedure for verifying that status.
(v) That accordingly, the Respondents [Defendants] are under a duty to take all reasonable steps within their jurisdiction and powers enjoyed by the Defendants to:
   a. release the Second Claimant from detention or
   b. return him to the custody or control of the Respondents [Defendants] in the United Kingdom, or
   c. bring the Second Claimant before a competent court or tribunal to determine whether the Claimant is being held in accordance with the law, and applicable international standards;
   d. permit access by the Second Claimant to a lawyer of his choice for the purpose of c. above, and/or advising his rights with respect to any criminal law investigation to which he may be subject.

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United States of one of his fundamental human rights and that, in these circumstances, the Foreign Secretary owed him a duty under English public law to take positive steps to redress the position, or at least to give a reasoned response to his request for assistance. Mr Blake accepted that no legal precedent established such a duty, but submitted that the increased regard paid to human rights in both international and domestic law required that such a duty should be recognised.

The issues

26. For the Secretary of State, Mr Greenwood QC submitted that the authorities clearly established two principles that posed insuperable barriers to the relief claimed in these proceedings: (1) the English court will not examine the legitimacy of action taken by a foreign sovereign state; (2) the English court will not adjudicate upon actions taken by the executive in the conduct of foreign relations. Most of the debate focussed on the question of whether these principles do, indeed, bar the claimants' claim to relief.

The submissions

27. We propose to outline the submissions made in respect of each of the principles relied upon by Mr Greenwood.

Is the legitimacy of action taken by a foreign sovereign state justiciable?

28. A lengthy section of Mr Blake’s argument was devoted to demonstrating that the United States was in breach of a fundamental right, or ‘ius cogens’, in subjecting Mr Abbasi to arbitrary detention. Mr Blake did not suggest that there might not be good grounds for detaining Mr Abbasi. He accepted that the application of the principles of the rules of war, and the provisions of the Geneva Convention, raised difficult questions in the context of the events of September 11th and the military campaign in Afghanistan which followed. The status of Mr Abbasi was in doubt. The violation of international law consisted in his denial of access to any tribunal before which that doubt could be resolved. He was, in truth, subject to arbitrary detention.

29. In support of this submission, Mr Blake referred us to a number of instruments which, so he submitted, established that the prohibition of arbitrary detention had reached the status of a norm of customary international law: Article 9 of the United Nations Declaration of Human Rights; Article 9 of the International Covenant on Civil and Political Rights; Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 7 of the American Convention of Human Rights.

30. Mr Blake also relied on the 3rd Geneva Convention. Article 5 provides that where there is doubt as to whether persons who have committed belligerent acts are prisoners of war, they are to be accorded the protection of the Convention until their status has been determined ‘by a competent tribunal’. It was contrary to the Convention and to international law to deny Guantanamo prisoners both the protection of the Convention and the right to have their status determined by a competent tribunal. Principles of humanitarian law and human rights alike would not permit the denial of access to a review by a court of whether detention was lawful.

31. Mr Greenwood did not challenge the proposition that arbitrary detention violated a fundamental human right. He emphasised that the United States government denied that the detention of prisoners at Guantanamo was unlawful and submitted that the legality of that detention was not justiciable in an English court.

32. In support of the proposition that the English court has no jurisdiction to determine whether a foreign State is in breach of its treaty obligations, Mr Greenwood referred us to the observations of Lord Diplock in British Airways v. Laker Airways [1985] AC 58 at 85-6. He further submitted that it is well established that the English court will not adjudicate upon the legality of a foreign State's transactions in the sphere of international relations in the exercise of sovereign authority, citing Buttes Gas and Oil v Hammer [1982] AC 888 at 932 (per Lord Wilberforce); Westland Helicopters Ltd v AOI [1995] QB 282. To do so would involve a serious breach of comity: see Buck v AG [1965] 1 Ch 745 at 770-771 (per Lord Diplock) and R v Secretary of State, ex parte British Council of Turkish Cypriot Associations [2001] 2 AC 477 at 740 (per Sedley J). He observed that the relief sought by the claimants was founded on the assertion that the United States government was acting unlawfully. For the court to rule on that assertion would be contrary to comity and to the principle of State immunity.

33. The cases cited by Mr Greenwood unquestionably support the general proposition for which they were cited. It is not, however, a proposition that affords of no exception. Mr Greenwood accepted that there were exceptions to the rule. He submitted, however, that the exceptions applied only in exceptional circumstances and had no application to the facts of the present case. Examples of cases where the rule was not applied are Oppenheim v Cattermole [1976] AC 249, R v Secretary of State for the Home Department, ex parte Adam [2001] 2 AC 477 and Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] 2 WLR 1352. We shall revert to these decisions when we come to review the merits of the rival contentions.

34. Mr Blake for his part did not challenge the general proposition that the English court will not adjudicate on the legality of the executive actions of a foreign State. He held, however, that this principle of comity, founded in public international law, has no application to the facts of this case. The United States are not impleaded in the present proceedings. The rights and liabilities of the United States are not in issue. What is here sought is domestic relief against the Secretary of State.

35. Mr Blake laid emphasis on the fact that international law recognises that municipal law may afford the individual a right to diplomatic protection against breaches of international law by another State. He referred us to the following passage from the Barcelona Traction Company case – 1970 ICR Reports at page 44:

"The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to national law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right
with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally." (1970 ICJ reports, p. 3, para. 78).

He submitted that this passage demonstrates that no breach of comity is involved where a court adjudicates on a claim for a domestic law remedy that is founded on an alleged breach of international law by another State.

36. This argument overlapped with the submissions made by Mr Blake in relation to the next issue – can the English court adjudicate upon the conduct of the executive in the field of international relations? In support of the submission that it was desirable that the court should assert such jurisdiction, Mr Blake referred us to the views of Professor Dugard, Special Rapporteur to the Fifty Second Session of the International Law Commission. Professor Dugard advocated municipal law rights to diplomatic protection and observed that in some States such rights were already recognised. It was implicit that the exercise of such rights did not infringe any principle of international law.

Is executive action in the conduct of foreign affairs justiciable?

37. Mr Greenwood referred to a formidable line of authority in support of his submission that the decisions taken by the executive in its dealings with foreign states regarding the protection of British citizens abroad are non-justiciable, starting with Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374 (the GCHQ case). Mr Greenwood drew particular attention to the observations of Lord Diplock at p.411. He submitted that the courts have repeatedly held that the decisions taken by the executive in its dealings with foreign states regarding the protection of British nationals abroad are non-justiciable. He cited the following passages from recent decisions in support of this proposition:

(1) R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Piribhai (107 ILR 462 (1985)):

"... in the context of a situation with serious implications for international relations, the courts should act with a high degree of circumspection in the interests of all concerned. It can rarely, if ever, be for judges to intervene where diplomats fear to tread." (p.479, per Sir John Donaldson MR)

(2) R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Ferhut Butt (116 ILR 607 (1999)):

"The general rule is well established that the courts should not interfere in the conduct of foreign relations by the Executive, most particularly where such interference is likely to have foreign policy repercussions (see R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett [1989] 1 QB 811 at 820). This extends to decisions whether or not to seek to persuade a foreign government of any international obligation (e.g. to respect human rights) which it has assumed. What if any approach should be made to the Yemeni authorities in regard to the conduct of the trial of these terrorist charges must be a matter for delicate diplomacy and the considered and informed judgement of the FCO. In such matters the courts have no supervisory role." (p.615, per Lightman J).

"Whether and when to seek to interfere or to put pressure on in relation to the legal process, if ever it is a sensible and a right thing to do, must be a matter for the Executive and no one else, with their access to information and to local knowledge. It is clearly not a matter for the courts. It is clearly a high policy decision of a government in relation to its foreign relations and is not justiciable by way of judicial review." (p.622, per Henry LJ).

38. To the above he added a citation from the judgment of Laws LJ in the matter of Foday Saybana Sankoh (119 ILR (2000) 389 at 396) where it was described as a hopeless proposition that "the court should dictate to the executive government steps that it should take in the course of executing government foreign policy."

39. Mr Blake embarked with fervour on the task of persuading us that there were good reasons why the court should extend the boundaries of judicial review to embrace decisions as to the exercise of diplomacy where fundamental rights of British subjects were threatened in a foreign country. Public international law governed relations between states. It could not be expected to be in the van in imposing duties on individual States to protect their own subjects against violation of their human rights. There was, however, a growing recognition that international law could and should give rise to individual rights. This country should take the lead in recognising that the government owed a duty to British citizens to take appropriate steps to protect them against violation of their fundamental human rights by other countries.

40. Mr Blake started with the position under international law. The conventional view is that where a state intervenes by diplomatic action in aid of a subject who has been treated by another state in a manner which infringes international law, the injury that has been done is to the state and the right asserted is that of the subject and the intervention of the state is in support of the right of its subject. It is only a short further step for the municipal law of a state to recognise a duty owed to the subject to intervene to protect the subject against the violation of the rights that he enjoys under international law.

41. Mr Blake referred us to the First Report on Diplomatic Protection by Professor Dugard, to which we have already referred. The Dugard Report proposed that a State should have legal duty (under general international law) "to exercise diplomatic protection on behalf of the injured [national] upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State" (draft Article 4(1)). It suggested that such a duty (and the corresponding right of the national) should exist where the national was unable to bring a claim before a competent international court or tribunal. Mr Blake recognised that this proposal had not yet been accepted by all states parties (including the US and the UK). Indeed Professor Dugard himself had accepted that his proposal would not in fact go forward. He later said:
"The Special Rapporteur recognised that he had introduced Article 4 de lege ferenda. As already indicated, the proposal enjoyed the support of certain writers, as well as some members of the Sixth Committee and of the International Law Association; it even formed part of some Constitutions. It was thus an exercise in the progressive development of international law. But the general view was that the issue was not yet ripe for the attention of the Commission and that there was a need for more state practice and, particularly, more opinio juris before it could be considered." (ILC Report, 2000, para. 456).

42. Mr Blake referred us, in addition, to an article by Professor Warbrick on Diplomatic Representations and Diplomatic Protection in (2002) 1 Ch 723. That article recognised, at p.724, the present position in English municipal law:

"The government adheres to the orthodoxy of the 'Vattelian' fiction that diplomatic protection is the right of the State, that it is a right to claim for breaches of international law ... which affects its nationals. Whether or not to bring the claim, on what terms it is settled and the destination of the proceeds of any settlement are for the State alone to decide. This international perspective is replicated in domestic law, where the presentation of claims is an exercise of the foreign affairs prerogative, which, despite the advances in accountability for the exercise of prerogative powers in recent years, has remained outside the scope of judicial review."

43. Professor Warbrick went on, however, at p.733, to observe that German constitutional case law suggested that the state had a duty to protect German nationals and that South African writers had argued for a constitutional right to diplomatic protection. He then contemplated the possibility of such a right under English domestic law, at least in a situation where urgent intervention was required to prevent torture or similar gross ill-treatment.

"What would be required of the English court is to identify a minimum obligation on the government to give an account of what steps it has taken by way of intervention and why, given the circumstances, it has not done more."

This was the minimum obligation that Mr Blake urged the court should recognise in the present case.

44. In this context Mr Blake drew attention to the 1963 Convention on Consular Relations, to which both this country and the United States are party. In the La Grand case (Germany v United States) 27 June 2001 the International Court of Justice held that Article 36 of this Convention created individual rights of detained persons to have consular access. Initially the applicants had sought to enforce such a right in these proceedings, but this remedy was not pursued before us. Mr Blake did, however, submit that this was a pertinent example of international law creating individual rights, to which effect should be given under domestic law.

45. Mr Blake also submitted that, as a matter of international law, the European Convention on Human Rights was capable of creating rights to seek diplomatic intervention on the part of a person in the position of Mr Abbasi. These submissions overlapped with submissions that the Human Rights Act should be so interpreted as to give rise to such rights under domestic law, and we shall consider them in that context, to which we now turn.

46. In answer to the case advanced by Mr Greenwood, Mr Blake submitted that the mere fact that the decision sought to be reviewed related to the exercise of prerogative power by the Foreign Office did not place a complete embargo on relief being obtained from the court. He referred to ex parte Everett [1989] 1 QB 811 relating to the issue of passports, and to Lewis v A-G of Jamaica [2001] 2 AC 50 a case concerned with the prerogative of mercy, where a procedural irregularity was held to be the subject of review. He, in his turn, relied on the GCHQ case where he pointed out that the court held that executive action was not immune from judicial review merely because it was carried out in pursuance of a power derived from a common law or prerogative, rather than a statutory source. This is an authority to which we will return.

47. Mr Blake then proceeded to develop his case as to why, on the facts of this case, the exercise of prerogative should be subject to judicial review. In essence his submissions were as follows: (i) a continuing and serious wrong was being done to Mr Abbasi, a British national, abroad; (ii) it was within the power of the Foreign and Commonwealth Office to make representations to the United States; (iii) those representations might bring the wrong to an end; (iv) the Foreign and Commonwealth Office had taken no relevant action, nor given any explanation for their failure; (v) in these circumstances judicial review should lie.

48. Mr Blake sought to derive assistance from the Human Rights Convention and the Human Rights Act, although once again he accepted that this required an extension of the existing jurisprudence. Article 1 of the Convention provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1."

49. Section 6(1) of the Human Rights Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Mr Blake accepted that the applicants had to establish that Mr Abbasi was within the jurisdiction of the United Kingdom in order to invoke the Act and the Convention. He submitted however that this requirement was satisfied because, as Mr Abbasi was a British national, the United Kingdom government had jurisdiction to take measures in relation to him.

50. In support of this submission, Mr Blake relied on the reasoning of Stanley Burton J. in R (Carson) v Secretary of State for Employment and Pensions (23rd May 2002), a case concerned with the pension rights of a British subject resident abroad. Mr Blake accepted that there was no Convention right to diplomatic protection, but argued that if there was a causal link between the failure to accord Mr Abbasi diplomatic protection and his continued arbitrary detention, then the Foreign and Commonwealth Office was acting in a way which was incompatible with Mr Abbasi's Convention right to liberty under Article 5 and was thus in breach of Section 6 of the Human Rights Act.

Discussion

Is the legitimacy of executive action taken by a foreign State justiciable?
...if the decree had simply provided that all Germans who had
left Germany since Hitler’s advent to power with the...not deprive all “émigrés” of their status as German nationals. It only deprived Jewish émigrés of their citizenship.

51. A judge should, of course, be very slow to refuse to give
effect to the legislation of a foreign state in any sphere in which,
according to accepted principles of international law, the foreign
state has jurisdiction. He may well have an inadequate
understanding of the circumstances in which the legislation was
passed and of the executive which is to be maintained friendly
relations between this country and the foreign country in question.

whether, for example, legislation of a particular type is contrary to
international law, because it is “confiscatory.” It is a question upon
which a court can pronounce only if it is satisfied of the
validity, according to international law, of the claim upon which the
foreign state is acting in breach of international law or

24. On behalf of IAC Mr Donaldson submitted that the public policy
principle is not discretionary. It is inherent in the very nature of the
judicial process: see Buret Gas and Oil v Hammer [1982] AC 888, 932. KAC’s argument, this submission by IAC continued, invites the court to determine whether the invasion of
international law. The courts below were wrong to accede to this
invitation.

25. My Lords, this submission seeks to press the non-justiciability principle
too far. Undoubtedly there may be cases, of which the
illustration, where the issues are such that the court has, in the words of
Lord Wilberforce, at 277G, “no judicial or manageable standards by which
the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a

6. It is not to say an English court is disabled from ever taking
consideration of the claim for asylum frequently involves ruling on
allegations that a foreign state is acting in breach of international law or

55. The United Kingdom took the view that under Article 1A(2) of the Refugee
Convention protection extended to asylum seekers who feared persecution
by persons other than the state if for any reason the state could not
protect them against such persecution. The United Kingdom accepted that
two asylum seekers, Adam and Alaseh were not returned to
Somalia having regard to the United Kingdom’s interpretation, but the

26. This is not to say an English court is disabled from ever taking
consideration of the claim for asylum frequently involves ruling on
allegations that a foreign state is acting in breach of international law or

54. In R v Home Secretary, ex parte Adam [2001] 2 WLR 143 the issue was
raised of whether the courts of this country should entertain a contention
that the courts of France and Germany were mis-applying the Refugee
s.2 of the Asylum and Immigration Act 1996.
Mr Blake relies - it is the fact that Mr Abbasi has no means of challenging the legality of his detention. It is this predicament which, so Mr Blake contends, gives rise to a duty on the part of the Foreign Secretary to come to Mr Abbasi's assistance. That assistance is claimed as a matter of last resort. We do not consider that we can deal satisfactorily with this appeal without addressing those submissions and we consider, in the light of the jurisprudence discussed above, that it is open to us to do so.

59. The United Kingdom and the United States share a great legal tradition, founded in the English common law. One of the cornerstones of that tradition is the ancient writ of habeas corpus, recognised at least by the time of Edward I, and developed by the 17th Century into “the most efficient protection yet developed for the liberty of the subject” (per Lord Evershed MR, *Ex p Mwenya* [1960] 1 QB 241, 292, citing Holdsworth’s History of English Law, vol 9 pp.108-125). The court's jurisdiction was recognised from early times as extending to any part of the Crown's dominions:

"for the King is at all times entitled to have an account why the liberty of any of his subjects is restrained wherever that restraint is inflicted" (Blackstone, Commentaries (1768) vol 3 p.131, cited by Lord Evershed MR, *ibid*, p.292; see also the recent review of the authorities by Laws LJ, *R (Bancoult) v Foreign Secretary* [2001] 2 WLR 1219, 1236).

60. The underlying principle, fundamental in English law, is that every imprisonment is prima facie unlawful, and that:

"...no member of the executive can interfere with the liberty... of a British subject except on the condition that he can support the legality of his action before a court of justice" (*R v Home Secretary ex p Khawaja* [1984] 1 AC 74, 110, per Lord Scarman; citing the classic dissenting judgment of Lord Atkin in *Liversidge v Anderson* [1942] AC 206, 245 and Eshugbayi Eleko v Government of Nigeria [1931] AC 662, 670).

This principle applies to every person, British citizen or not, who finds himself within the jurisdiction of the court: "He who is subject to English law is entitled to its protection." (per Lord Scarman, *ibid* p.111). It applies in war as in peace; in Lord Atkin's words (written in one of the darkest periods of the last war):

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace." (*Liversidge v Anderson* [1942] AC 206, 245 at p.244)

61. As one would expect, endorsement of this common tradition is no less strong in the United States. In *Fay v Noia* (1963) 372 US 391, 400, Justice Brennan referred to:

"the 'extraordinary prestige' of the Great Writ, *habeas corpus ad subjiciendum*, in Anglo-American jurisprudence... It is 'a writ antecedent to statute, and throwing its root deep into the genius of our common law... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift remedy in all cases of illegal restraint or confinement...'" (adopting the words of Lord Birkenhead LC, in *Secretary of State v O'Brien* [1923] AC 603, 609).
These comments can be applied with equal force to those suspected of involvement in military operations involving terrorist organisations.

65. The conduct of the Secretary of State justiciable?

66. The recognition of this basic protection in both English and American law long pre-dates the adoption of the same principle as a fundamental part of international human rights law. Of the many sources to which we have referred, it is enough to cite the International Covenant of Civil and Political Rights, to which the United Kingdom and the United States are parties. Article 9, which affirms "the right to liberty and security of person" provides:

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a decision may be made on the lawfulness of his detention and order his release if the detention is not lawful.

67. It is clear that there can be no direct remedy in this court. The United States Government is not before the court, and no order of the court would be binding upon it. Conversely, the United Kingdom Government, which applies the same legal principles to the detention of non-nationals within its borders as it will towards a regime, is not suggested that it has any enforceable right, or even standing, before any domestic or international tribunal to represent the rights of the applicant, or compel access to a court.

68. Mr Blake submitted that we should find that the Foreign Secretary owed Mr Abbasi a duty to respond positively to his, and his mother's, request for diplomatic assistance. He founded this submission on (i) the assertion that international law is moving towards the recognition of such a duty and alleged recognition of such a duty under the United Nations Human Rights Convention together with the Human Rights Act. It is convenient to deal with this last point first. It is clear that the international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State. This emerges clearly from the passage from the Barcelona Traction case which we have cited at paragraph 35 above, and from the concession made by Professor Dugard to which we have referred at paragraph 41. Mr Blake accepted this as the case, but suggested that these principles were established principles of international law.

69. That is not to say that his detention is an "enemy combatant" and consideration of fundamental principles recognised by both jurisdictions and by international law may follow. In these circumstances it does not seem to us that Mr Blake can derive any assistance from established principles of international law.

70. We turn to Mr Blake's reliance on the European Convention on Human Rights and the Human Rights Act. Section 2 of the Act requires us to take into account any relevant decisions of the Strasbourg Court. There are two recent decisions which are particularly in point. In [2002] 34 EHRR 11 the applicant, who had British and Kuwaiti citizenship, wished to pursue proceedings in England against the Government of Kuwait in respect of torture, to which he alleged he had been subjected in Kuwait. He was unable to do so by reason of the immunity of the Kuwaiti Government doubted to which we have referred that our municipal law should lead so that international law may follow. In these circumstances it does not seem to us that Mr Blake can derive any assistance from established principles of international law.

71. The Secretary of State has argued that Mr Abbasi's detention falls within the doctrine of the inherent powers of the state. He relies on the Home Department (2002) EWCA Civ 152. We would endorse the summary of the position under international law of Brooke LJ at paragraph 130: "What emerges from the efforts of the international community to introduce orderly arrangements is that the power of the state to detain a person in a regime, whether they are nationals or non-nationals, must be recognised objec tively, but there must be a reasonable relationship of proportionality between the end and the means. On the other hand, both customary international law and the Human Rights Act 1998 [2002] 34 EHRR 11 require the proportional relationship to be established in practice as well as in law. That is to say, the power to detain and the detention itself must be consistent with the rule of law. This means that the treatment of the patient must be consistent with the rule of law. 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This means that the treatment of the patient must be consistent with the rule of law. This means that the treatme
question of whether the torture had been committed within the jurisdiction of the United Kingdom the Court said:

"In the above-mentioned Soering case the Court recognised that Article 3 has some, limited, extraterritorial application, to the extent that the decision by a Contracting State to expel an individual might engage the responsibility of that State under the Convention, where substantial grounds had been shown for believing that the person concerned, if expelled, faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. In the judgment it was emphasised, however, that insofar as any liability under the Convention might be incurred in such circumstances, it would be incurred by the expelling Contracting State by reason of its having taken action which had as a direct consequence the exposure of an individual to proscribed ill-treatment.

The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities."

71. This passage demonstrates (i) that the concept of jurisdiction under Article 1 of the Convention is essentially territorial, but (ii) that acts within the territory of the United Kingdom that cause an individual to suffer violation of his human rights outside the territory may infringe the Convention. It is a considerable extension of that principle to postulate that the Convention requires a state to take positive action to prevent, or mitigate the effects of, violations of human rights that take place outside the jurisdiction and for which the state has no responsibility.

72. In Bankovic and Others v Belgium and Others (App. No. 52207/99) [11 BHRC 435] citizens of the Federal Republic of Yugoslavia ('FRY') sought to complain to the Strasbourg Court that deaths and injuries caused by air strikes carried out by members of Nato in the course of the conflict in Kosovo violated, among others, Article 2 of the Convention. The respondent governments contended that the applicants and their deceased relatives were not at the material time within their jurisdictions, within the meaning of Article 1. The applicants argued that the very act of carrying out the air strikes was an assertion of effective control, which brought the applicants within the jurisdiction of those carrying out the strikes. They further argued that the decision to carry out the air-strikes had been taken within the territories of the respondent governments, so that the principle in Soering v UK [1989] ECHR 14038/88 was applicable.

73. As to the latter point the Court noted at paragraph 68 that:

"...liability is incurred in such cases by an action of the respondent state concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a state's competence or jurisdiction abroad."

As to the former point, the Court held that the argument was inconsistent with the terms of Article 1 of the Convention.

74. The conclusions of the Court were encapsulated in this sentence from paragraph 61 of the judgment:

"The court is of the view, therefore, that article 1 of the convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."

75. In paragraphs 71 and 73 the Court had this to say about the circumstances in which the exercise of an extra-territorial jurisdiction would bring an act within the ambit of the Convention:

"In sum, the case law of the court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a contracting state is exceptional: it has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government.

Additionally, the court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a state include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant state."

76. We derive the following principles from the decisions considered above:

i. The jurisdiction referred to in Article 1 of the Convention will normally be territorial jurisdiction.

ii. Where a State enjoys effective control of foreign territory, that territory will fall within its jurisdiction for the purposes of Article 1.

iii. Where, under principles of international law, a state enjoys extra-territorial jurisdiction over an individual and acts in the exercise of that jurisdiction, that individual will be deemed to be within the jurisdiction of the state for the purposes of Article 1, insofar as the action in question is concerned.

77. These principles come nowhere near rendering Mr Abbasi within the jurisdiction of the United Kingdom for the purposes of Article 1 on the simple ground that every state enjoys a degree of authority over its own nationals. Mr Blake has not identified any relevant control or authority exercised by the United Kingdom over Mr Abbasi in his present predicament. Nor has he identified any act of the United Kingdom government of which complaint can be made that it violates Mr Abbasi's human rights.

78. Finally in this context we should refer to the decision of the Commission in Bertrand Russell Peace Foundation v United Kingdom (2 May 1978). The applicant, which was unquestionably within the jurisdiction of the United Kingdom, complained of the failure by the British postal authorities to make representations to the Soviet authorities in respect of the interception and destruction of mail sent by the applicant to Russia. The applicant alleged that this failure violated Articles 8 and 10 of the
The Convention held that the application was not admissible.

As to the first, under the modern law of judicial review, the doctrine of legitimate expectation provides a well-established and flexible means for giving legal effect to a settled policy or practice for the exercise of an administrative discretion. The expectation may arise from an express promise or "from the existence of a regular practice which the claimant can reasonably expect to continue", per Lord Fraser, Council of Civil Service Unions v Minister for Civil Service [1985] AC 374, 401; and see de Smidt pp 547-5, 549.

"In this respect the Commission observes that no right to diplomatic protection or other such measures by a High Contracting Party to a Convention can reasonably be inferred from the obligation imposed on the Contracting State by Article 1 of the Convention to "secure" that person's rights.

The Commission held that the application was not admissible.

The second development, it is necessary to refer to the landmark decision in Council of Civil Service Unions v Minister for Civil Service [1985] AC 374, which established that the mere fact that power derived from the Royal Prerogative is not subject to judicial review does not exclude it from the scope of judicial review. The House of Lords did, however, accept that there were certain areas which remain outside the area of justiciability. Thus, at p.398, Lord Fraser referred to:

"Such decisions will generally involve the application of policy which, if disputed, the judicial process is adapted to provide the right, if disputed, by which the kind of evidence that is to be admissible may be described, and the manner in which it is to be weighed against other evidence: by which judges may be qualified to perform."

"The European Convention on Human Rights and the Human Rights Act afford any support to the contention that the Foreign Secretary owes Mr Abbasi a duty to exercise his powers of international diplomacy on his behalf.

Lord Scarman said, at p.407, that the controlling factor in considering whether a particular exercise of prerogative power was subject to review was not its source but its subject matter. Lord Diplock, at p.411, expanded on the categories of prerogative decision which remained unsuitable for judicial review.

For these reasons, the application is not admissible under judicial procedures and the way in which it has to be adduced tends to exclude it from the attention of the court.

Mr Abbasi enjoys a right to receive and impart information "regardless of frontiers", this does not imply any right to intervention in respect of the acts of a non-contracting state. Thus, the principle that the Contracting State has no way of responsible. It does not imply merely that the Contracting State must, in the exercise of its jurisdiction, respect this right.

While this is a decision of relative antiquity, we are not aware of any more recent Strasbourg jurisprudence that throws doubt on it. The principle that it enunciates is fatal to the limit of the applicants' argument.

The authorities relied upon by Mr. Blake are unable to demonstrate that, either through the incorporation of international law or under the Human Rights Act, Mr. Abbasi enjoys a right to diplomatic assistance under our domestic law. The authorities establishing such a right by way of Mr. Blake would conceivably enjoy a beneficial development of our public law. The authorities relied upon by Mr. Blake are unable to demonstrate that it is not a right to diplomatic protection that the Convention establishes.
In relation to formal claims, the 1999 British Year Book of International Law records two further Ministerial statements of policy. The first refers to a review of our policy on making representations about convictions and sentencing of British prisoners abroad. At present we consider making representations if, when all legal remedies have been exhausted, the British national and their lawyer have evidence of a miscarriage or denial of justice. We are extending this case to relevant international human rights mechanisms.

This review was further explained in a Parliamentary Answer on 16th December 1999 by Baroness Scotland. Having referred to the revised policy, she said:

"We are very conscious of the rights of other British citizens' obligations to Australian people that the Executive Government and its agencies should act in accordance with convention that positive statement is an adequate foundation for a legitimate expectation, which, from the words emphasised contain no more than a commitment "to consider" making direct representations to third governments on behalf of their citizens where they were in breach of their international obligations."
The citizen’s legitimate expectation is that his request will be "considered", and that in that consideration all relevant factors will be properly taken into the balance. The Secretary of State must be free to give due consideration to the applicant’s case. The courts have no right to substitute their own judgment for that of the Secretary of State. Where there is a case before the Court of Appeal, it is for that court to decide on that basis how far further steps are appropriate or necessary.

The claimants are not seeking relief against the US Government and nor are they seeking to dictate to the Executive how it should conduct foreign policy and by what means; they are merely stating the content of the "duty" which they assert: they are merely stating the expected by British subjects abroad from a British consul. These expressly excluded intervention in a criminal trial, which was fatal to the application. But it seems to us that, in the light of the concession made by the Secretary of State that there was a legitimate expectation that such assistance as was proffered in the leaflets would be provided, the applicants were entitled to rely on the published government policy in relation to consular assistance, the content of which the government are bound to respect. This content provided for assistance in the event of an inter-State claim. These aliens fall within the protections of certain provisions of international law and that diplomatic channels remain an ongoing and viable means to address the claims raised by these aliens.

These statements reflect the fact that, to use the words of Everett, it must be a normal expectation of every citizen that, if subjected abroad to a violation of a fundamental right, the British Government will not simply wash their hands of the matter and abandon him to his fate. What then is the nature of the expectation that a British subject in the position of Mr Abbasi can legitimately hold? The policy statements that we have cited underline the very limited nature of the expectation. They indicate that where certain criteria are satisfied, the Government will consider making representations to the Foreign Secretary to give due consideration to the applicant’s case.
105. Beyond this we do not believe it is possible to make general propositions. In some cases it might be reasonable to expect the Secretary of State to state the result of considering a request for assistance, in others it might not. In some cases he might be expected to give reasons for his decision, in others he might not. In some cases such reasons might be open to attack, in others they would not.

106. We would summarise our views as to what the authorities establish as follows:

i. It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative.

ii. Despite extensive citation of authority there is nothing which supports the imposition of an enforceable duty to protect the citizen. The European Convention on Human Rights does not impose any such duty. Its incorporation into the municipal law cannot therefore found a sound basis on which to reconsider the authorities binding on this court.

iii. However the Foreign Office has discretion whether to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation; but the court cannot enter the forbidden areas, including decisions affecting foreign policy.

iv. It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country’s foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.

v. The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case.

Are the applicants entitled to relief in the present case?

107. We have made clear our deep concern that, in apparent contravention of fundamental principles of law, Mr Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. However, there are a number of reasons why we consider that the applicants’ claim to relief must be rejected:

i. It is quite clear from Mr Fry’s evidence that the Foreign and Commonwealth Office have considered Mr Abbasi’s request for assistance. He has also disclosed that the British detainees are the subject of discussions between this country and the United States both at Secretary of State and lower official levels. We do not consider that Mr Abbasi could reasonably expect more than this. In particular, if the Foreign and Commonwealth Office were to make any statement as to the nature of discussions held with United States officials, this might well undermine those discussions.

ii. On no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time.

iii. The position of detainees at Guantanamo Bay is to be considered further by the appellate courts in the United States. It may be that the anxiety that we have expressed will be drawn to their attention. We wish to make it clear that we are only expressing an anxiety that we believe was felt by the court in Rasul. As is clear from our judgment, we believe that the United States courts have the same respect for human rights as our own.

iv. The Inter-American Commission on Human Rights has taken up the case of the detainees. It is as yet unclear what the result of the Commission’s intervention will be. It is not clear that any activity on the part of the Foreign and Commonwealth Office would assist in taking the matter further while it is in the hands of that international body.

108. For all these reasons the application before us must be dismissed.
Constitutional Court of South Africa

Samuel Kaunda and Others v. The President of the Republic of South Africa and Others,
4 August 2004

[2004] ZACC 5
CHASKALSON CJ

The applicants in this matter are 69 South African citizens presently held in Zimbabwe on a variety of charges. The first six respondents are the President of the Republic of South Africa and various Cabinet Ministers who are cited as representatives of the South African government (the government). The National Director of Public Prosecutions is cited as the seventh respondent.

The applicants were arrested in Zimbabwe on 7 March 2004. On 9 March 2004, a group of 15 men were arrested in Malabo, the capital of Equatorial Guinea, and accused of being mercenaries and plotting a coup against the President of Equatorial Guinea. The majority of the detainees are South African nationals. The applicants fear that they may be extradited from Zimbabwe to Equatorial Guinea and put on trial with those who have been arrested there. They contend that if this happens they will not get a fair trial and, if convicted, that they stand the risk of being sentenced to death.

The applicants initially approached the High Court in Pretoria (the High Court) seeking orders aimed at compelling the government to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, and to take steps to ensure that their rights to dignity, freedom and security of the person and fair

1 Details of the charges are referred to in para 12 below. In the High Court there were 70 applicants, but on 5 July 2004, Simon Francis Mann, the sixty-ninth applicant in the High Court, lodged a notice of withdrawal from the proceedings in this Court.
conditions of detention and trial are at all times respected and protected in Zimbabwe and Equatorial Guinea.

[4] The substantive relief claimed was in the following terms:

2. Directing and ordering the Government of the Republic of South Africa (the Government) to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

3. Declaring that the Government is, as a matter of law, entitled to request the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

4. Directing and ordering the Government to seek an assurance as a matter of extreme urgency from the Zimbabwean Government that the applicants will not be released or extradited to Equatorial Guinea.

5. Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean and Equatorial Guinean Governments, as the case may be, to not impose the death penalty on the applicants.

6. Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa (the Constitution) are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

7. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants’ right to freedom and security of person including the rights not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

8. Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

9. Directing and ordering the Government to, through the office of the second respondent, report in writing to the Registrar of this Honourable Court on a weekly basis as to the issues set out above where applicable."

[5] The application which was heard in the High Court by Ngoepe JP was dismissed. The Judge President delivered his judgment on 9 June 2004. On 21 June 2004 the applicants lodged an urgent application with the registrar of this Court for leave to appeal directly to it against the decision of the High Court. On 29 June the government lodged an affidavit opposing the application. This Court was then in recess and not due to convene again until 15 August. Because of the seriousness of the allegations made it was decided to convene the Court during the recess. On 30 June directions were given that the application for leave to appeal would be heard on 19 and 20 July 2004. The parties were put on terms to lodge their arguments expeditiously and to deal with the merits of the application to ensure that if leave to appeal was granted the matter could be disposed of without hearing further argument.

[6] The Society for the Abolition of the Death Penalty in South Africa was admitted as an amicus curiae in the High Court proceedings and provided argument supporting the applicants’ application. It has sought leave to participate as an amicus in the application for leave to appeal. That was granted and we have had the benefit of written and oral argument from the amicus as well as the applicants and the government.

The application to the High Court
The proceedings against the government were commenced in the High Court over two months ago as a matter of urgency. The application was foreshadowed by a newspaper report published on 5 May 2004 saying that the applicants were expected to lodge an application in the High Court to force the government to step in. The report which is attached to the applicants' founding affidavit is based largely on statements attributed to the applicants' attorney and counsel in this matter. No demand was, however, made on the government at that time. Some twelve days later, on 17 May 2004, the government was given twenty four hours' notice to comply with the demands made in a letter from the applicants' attorney. The demands made were those which are now the claims referred to above. Their application to the High Court for this relief was lodged the following day with an affidavit of over 100 pages signed by the applicants' attorney, to which were attached 34 annexures running to over 200 pages.

There is no justification for the peremptory manner in which the proceedings were commenced, nor satisfactory explanation for the failure to make the demand at the time the media was informed that court proceedings were to be launched. It must have been obvious to the applicants' attorneys that the demands could not reasonably have been responded to within twenty four hours. Not surprisingly there was no response and the following day the application was lodged requiring the government to respond within a week. The answering affidavits draw attention to the short time within which the government has had to deal with the allegations made in the founding affidavit. They place most of the material allegations in issue but do so at times baldly, and without providing an account of all that they intend to do in the circumstances of the case. A consequence of the way that the papers have been drafted by the applicants and the respondents is that some of the issues that have been the subject of argument were not clearly formulated in the founding affidavit or the government's answer. The picture which emerges from the record and on which the application must be decided is dealt with more fully when the various claims are addressed. The background is as follows.

The arrest of the applicants in Zimbabwe

The applicants say that they were employed to act as security guards in the Democratic Republic of the Congo (DRC) for a company which conducts mining operations there. Their services were required because mines in the DRC are subject to attacks by rebel armies and need protection. The rebel armies are equipped with modern weapons and the security guards need weapons suitable to enable them to resist such attacks. The applicants allege that a company known as Military Technical Services (MTS), which is a licensed arms dealer in South Africa, entered into an agreement earlier this year with a state owned company in Zimbabwe called Zimbabwe Defence Industries (ZDI) to supply the arms that would be required for this purpose.

On 7 March 2004 the applicants boarded a plane at Wonderboom Airport in South Africa from where they allege they were to commence their journey to the DRC to fulfil their contract to act as security guards. The plane took off and landed at the
Polokwane International Airport where the applicants' papers were cleared. The plane took off again and finally landed at Harare International Airport. According to the applicants, they were to refuel at Harare, pick up cargo there and then fly to Burundi, with their final destination being the DRC. They were arrested at Harare airport before the cargo had been loaded.

According to the charges they face in Harare the cargo was to consist of

“61 AK rifles – 150 offensive hand grenades
45 000 AK ammunition
20 PKM Light machine guns
30 000 PKM ammunition
100 RPG 7 anti tank launchers
2 X 60mm mortar tubes
5080 X 60mm mortar bombs
150 offensive hand grenades
20 icarus flairs
500 boxes 7.62 X 54mm ammunition
1 000 boxes 7.62 X 39mm ammunition
1 000 rounds RPG anti tank H.E ammunition
50 PRM machine guns.”

After the applicants had been arrested they were moved to Chikurubi Maximum Security Prison (Chikurubi Prison). They make serious allegations concerning the conditions in which they have been held since then and the difficulties they have had in instructing their attorneys and preparing for their trial in Zimbabwe. These allegations will be dealt with more fully later. For the moment it is sufficient to say that they face the following charges in Zimbabwe:

“Contravening section 13(1) of the Public Order and Security Act –
Count 1 – Conspiracy to possess dangerous weapons;
Count 2 – Attempt to possess dangerous weapons.

Contravening section 4(2)(b) of the Firearms Act –
Count 1 – Conspiracy to purchase firearms without a firearms certificate;

Contravening section 4(4)(a) of the Firearms Act –
Count 2 – Conspiracy to purchase ammunition without a firearms certificate.

Contravening section 36(1)(a)(i) and section 36(1)(c) or alternatively section 36(1)(e) of the Immigration Act – enter or assist any person to enter, remain or depart from Zimbabwe and making a false statement.

Contravening section 89(2)(b) of Statutory Instrument 79/88 of Aviation (air navigation) Regulations – make a false statement or declaration to an official of the Civil Aviation Authority of Zimbabwe.”

The applicants’ trial in Zimbabwe was due to commence on the first day of the hearing of this application. It was, however, postponed for two days to enable the counsel and attorneys who represent them in this application to appear on their behalf in Zimbabwe.

The allegations made by the applicants in the High Court proceedings

The founding affidavit on which the application is based was made by the applicants’ attorney, Mr Griebenow (Griebenow). He explains in great detail the difficulty he has experienced in consulting with the applicants in Chikurubi Prison and the practical difficulty he would have had in attempting to get them to make the affidavit. The government disputed various allegations made by Griebenow, but did
not make an issue of the fact that there were no affidavits from the applicants confirming what he said. The High Court accepted Griebenow’s explanation for making the founding affidavit himself. I will therefore deal with the matter as if the applicants had confirmed the allegations made by Griebenow.

[14] The applicants have nine separate claims that are set out in their notice of motion. These are claims of extraordinary breadth. I will deal with each of the claims in turn. But before doing so it is necessary to deal with two procedural issues raised during argument.

**Is the application urgent and are the applicants entitled to appeal directly to this Court?**

[15] The procedural issues are related and can be dealt with together. They are whether the application for leave to appeal is sufficiently urgent to warrant the failure to comply with the normal rules of procedure and to entitle the applicants to bypass the Supreme Court of Appeal or the Full Bench of the High Court, and appeal directly to this Court.

[16] This Court has held on various occasions that the granting of leave to appeal directly to it depends on various factors:

> Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court’s roll and to the ultimate decision of the case if the SCA is bypassed.\(^1\)

[17] The applicants primarily aim to avoid being extradited to Equatorial Guinea and being tried in Zimbabwe or Equatorial Guinea. To that end their first claim is to require the South African government to take steps to have them extradited to South Africa so that any trial they may have to face can be conducted here. The other claims are directed to their conditions of detention, and to trial procedures should they be put on trial in Zimbabwe or Equatorial Guinea.

[18] If the applicants are extradited to Equatorial Guinea or put on trial in Zimbabwe, the relief claimed by them seeking to prevent this will become academic. The claims relating to their conditions of detention are immediate and if they are entitled to the relief claimed, are pressing. It is desirable that finality be reached on these issues without delay.

[19] The constitutional issues raise the question whether the Constitution binds the state to take steps to protect the applicants in relation to the complaints they have concerning their conditions of detention in Zimbabwe and the prosecution they face there, as well as the possibility of their being extradited to Equatorial Guinea to face charges which could result, if they were to be convicted, in their being sentenced to death. These issues involve the reach of the Constitution, and the relationship

\(^1\) Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.
between the judiciary and the executive and the separation of powers between them. They are issues of great moment, and if their claims have substance, of great importance to the applicants.

[20] The merits of the constitutional claim are relevant to the application for leave to appeal directly to this Court and the alleged urgency of the matter. The procedure followed by this Court in setting the application down for hearing and requiring the parties to deal with the merits enables the Court to consider the merits of the claim and, if so advised, to bring this dispute to finality. It also avoids a situation in which delays may result in the relief claimed becoming academic.

[21] A theme that runs through all the claims is a demand that the government should seek assurances from foreign governments concerning prosecutions or contemplated prosecutions in those countries. The applicants assert that they have rights under the Constitution entitling them to make such demands, that the government has failed to comply with their demands and that in failing to do so it has breached their constitutional rights. The relief they claim is in effect a mandamus ordering the government to take action at a diplomatic level to ensure that the rights they claim to have under the South African Constitution are respected by the two foreign governments.

[22] The issues raised by the applicants and the amicus curiae involve, on the one hand, the relationship at an international level between South Africa and foreign states, in this case Zimbabwe and Equatorial Guinea, and on the other, the nature and extent of its obligations to citizens beyond its borders. To answer the questions raised it is necessary to deal both with international law and domestic law. As the setting is international, I begin with international law.

International law

[23] Section 232 of the Constitution provides that:

“Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

Traditionally, international law has acknowledged that states have the right to protect their nationals beyond their borders but are under no obligation to do so. Counsel for the government, citing the Barcelona Traction case,3 relied on this principle to support the government's contention that the applicants’ claims are misconceived. They referred to the following passages from the judgment of the International Court of Justice (ICJ) in that case:

“The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress . . .

3 Barcelona Traction Light and Power Company Limited 1970 ICJ Reports 3; 46 ILR 178.
The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.  

Their argument comes down to this. The applicants’ remedy is to approach the government for assistance and not the courts. If this is done the government will consider their requests. It is, however, the sole judge of what should be done in any given case and when and in what manner assistance that is given should be provided.

The nature and scope of diplomatic protection has been the subject of investigations by the International Law Commission. It was requested in 1996 by the General Assembly of the United Nations to undertake this task. Special Rapporteurs and working groups were involved in the investigations the outcome of which is referred to in reports of the International Law Commission. The report dealing with issues relevant to the present matter is the report published in 2000 (the ILC report). This report contains summaries by the Special Rapporteur, Professor Dugard, of the relevant debates.

The term diplomatic protection is not a precise term of art. It is defined in the Special Rapporteur’s report as

“action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.”

It is also used by some commentators to refer to

“preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained.”

It appears from the ILC report, however, that there are differences on this and that some commentators take the view that diplomatic protection applies only to actions taken to secure redress for injuries actually caused.

According to the Special Rapporteur’s report, diplomatic protection includes, in a broad sense, “consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, [and] economic pressures”. Some authorities distinguish between diplomatic action taken by a state to secure redress for an injury to a national, and judicial proceedings taken to that end. The distinction is not relevant for the purposes of this case.

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6 Special Rapporteur’s report above n 5 at 11.

7 Dunn The Protection of Nationals: A Study in the Application of International Law (Johns Hopkins Press, Baltimore 1932) at 18.

8 ILC report above n 5 at 146.

9 Special Rapporteur’s report above n 5 at 15.
[28] It had been suggested that the traditional approach to diplomatic protection, such as that set out in the Barcelona Traction case,10 should be developed to recognise that in certain circumstances where injury is the result of a grave breach of a jus cogens norm, the state whose national has been injured, should have a legal duty to exercise diplomatic protection on behalf of the injured person. As a corollary to that, states would be obliged to make provision in their municipal law for the enforcement of this right before a competent court or other independent national authority.

[29] It appears from the ILC report that although there was some support for this development, and some recent national constitutions made provision for such an obligation, presently this is not the general practice of states. Currently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such. To do so may give rise to more problems than it would solve. Diplomatic protection remains the prerogative of the state to be exercised at its discretion. It must be accepted, therefore, that the applicants cannot base their claims on customary international law. No contention to the contrary was addressed to us in argument.

South African law

[30] Against this background of international law and practice I turn to consider the question whether according to our municipal law the applicants have a right to diplomatic protection from the state, and can require it to come to their assistance in Zimbabwe or Equatorial Guinea if they are extradited to that country.

[31] Counsel for the applicants contended that the applicants’ rights to dignity, life, freedom and security of the person, including the right not to be treated or punished in a cruel, inhuman or degrading way, and also the right to a fair trial entrenched in sections 10, 11, 12 and 35 of the Constitution, are being infringed in Zimbabwe and are likely to be infringed if they are extradited to Equatorial Guinea. Relying on section 7(2) of the Constitution, which requires the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”, he contended that the state is obliged to protect these rights of the applicants, and the only way it can do so in the circumstances of this case is to provide them with diplomatic protection. Counsel for the amicus adopted a similar but more nuanced approach directing himself to the issue of capital punishment and the state’s duties to its citizens if that risk arises in a foreign country.

[32] The argument based on section 7(2) is built on the proposition that the state has a positive obligation to comply with its provisions.11 I accept that this is so. But that does not mean that the rights nationals have under our Constitution attach to them

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10 Above n 3.

11 See Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 44; Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another intervening) 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 37; Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 20; S v Baloyi (Minister of Justice and Another intervening) 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 11.
when they are outside of South Africa, or that the state has an obligation under section 7(2) to “respect, protect, promote, and fulfil” the rights in the Bill of Rights which extends beyond its borders. Those are different issues which depend, in the first instance, on whether the Constitution can be construed as having extraterritorial effect.

Section 233 of the Constitution provides:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

This must apply equally to the provisions of the Bill of Rights and the Constitution as a whole. Consistently with this, section 39(1)(b) of the Constitution requires courts, when interpreting the Bill of Rights, to consider international law.

A right to diplomatic protection is not referred to in the Universal Declaration of Human Rights, nor is it a right contained in any international agreement of which I am aware, including the international human rights’ treaties to which South Africa is a party, such as the African Charter on Human and Peoples’ Rights or the International Covenant on Civil and Political Rights. Our Constitution shows respect for international law, and although it includes rights which go beyond those recognised by international law and major human rights instruments, when it does so, it spells out the rights expressly.

As Ackermann J pointed out in Bernstein and Others v Bester and Others NNO, “the internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights”. The Bill of Rights is extensive and covers conventional and less conventional rights in detail. A right to diplomatic protection is a most unusual right, which one would expect to be spelt out expressly rather than being left to implication.

Extraterritoriality: the constitutional text

The starting point of the enquiry into extraterritoriality is to determine the ambit of the rights that are the subject matter of section 7(2). To begin with two observations are called for. First, the Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which

12 See para 44 below.


15 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).

16 Id at para 106.

17 Cf Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 45.
reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African state to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders. Does section 7(2) contemplate that the state’s obligation to South Africans under that section is more extensive than its obligation to foreigners, and attaches to them when they are in foreign countries?

Section 7(1) refers to the Bill of Rights as the ‘cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders.

Extraterritoriality: international law

It is a general rule of international law that the laws of a state ordinarily apply only within its own territory. It is recognised, however, that a state is also entitled, in certain circumstances, to make laws binding on nationals wherever they may be. This can give rise to a tension if laws binding on nationals conflict with laws of a foreign sovereign state in which the national is. As Dugard points out, sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of all other states. In most instances, the exercise of jurisdiction beyond a state’s territorial limits would under international law constitute an interference with the exclusive territorial jurisdiction of another state. In The Case of the S.S. Lotus, the Permanent Court of International Justice described this principle as follows:

“No first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention... all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”

As Brownlie and Shaw point out, the passage of which this forms a part has been criticised by a substantial number of authorities. The criticism emanates from a reading of the passage which appears to regard states as possessing very wide powers of jurisdiction which could only be restricted by proof of a rule of international law.


20 Island of Palmas Case (Netherlands v United States) 2 RIAA 829 (1928) at 838.
21 The Case of the S.S. Lotus (France v Turkey) (1927) PCIJ Series A, No. 10.
22 Id at paras 18-19.
23 Brownlie above n 18 at 301.
prohibiting the action concerned. As Shaw notes, however, two later judgments of the ICJ indicate that “the emphasis lies the other way around.”

[40] It is not necessary to enter this controversy. What seems to be clear is that when the application of a national law would infringe the sovereignty of another state, that would ordinarily be inconsistent with and not sanctioned by international law.

[41] In the case of *R v Cook*, the majority of the Supreme Court of Canada endorsed this understanding of the international law position holding that “the principle of the sovereign equality of states generally prohibits extraterritorial application of domestic law”. In dealing with the application of the Charter beyond the borders of Canada, they said

“on the jurisdictional basis of nationality, the Charter applies to the actions of Canadian law enforcement authorities on foreign territory (which satisfies s. 32(1)), provided that the application of Charter standards would not interfere with the sovereign authority of the foreign state.”

[42] I agree with this approach which, on issues relevant to the application of the Bill of Rights to foreign states and their functionaries, does not seem to me to be inconsistent with the views of the other judges in that case. L’Heureux-Dube and McLachlin JJ expressed themselves as follows:

“[F]or the protection of the Charter to apply, the action alleged to have violated the claimant’s Charter rights must have been carried out by one of the governmental actors enumerated in s. 32. Under no circumstances can the actions of officials of another jurisdiction, acting outside Canada, be considered to violate the Charter. Officials of other jurisdictions will not be considered agents of Canadian authorities. This emerges from the need to respect the sovereignty and laws of countries where Canadian officials work, by not expecting foreign officials to comply with Canadian law or modify their procedures to respect Canadian law.”

[43] Bastarache and Gonthier JJ said:

“By its terms, s. 32(1) dictates that the Charter applies to the Canadian police by virtue of their identity as part of the Canadian government. By those same terms, however, the Charter may not be applied to a person who is neither within the authority of the various Canadian legislatures, nor a Canadian official.”

[44] There may be special circumstances where the laws of a state are applicable to nationals beyond the state’s borders, but only if the application of the law does not interfere with the sovereignty of other states. For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the

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29 Id at para 91.
30 Id at para 124.
31 Where there are formal agreements or informal acts of cooperation between states which sanction the one state’s exercise of jurisdiction in the territory of the other, questions of sovereignty do not arise and thus nationals affected by their state’s action in a foreign territory may conceivably invoke the protection of their Constitution – See in this regard the case of *Reid v Cover* 354 US 1 (1957).
requirements of the foreign state’s own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty. Section 7(2) should not be construed as imposing a positive obligation on government to do this.

[45] During argument hypothetical questions were raised relating to South African officials abroad, to South African companies doing business beyond our borders, to the government itself engaging in commercial ventures through state owned companies with bases in foreign countries, and to what the state’s obligations might be in such circumstances. There is a difference between an extraterritorial infringement of a constitutional right by an organ of state bound under section 8(1) of the Constitution, or by persons bound under section 8(2) of the Constitution, in circumstances which do not infringe the sovereignty of a foreign state, and an obligation on our government to take action in a foreign state that interferes directly or indirectly with the sovereignty of that state. Claims that fall in the former category raise problems with which it is not necessary to deal now. They may, however, be justiciable in our courts, and nothing in this judgment should be construed as excluding that possibility.

The decision in Mohamed and Another v President of the Republic of South Africa and Others

[46] The applicants contend that because the state provided intelligence to Zimbabwe and Equatorial Guinea which was the cause of their being arrested in Zimbabwe, where they face the possibility of being extradited to Equatorial Guinea, the state has a particular duty to protect them in the situation in which they now find themselves. In support of this submission they placed considerable reliance on the decision of this Court in Mohamed and Another v President of the Republic of South Africa and Others.33

[47] Mohamed’s case dealt with an entirely different situation to that which exists in the present case. In that case certain state functionaries had colluded with the FBI to secure the removal of Mohamed from South Africa to the USA. In doing so they had acted illegally and in breach of Mohamed’s rights under the Constitution. The Court held that in doing so

“they infringed Mohamed’s rights under the Constitution and acted contrary to their obligations to uphold and promote the rights entrenched in the Bill of Rights.”34

[48] It was this that led this Court to say:

“It would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case”35

and that it would not

32 The difficulties are illustrated by decisions in a number of Canadian cases in which different approaches have been adopted by the judges dealing with them. See for instance, R v Cook above n 26 and the cases there referred to.

33 Mohamed above n 11.

34 Id at para 60.

35 Id at para 70.
“be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him.”

On the facts of the case, however, and despite the fact that it made a declaration that the government had acted unlawfully in handing Mohamed over to the FBI, it declined to make an order requiring the government to take positive action to ameliorate the prejudice resulting from the unlawful act.

O'Regan J refers to the fact that Mohamed was in the USA at the time. But the relevant events in that case all took place in South Africa. His rights were infringed in South Africa by government officials and not in the USA where he found himself as a result of their having violated his rights. This Court therefore had no difficulty in finding that his constitutional rights had been breached. The state argued that Mohamed had consented to being taken to the USA and had accordingly waived his rights under the Bill of Rights. That was denied by Mohamed. In dealing with the question of waiver this Court held:

“We did not have the benefit of full argument on this issue and it would accordingly be unwise to express a view on it. We will, without deciding, assume in favour of the respondents, that a proper consent of such a nature would be enforceable against Mohamed. To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent.”

It then examined the evidence and concluded:

“[I]t has not been established that any agreement which Mohamed might have expressed to his being delivered to the United States constitutes valid consent on which the government can place any reliance. Its contention in this regard is accordingly rejected. The handing over of Mohamed to the United States government agents for removal by them to the United States was unlawful.”

The facts of the present case are entirely different. The applicants were not removed from South Africa by the government, or with the government’s assistance. They left South Africa voluntarily and now find themselves in difficulty in Zimbabwe and at risk of being extradited to Equatorial Guinea. Their arrest in Zimbabwe, the criminal charges brought against them there, and the possibility of their being extradited from Zimbabwe to Equatorial Guinea are not the result of any unlawful conduct on the part of the government or of the breach of any duty it owed to them.

Police who receive information that a bank robbery is being planned do not commit a wrong by failing to advise the would-be robbers of the information that they have, nor do they act illegally by lying in wait at the site of the proposed robbery in order to apprehend the robbers when they arrive at the scene. For a court to hold otherwise would undermine legitimate methods of policing and law enforcement.
[52] The applicants characterise what happened as a trap. But this too is wrong. There is nothing to suggest that the South African authorities encouraged the applicants in any way to embark upon the venture in which they were engaged or induced them to do so. At best for the applicants the South African authorities failed to warn them of the intelligence that they had received or of the fact that it would be passed on to Zimbabwe and Equatorial Guinea. But that was not a breach of any duty owed by the South African government to the applicants. On the contrary, a failure to pass on the intelligence to the authorities in Zimbabwe and Equatorial Guinea would have been a breach of the duties that South Africa owed to those countries.39

[53] Even if the intelligence passed on by South Africa to Zimbabwe and Equatorial Guinea led to the arrests in Zimbabwe, the passing on of the intelligence was not a wrongful act. In the times in which we live it is essential that this be done, and comity between nations would be harmed by a failure to do so. No wrong has been done to the applicants by the South African government that has to be remedied, nor is there a consequence of unlawful conduct that has to be ameliorated.

[54] The Bill of Rights binds the South African government, but does not bind other governments. As the Canadian Supreme Court has said with regard to the application of its own constitution in respect of appeals by Canadian nationals to be protected against the application of inconsistent foreign law, “individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents.”40

[55] There too, a distinction is drawn between extradition proceedings in Canada, which are subject to constitutional scrutiny, and the non-retention of constitutional rights if extradition takes place, or if the national is out of the country.41 The same rule is applicable in the United States.42

[56] Subject to an important qualification that I raise later in this judgment concerning law, procedure and punishment inconsistent with international human rights norms, I would adopt that principle for the purpose of South African law.

[57] In the present case the actors responsible for the action against which the applicants demand protection from the South African government are all actors in the employ of sovereign states over whom our government has no control. The laws to which objection is taken are the laws of foreign states who are entitled to demand that they be respected by everyone within their territorial jurisdiction, and also by other states. The applicants have no right to demand that the government take action to

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39 See para 90 below.


41 “There can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter (s. 32). Equally, though, there cannot be any doubt that the Charter does not govern the actions of a foreign country; see, for example, Spencer v The Queen [1985] 2 SCR 278. In particular the Charter cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted.” – Canada v Schmidt [1987] 1 SCR 500 at 518.

42 “When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.” – Neely v Henkel (No. 1) 180 US 109 (1901) at 123 cited with approval in Canada v Schmidt above n 41 at 525.
prevent those laws being applied to them. *Mohamed's* case is not authority for the contrary submission advanced by the applicants.

### Section 3 of the Constitution

[58] This does not mean that our Constitution is silent on this issue. Section 3 of the Constitution provides:

“(1) There is a common South African citizenship.
(2) All citizens are —
   (a) equally entitled to the rights, privileges and benefits of citizenship; and
   (b) equally subject to the duties and responsibilities of citizenship.
(3) National legislation must provide for the acquisition, loss and restoration of citizenship.”

[59] The relevance of these provisions to diplomatic protection is discussed by Erasmus and Davidson in an article in the South African Yearbook of International Law.43 Although I take a somewhat different view as to the content to be given to the benefits and privileges of citizens guaranteed by section 3, I agree with much of what they say, and to a large extent with the conclusions that they reach.

[60] As a nation we have committed ourselves to uphold and protect fundamental rights which are the cornerstone of our democracy. We recognise a common citizenship and that all citizens are equally entitled to the rights, privileges and benefits of citizenship. Whilst I have held that there is no enforceable right to diplomatic protection, South African citizens are entitled to request South Africa for protection under international law against wrongful acts of a foreign state.

[61] They are not in a position to invoke international law themselves and are obliged to seek protection through the state of which they are nationals. Whilst the state is entitled but not obliged under international law to take such action, it invariably acts only if requested by the national to do so.44

[62] South African citizenship requirements45 are such that citizens invariably, if not always, will be nationals of South Africa. They are entitled, as such, to request the protection of South Africa in a foreign country in case of need.

[63] Nationality is an incident of their citizenship which entitles them to the privilege or benefit of making such a request. Should there ever be an exceptional case where the citizen’s connection with South Africa is too remote to justify a claim of nationality, it would be a legitimate response to such a request to say that South Africa is not entitled to demand diplomatic protection for that person.46 But apart from that, the citizen is entitled to have the request considered and responded to appropriately.

43 *Erasmus & Davidson “Do South Africans have a right to diplomatic protection?”* (2000) 25 *SA Yearbook of International Law* 113.

44 *Id* at 116 where the authors refer to a decision of a mixed claims commission between the United States and Germany where it was pointed out that there would be no action unless the injured national requests the state to act on its behalf – *Administrative Decision No 5 (United States v Germany)* (1924) 7 RIAA 119 as cited by Harris *Cases and Materials on International Law* 5 ed (Sweet & Maxwell, London 1998) at 521.


46 *Nottebohm Case (Liechtenstein v Guatemala)* 22 *ILR* 349 at 360.
When the request is directed to a material infringement of a human right that forms part of customary international law, one would not expect our government to be passive. Whatever theoretical disputes may still exist about the basis for diplomatic protection, it cannot be doubted that in substance the true beneficiary of the right that is asserted is the individual.\footnote{47}

The founding values of our Constitution include human dignity, equality and the advancement of human rights and freedoms. Equality is reflected in the principle of equal citizenship demanded by section 3.

The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution and informs the manner in which government is required to exercise its powers. To this extent, the provisions of section 7(2) are relevant, not as giving our Constitution extraterritorial effect, but as showing that our Constitution contemplates that government will act positively to protect its citizens against human rights abuses.

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\footnote{47 The Special Rapporteur’s report (above n 5 at 12-13) highlights the controversy regarding the question of whose rights are asserted when a state exercises diplomatic protection on behalf of its national. Erasmus & Davidson also discuss this issue in their article (above n 43 at 116-7). In recent proceedings before the ICI, South Africa adopted the attitude that the true beneficiary of the right asserted is the individual. In its written submissions to the Court, South Africa outlined its position as follows: “the focus of [international] human rights vests in the individual and not the Government” and the individual is “the beneficiary of at least a core of human rights and the protection so afforded”. See page 22 of the written submissions submitted by the Government of the Republic of South Africa on 30 January 2004 to the ICI in the matter of the request by the United Nations General Assembly for an Advisory Opinion on the legal consequences of the wall being built by Israel.

[67] The entitlement to request diplomatic protection which is part of the constitutional guarantee given by section 3 has certain consequences. If, as I have held, citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution.\footnote{48} I mention later that there may even be a duty in extreme cases for the government to act on its own initiative.\footnote{49} This, however, is a terrain in which courts must exercise discretion and recognise that government is better placed than they are to deal with such matters.

[68] According to the government’s answering affidavit its policy in regard to such matters was correctly stated by Deputy Minister of Foreign Affairs Mr Aziz Pahad in an interview with the media, a transcript of which was annexed by the applicants to their founding affidavit. The transcript is in the following terms:

“[A]s their government, we have to ensure that all South African citizens, whatever offence they have carried out or are charged with, must receive a fair trial, they must have access to their lawyers, they must be tried within the framework of the Geneva Convention, they must be held in prison within the framework of the Geneva Convention and International law and we will always, it is our constitutional duty to ensure that this is getting out within the framework of the Geneva Convention and that there is a fair trial.”

[69] There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of

\footnote{48 FedSure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56.

\footnote{49 See para 70 below.}
international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action.

[70] There may even be a duty on government in extreme cases to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstances, on becoming aware of the breaches, the government may well be obliged to take an initiative itself.

[71] The difficulty of dealing with legal claims for diplomatic protection is exemplified by the approach of courts confronted with such claims. The Special Rapporteur draws attention to cases in British, Dutch, Spanish, Austrian, Belgian, and French courts in which claims by individuals against their governments for diplomatic protection were dismissed.50 He refers to these cases as demonstrating an expectation that courts should come to the assistance of nationals injured by foreign states. The fact that the claims were dismissed shows, however, how difficult it is to do so.

[72] Even in those countries where the constitution recognises that the state has an obligation to afford such protection, the ILC report suggests that there is some doubt as to whether that obligation is justiciable under municipal law.51

[73] A court cannot tell the government how to make diplomatic interventions for the protection of its nationals. Germany, which has a long tradition of recognising a state obligation to provide diplomatic assistance to nationals injured by foreign states recognises this, and leaves much to the discretion of the government.52

[74] Although the exercise of the discretion can be tested for compliance with the constitution,

"[t]he scope of discretion in the foreign policy sphere is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control. In order to enable current political objectives of the Federal Republic of Germany to be achieved within the framework of what is permissible under international and constitutional law, the Federal Basic Law grants the organs of foreign affairs wide room for manoeuvre in the assessment of foreign policy issues as well as the consideration of the necessity for possible courses of action."53

50 Special Rapporteur’s report above n 5 at 32.

51 ILC report above n 5 at 156.

52 Hess decision BVerfGE 55, 349; 90 ILR 386 where the Federal Constitutional Court held that “the Federal Government enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States” – at 395.

53 Id at 396.
The Court of Appeal in England recently had occasion to consider in the *Abbasi* case whether claims for diplomatic protection are justiciable. After a careful review of the relevant authorities it came to the conclusion that although there is no enforceable duty under English law to protect citizens injured by breaches of their fundamental rights, the discretion that the Foreign Office has to provide such protection is not beyond a court’s powers of review if it can be shown that the decision was irrational or contrary to legitimate expectation. According to this judgment:

“...it is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country’s foreign policy; but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.

The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case.”

We were not referred to decisions of other national courts which suggest a higher intensity of review than that evinced by the German and English decisions. None are referred to by the Special Rapporteur, and I am not aware of any other decisions that may be relevant to evaluating international practice.

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54 *Abbasi and Another v Secretary of State for Foreign and Commonwealth Affairs and Another* [2002] EWCA Civ 1598.

55 Id at para 106 iv-v.

A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.

This does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection. The exercise of all public power is subject to constitutional control. Thus even decisions by the President to grant a pardon or to appoint a commission of inquiry are justiciable. This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection.

For instance if the decision were to be irrational, a court could intervene. This does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection.

56 *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 13.

57 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 38.
“Rationality . . . is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary’s decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.\(^{58}\)

[80] If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list.

[81] What needs to be stressed, however, in the light of some of the submissions made to us in this case, is that government has a broad discretion in such matters which must be respected by our courts. With this in mind, I proceed now to deal with the specific claims made by the applicants. I will deal with each of the claims in turn, though not in the same order as they appear in the notice of motion.

**The claim to be extradited from Zimbabwe to South Africa**

[82] The relief claimed by the applicants in this regard is as follows:

\(^{58}\) Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 90.

“Directing and ordering the government . . . to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.”

[83] In terms of the Constitution the prosecuting authority, headed by the National Director of Public Prosecutions, has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to the instituting of criminal proceedings.\(^{59}\) This would include applying for extradition where this is necessary. The powers of the prosecuting authority, for which the Minister of Justice and Constitutional Affairs assumes final responsibility,\(^{60}\) must be exercised by the prosecuting authority without fear, favour, or prejudice.\(^{61}\) Decisions to institute prosecutions may raise policy issues which are far from easy to determine where, as in the present case, the events are already the subject matter of criminal proceedings in another country.

[84] In terms of the Promotion of Administrative Justice Act\(^{62}\) a decision to institute a prosecution is not subject to review.\(^{63}\) The Act does not, however, deal specifically with a decision not to prosecute. I am prepared to assume in favour of the applicants that different considerations apply to such decisions, and that there may possibly be
circumstances in which a decision not to prosecute could be reviewed by a court. But even if this assumption is made in favour of the applicants, they have failed to establish that this is a case in which such a power should be exercised.

[85] It is not disputed that the prosecuting authority in South Africa opened an investigation into the possibility of charging the applicants under the Regulation of Foreign Military Assistance Act with being party to a planned coup in Equatorial Guinea. Section 3(b) of this Act makes it an offence to

"render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in section 5."

Foreign military assistance includes

"any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state."

It is not suggested that the applicants had approval under section 5 to provide "foreign military assistance".

[86] If there is substance in the suggestion that a coup was being planned, there would be a basis for the South African government to put the applicants on trial here and to apply for their extradition for that purpose. To do so, however, they would have to meet the requirements of the Zimbabwean law regulating extradition from that country to South Africa. The relevant law is the Revised Edition of the Extradition Act of 1996 (the Zimbabwe Extradition Act). South Africa is a designated country in terms of that Act.

[87] Section 16 of the Zimbabwe Extradition Act requires requests for extradition by a designated country to be accompanied by a warrant of arrest giving particulars of the offence in respect of which the extradition is sought and such evidence as would establish a prima facie case in a court of law in Zimbabwe that the person concerned has committed the offence concerned in the designated country.

67 Section 16 of the Zimbabwe Extradition Act provides:

"(1) Subject to section twenty-four, a request for extradition to a designated country in terms of this Part shall be submitted through channels to the Minister and shall be accompanied by-
(a) a warrant for the arrest of the person concerned specifying and giving particulars of the offence in respect of which his extradition is sought; and
(b) such evidence as would establish a prima facie case in a court of law in Zimbabwe that the person concerned has committed or has been convicted of the offence concerned in the designated country:
Provided that, if the order declaring the country concerned to be a designated country in terms of section thirteen so provides, the request may be accompanied by a record of the case in respect of the offence concerned, containing the particulars and documents referred to in subsection (2), and accompanied by-
(i) an affidavit, sworn statement or affirmation of an officer of the investigating authority of the designated country stating that the record was prepared by him or under his direction and that the evidence referred to therein has been preserved for use in court; and
(ii) a certificate of the Attorney-General of the designated country stating that, in his opinion, the record discloses the existence of evidence under the law of the designated country sufficient to justify a prosecution."

64 As to the position prior to the Promotion of Administrative Justice Act, see: Gillingham v Attorney-General and Others 1989 TS 572; Wronsky v Prokureur-Generaal 1971 (3) SA 292 (SWA); Highstead Entertainment (Pty) Ltd v Minister of Law and Order 1994 (1) SA 387 (C) at 394H where it is said that courts would be slow to interfere with such decisions. This is similar to the approach taken in the United Kingdom where courts have held that there is a power to review a decision not to prosecute, but it is a power that has to be "sparingly exercised" - R v Director of Public Prosecutions, ex parte C[1995] 1 Cr. App. R. 136 at 140.


66 Id. As defined in paragraph (c) of the definition of foreign military assistance in section 1.
Mr J P Pretorius (Pretorius), the Deputy Director of Public Prosecutions in the Priority Crimes Litigation Unit of the prosecuting authority is in charge of the investigations against the applicants. An affidavit by him forms part of the record in the High Court proceedings. It says:

“At present there is not sufficient evidence to make a decision whether to institute a prosecution against the persons concerned in connection with this matter. This situation may change in the near future.”

Griebenow says that he was told on 17 May by Pretorius that he would be drawing up an indictment that evening. Pretorius denies this and says that he told Griebenow that he would start working on the indictment on the 17th. He goes on to say that the docket is not complete and further investigations are necessary. The allegation by Pretorius that there was insufficient evidence to make a decision about a prosecution is not denied. Counsel for the applicants conceded that he could not dispute this allegation. He suggested that a charge could be framed on the basis of the applicants’ own evidence that they were going to the DRC to provide security services. This he says is covered by the definition of foreign military assistance which includes:

“[S]ecurity services for the protection of individuals involved in armed conflict or their property.”

But even if this be so, there is a vast difference between defending a mine owner against unlawful assaults on its property, and planning a coup against the head of a state with which South Africa enjoys diplomatic relations. South Africa and Equatorial Guinea have also entered into a joint security agreement entitled “Agreement between the Government of the Republic of South Africa and the Government of the Republic of Equatorial Guinea Concerning Cooperation on Defence and Security”. Article 3 of the Agreement provides the functions of the South Africa–Equatorial Guinea Joint Commission on Defence and Security. These include: promoting cooperation at all levels in the fields of defence and security; exchanging security information on the activities and movement of elements threatening the security and stability of the two countries; establishing effective channels of communication between the defence and security forces of the two countries; dealing with matters of cross-border crimes and illegal immigration; briefing members on the security situation prevailing in each country generally and exchanging ideas and acting jointly on how the attendant problems may be addressed; and dealing with any other matters which in the opinion of the parties will enhance better mutual understanding and strengthen relations of solidarity between the two countries.

An application for extradition must provide particulars of the offence and prima facie evidence to support the charge. If the prosecuting authority’s investigations are directed to the possibility of putting the applicants on trial for planning a coup in Equatorial Guinea it must have evidence to support that allegation. Secondly, the

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68 As defined in paragraph (b) of the definition of foreign military assistance in section 1 of Act 15 of 1998.
offence for which the extradition is sought must be an offence for which the accused person could have been charged and prosecuted in Zimbabwe if the offence had been committed there. Neither of these propositions has been established by the applicants. Zimbabwe does not have legislation comparable to the Regulation of Foreign Military Assistance Act.

[92] The applicants seek to overcome this difficulty by saying that they will consent to being extradited to South Africa should such an application be made. But that is no answer. If the government lacks evidence to establish a prima facie case against the applicants it is not entitled to put them on trial. Nor would a Zimbabwean court be entitled to order that they be extradited to South Africa rather than Equatorial Guinea. An extradition by consent in such circumstances would be no more than a device to remove the applicants from Zimbabwe and bring them back to South Africa, where they would then have to be put on trial for a lesser offence than participating in plans for a coup, or be released because of the lack of evidence of their having committed any crime. To pursue a request for extradition in such circumstances would be contrary to South African law and Zimbabwean law and inconsistent with the government’s duty to conduct its foreign relations in good faith.

69 Section 14 of the Zimbabwe Extradition Act provides:

“(1) Subject to this Act, a person may be arrested, detained and extradited from Zimbabwe to a designated country in the manner provided for in this Part, for an offence in respect of which in the designated country he is accused or has been convicted and is required to be sentenced or to undergo punishment, whether the offence was committed before or after the declaration of the country concerned as a designated country.

(2) This Part shall apply to any offence which-

(a) is punishable in the law of the designated country concerned by imprisonment for a period of twelve months or by any more severe punishment; and

(b) would constitute an offence punishable in Zimbabwe if the act or omission constituting the offence took place in Zimbabwe or, in the case of an extra-territorial offence, in corresponding circumstances outside Zimbabwe.”

[93] The government says that the prosecuting authority’s investigations have not been completed and there is not yet sufficient evidence to take a decision to institute a prosecution. This is not denied by the applicants, who themselves deny that they were party to plans to stage a coup. That being so, it must be accepted that when these proceedings were initiated the government lacked the evidence necessary to apply for the extradition of the applicants. On that ground alone the first claim must fail. Counsel for the applicants was constrained to concede that this was so and did not persist in the claim.

[94] In the circumstances it is not necessary to deal with the question whether, if there were a legitimate basis for seeking the extradition of the applicants, this Court would have had the power in the circumstances of this case to order the government to do so.

The claim that steps be taken to secure the release of the applicants from custody in Zimbabwe

[95] There is no evidence to suggest that the charges that the applicants face in Zimbabwe are not offences according to Zimbabwean law, or that there is no evidence to justify the bringing of such charges against them. That being so, there is no basis on which South Africa would be entitled to exert diplomatic pressure on Zimbabwe for them to be released, let alone for a court to order that this be done.
The risk of capital punishment

[96] The claim is formulated as follows:

"Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean and Equatorial Guinean Governments not to impose the death penalty on the applicants."

[97] There is nothing to suggest that the applicants are at risk of being charged with an offence in Zimbabwe for which capital punishment would be a competent sentence. That possibility need not, therefore, be considered. There is, however, evidence to suggest that the applicants may possibly be charged with capital offences in Equatorial Guinea.

[98] There can be no doubt that capital punishment is inconsistent with the provisions of our Bill of Rights. But the question whether South African citizens can require our government to take action to protect them against conduct in a foreign country, which would be lawful there, but would infringe their rights if committed in South Africa, raises entirely different issues. Although the abolitionist movement is growing stronger at an international level, capital punishment is not prohibited by the African Charter on Human and Peoples’ Rights or the International Covenant on Civil and Political Rights, and is still not impermissible under international law. The execution of the sentence, if imposed, would be by the state of Equatorial Guinea, which means that attempts to mitigate the sentence would necessarily engage the foreign relations between the two countries.

[99] The government’s policy on this issue is that it makes representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen. The government’s answering affidavit goes on to say:

"It is a concern of the South African government that there are South Africans who are indicted or incarcerated in foreign countries where the death sentence is a competent sentence. It is a continuing effort where appropriate to make representations regarding the death sentence as a form of punishment."

The applicants are entitled to the benefit of this policy, and if capital punishment were to be imposed on them, then consistently with its policy, government would have to make representations on their behalf. There is no evidence to suggest that this would not happen.

[100] Counsel for the amicus curiae submitted that it is cruel treatment to put a person on trial in a foreign country to face a possible death sentence if convicted. However, as long as the proceedings and prescribed punishments are consistent with international law, South Africans who commit offences in foreign countries are liable to be dealt with in accordance with the laws of those countries, and not the

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70 S v Makwanyane and Another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

71 See the discussion of this in Mohamed above n 11 at para 39 and Burns above n 40 at paras 85-92.
requirements of our Constitution, and are subject to the penalties prescribed by such laws. 72

[101] The question whether representations should be made now or later is a matter of judgment and a question of timing. There may in fact prove to be no need for representations to be made at all. The applicants may not be convicted, or if convicted, may not be sentenced to death. Counsel for the applicants submitted that if a death sentence were to result, there might be insufficient time between sentence and execution for representations to be made. There is, however, nothing to show that if the applicants were to be convicted and sentenced to death in Equatorial Guinea, there would not be sufficient time to make effective representations.

[102] Bearing in mind the deference to which the government is entitled in such matters it cannot be said that its response to the applicants’ demand that it make the representations now, is inconsistent with the Constitution. The claim that the government be directed as a matter of extreme urgency to seek an assurance that the death penalty will not be imposed must therefore be dismissed.

Extradition to Equatorial Guinea

[103] According to Griebenow, Equatorial Guinea has made a request to Zimbabwe for the extradition of the applicants. He bases this averment on submissions made to the court in Zimbabwe by a representative of the Attorney-General in opposing an application by the applicants to be released from custody. He also refers to the fact that the applicants’ legal representatives in Zimbabwe were told by the Attorney-General’s representative in Zimbabwe that a request for extradition had been made by Equatorial Guinea, and were shown pages from a document from the Zimbabwean Ministry of Foreign Affairs directed to the Attorney-General of Zimbabwe in which it is recommended that the application for extradition be considered favourably. Reference is also made to the fact that several people, including a number of South African citizens, have already been arrested in Equatorial Guinea in connection with the alleged coup.

[104] On 28 April 2004, the Government of Zimbabwe passed a statutory instrument in terms of which Equatorial Guinea was added to the list of countries to which Zimbabwe may extradite persons. The applicants also refer to news reports in Zimbabwe that President Nguema of Equatorial Guinea recently visited Zimbabwe for Independence-day celebrations, and on that occasion had a five hour meeting with President Mugabe of Zimbabwe at which the subject of the extradition of the applicants to Equatorial Guinea was discussed. This was referred to in comments made by the President of Equatorial Guinea after the meeting. The respondents offered no evidence to counter these allegations. I am satisfied that in the circumstances the applicants have established that there is a real risk that they are likely to be faced with proceedings in Zimbabwe for their extradition to Equatorial Guinea.

72 See above para 57.
[105] This does not mean, however, that they will in fact be extradited. The applicants deny the allegation that they were party to a plan to stage a coup in Equatorial Guinea. There is no reference to the precise nature of the charge on which the request for extradition is said to have been made, nor to the evidence that Equatorial Guinea has to support a claim for extradition under the Zimbabwe Extradition Act. In terms of the Zimbabwe Extradition Act an enquiry has to be conducted by a magistrate to establish whether or not there are grounds on which an extradition order can legitimately be made. The applicants will be entitled to resist such an order at the hearing. If the evidence against them is insufficient to justify extradition, the magistrate will not be entitled to grant an order. If an order is made, it would be subject to appeal.

[106] The applicants argue that there is a risk that Zimbabwe will act illegally and hand them over to Equatorial Guinea without an order being made for their extradition. They have, however, produced no evidence to support this allegation. The applicants have been in custody for over three months during which the court proceedings against them have been pending. If the Zimbabwean authorities contemplate handing them over to Equatorial Guinea without an extradition order sanctioning such a procedure, it is unlikely that they would not have done so immediately after their arrest, or as soon as they received the request for extradition.

[107] The applicants rely on media reports that the President of Zimbabwe had entered into an agreement with the President of Equatorial Guinea to extradite the applicants to Equatorial Guinea in exchange for the supply of oil. No attempt has been made to verify the accuracy of these reports. Apart from the reference to the media report, all that is said in support of the allegation is that there have been instances in the past in which the Zimbabwean government has ignored orders of court, and that the Zimbabwean authorities have in fact failed to comply with certain orders relating to the conditions in which they are kept in custody. But this does not mean that Zimbabwe is likely to act illegally, in breach of the duty that it owes to South Africa under international law, and hand South African citizens over to Equatorial Guinea contrary to orders made by courts dealing with the extradition application. The South African government cannot reasonably be expected to conduct its diplomatic relations with Zimbabwe on the assumption that this might happen, and to make demands on the Zimbabwean government on the assumption that they will act illegally and contrary to South Africa's rights under international law.

[108] The question of extradition to Equatorial Guinea has, however, been debated in the High Court and this Court and no purpose would be served by declining to deal with that question on the grounds that the demand is premature.

[109] The claim relating to the risk of extradition to Equatorial Guinea was originally formulated in general terms but during argument counsel for the applicants limited the claim and formulated it as follows:

"Directing and ordering the Government to seek an assurance as a matter of extreme urgency from the Zimbabwean Government that the applicants will not be released or
extradited to Equatorial Guinea without a prior assurance being obtained from Equatorial Guinea to the effect that the death sentence will not be imposed, and if imposed, will not be carried out.”

[110] There were two strands to the applicants’ argument. The first was based on the decision in Mohamed’s case.73 I have already dealt with that argument.74 It has no substance and must be rejected. The second relates to an allegation still to be considered, and that is that if extradited the applicants will be subjected to a trial that is not fair. I deal later with this aspect of their claim.

[111] The claim for extradition has not yet been lodged in the Magistrates’ Court and although there may be reasonable grounds to anticipate what the charges may be, the details of the evidence and the charges are unknown. Without that information it is not possible to say whether or not there is a real risk that the applicants will be extradited to Equatorial Guinea to face a capital charge.

[112] No request was made for this relief prior to the institution of these proceedings. Moreover, according to the ILC report there is general agreement that diplomatic protection “is concerned with injury under international law, and not injury under domestic law.”75 Capital punishment is permissible both in Zimbabwe and Equatorial Guinea. Capital punishment is also not impermissible under international law. If the applicants are extradited lawfully from Zimbabwe to Equatorial Guinea they cannot complain that they have suffered an injury according to international law solely on the grounds that they will face a capital charge in Zimbabwe. In the light of government’s stated policy concerning capital punishment in foreign countries, its response in its answering affidavit that it would seek an assurance only if capital punishment is imposed, is not a response with which a court can interfere.

[113] The claim as formulated in the prayer and as amended by counsel must therefore be dismissed.

Fair detention and trial

[114] The claim concerning fair detention and fair trial is formulated as follows:

“Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.”

[115] As far as the fair trial claim is concerned, the prayer that is directed to section 35 of our Constitution is misconceived. For reasons that I have already given the claim as formulated cannot succeed.

[116] Serious allegations have, however, been made about the criminal justice system in Equatorial Guinea. The applicants allege that if they are put on trial there and charged with being party to the alleged coup, they will be exposed to the risk of being convicted and put to death as a result of an unfair trial. That is a grave allegation

73 Above n 11.
74 See above paras 46-57.
75 Above n 5 at 147.
which calls for close scrutiny and careful consideration by this Court. The incorrect formulation of the applicants’ claim should not stand in the way of this being done.


[118] The Special Rapporteur reported in January 1999. His report refers to lawlessness, torture, the beating of prisoners, overcrowded prison conditions with a complete lack of hygiene and inadequate food, impunity enjoyed by agents of the state, and the lack of due process within the justice system.

[119] Amnesty International sent a mission to observe a trial of 144 persons alleged to have infringed state security between 23 May and 9 June 2002. The observer concluded that the trial was characterised by serious human rights violations and countless procedural irregularities. Despite overt evidence of broken limbs and obvious injuries, complaints of torture were not investigated. Defence lawyers were allowed only one day to consult with their clients before the trial started. The trial was also condemned by the European Parliament which called for the guilty verdict to be annulled and the release of the convicted persons. In its report, Amnesty International mentions that it has on numerous occasions submitted its concerns about human rights violations to the Equatorial Guinean authorities and has urged them to approve and implement safeguards to prevent arbitrary detention, torture, ill-treatment and trials which do not comply with due process of law. These are requirements of the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights, which were ratified by the government of Equatorial Guinea in 1986 and 1987 respectively.

[120] In March 2004 Amnesty International issued a press release drawing attention to the torture of foreign nationals then in custody and alleged to be mercenaries, and the deplorable conditions in which they were being detained. It questioned whether they would receive a fair trial.

[121] In July 2003 the International Bar Association sent a fact finding mission to Equatorial Guinea. The mission conducted wide ranging interviews with government ministers, politicians, judges, and the legal profession. In a lengthy report, including recommendations as to what needs to be done to secure compliance with the rule of law and an independent judiciary, the findings and conclusions of the mission included the following:

- The executive exercises considerable control over both the legislature and the judiciary.
- There is no separation of powers and very little or no respect for the rule of law. Torture, failure to guarantee the right to a fair trial, lack of freedom of expression and association, poor prison conditions and the failure of the
judiciary to act independently are some of the examples of human rights abuses that occur with impunity.

- The lack of independence of the judiciary, the expectation that judges will be loyal to the government, and the use of military judges in civilian courts are cause for concern.

[122] The South African government says that it is not its policy to comment on the justice systems of foreign countries and it has declined to do so. It takes the attitude that the reports are not admissible in evidence and that the court cannot make a finding on the efficacy and fairness of the legal and judicial systems of Equatorial Guinea without the benefit of expert evidence.

[123] Its attitude, as expressed in the answering affidavit, is that a decision as to whether or not to intervene is one that will be taken by a responsible authority in South Africa should the applicants be extradited to Equatorial Guinea. Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case.76

[124] If the reports are accurate and reflect the present position in Equatorial Guinea, and if the applicants are extradited to Equatorial Guinea to stand trial there, there would be serious concern about the fairness of the trial that they would face. A concern that goes beyond the differences in legal procedure referred to in cases such as Canada v Schmidt77 and Neely v Henkel.78 What are the obligations of the government to the applicants in such a situation?

[125] The history of coups and counter coups in Africa has undermined democracy on the continent. Such practices are the antithesis of the foreign policy principles of the South African government. These principles and the priorities of the Ministry of Foreign Affairs are referred to in the evidence. They include a commitment to justice and international law in the conduct of relations between nations, a commitment to interact with African partners as equals, and a commitment to the promotion of the New Partnership for Africa’s Development, described as “a continental instrument to advance people-centred development based on democratic values and principles.” It would be a breach of South Africa’s duty to Equatorial Guinea, and its international obligations, in particular to other African states, to frustrate a criminal prosecution instituted there simply because the accused persons are South African nationals.

[126] On the other hand, if the allegations by the applicants that they will not get a fair trial in Equatorial Guinea prove to be correct, and they are convicted and

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76 See International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd 1953 (3) SA 343 (W) at 346B.
77 Above n 41.
78 Above n 42.
sentenced to death, there will have been a grave breach of international law harmful to our government’s foreign policy and its aspirations for a democratic Africa. As far as the applicants are concerned the consequences would be catastrophic, and they will have suffered irreparable harm.79

[127] The applicants are not in Equatorial Guinea and they have not been put on trial there. No injury has been done to them by that country and no injury will be done unless they are put on trial there; nor will any wrong be done if they are put on trial and the proceedings are conducted fairly. To this extent the claim for protection is premature. It cannot, however, be said that there is not a risk that the consequences that the applicants fear will happen. Should that risk become a reality the government would be obliged to respond positively. Given its stated foreign policy, there is no reason to believe that this will not be done.

[128] This matter has been complicated by the excessive and precipitate demands that the applicants have made, and the form in which their claims for relief were couched. They relied directly on the Bill of Rights and not on the privileges and benefits to which they are entitled under section 3 of the Constitution. One of the results of this is that we may not have all the evidence that would be relevant to a section 3 claim.

79 In the case of Öcalan v Turkey Application 46221/99, 12 March 2003, the European Court of Human Rights held the following at para 207:

“[T]o impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence.”

[129] The situation is evolving and it is not known how it will develop. It is complicated by the fact that other South African citizens are already facing the likelihood of being tried in Equatorial Guinea, having been arrested there on allegations that they were party to the attempted coup. The government has to deal with that situation as well, and it appears from the record it is doing so. What happens in that regard may have a bearing on how the government will deal with the applicants’ request for diplomatic protection.

[130] It is also relevant to have regard to the limited power that the government has under international law to affect decisions of a foreign state. It is essentially a power of persuasion, and it is for this reason that courts everywhere are reluctant to intervene in such matters, even if, as in Germany, they have the power to do so. Thus in the Hess case80 the Federal Constitutional Court was at pains to point out that

“the Federal Government enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States.”81

[131] The situation which exists in the present case is one which calls for delicate negotiations to ensure that if reasonably possible the fears that the applicants entertain can be put to rest, and that the trial, if one takes place, is conducted in a way that meets internationally accepted standards. The assessment of the risk, the best way of

80 Above n 52.
81 Id at 395.
avoiding it and the timing of action are essentially matters within the domain of government.

[132] The situation that presently exists calls for skilled diplomacy the outcome of which could be harmed by any order that this Court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow. If the situation on the ground changes, the government may have to adapt its approach to address the developments that take place. In the circumstances it must be left to government, aware of its responsibilities, to decide what can best be done.

[133] We were told by counsel for the applicants that there have been ongoing sensitive discussions between the legal representatives of the applicants and representatives of government. If those discussions are continued they will no doubt be conducted in the light of what is said in this judgment. The applicants have not established that the government breached or threatened to breach any duty it has under the Constitution or international law. In the circumstances the applicants are not entitled to relief in this regard.

Claims relating to conditions of detention

[134] The claims dealing with detention are formulated as follows:

“Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa (the Constitution) are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants’ right to freedom and security of person including the rights not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

Directing and ordering the Government to, through the office of the second respondent, report in writing to the Registrar of this Honourable Court on a weekly basis as to the issues set out above where applicable.”

[135] The applicants are presently in custody in Zimbabwe, and the claim in so far as it relates to what might happen if they were to be held in Equatorial Guinea is premature. I will confine myself, therefore, to the allegations made concerning Zimbabwe.

[136] The claim concerning detention in Zimbabwe arises out of the conditions in which the applicants have been detained and treated in Chikurubi Prison. I consider it desirable to deal with these allegations notwithstanding the inappropriate form in which their claim has been formulated, and to consider whether there is any other relief to which they may be entitled.

[137] In the founding affidavit the following allegations are made. It is said that the applicants were assaulted and abused at the time of their arrest on 7 March 2004.
They were initially denied access to legal advisers, and some were tortured and forced to make untruthful statements against their will. When they were ultimately allowed access to legal advisers a number of obstacles were placed in the way of the advisers. They had difficulty in gaining access to the prison. When they did, they were not allowed to consult with the applicants in private, and members of the investigating team insisted on being present during consultations. The court proceedings are being held in hospital wards in the prison, and the public, including journalists and members of the applicants’ families, have difficulty in gaining access to the venue because of obstructions placed in their way. Members of the Central Intelligence Organisation (CIO) interrogate them in the absence of their legal representatives despite being asked not to do so. The applicants are shackled with leg irons and handcuffs when they attend court, and court orders requiring the shackles to be removed have been ignored. The explanation given was that this was “on instructions from above”.

[138] The conditions in which the applicants are being held in Chikurubi Prison are described in the founding affidavit as follows. There are no beds. The applicants are issued with lice ridden blankets under which they have to sleep. Most are being held in overcrowded cells, but four are being held in solitary confinement. All receive inadequate food, less than the minimum standards prescribed for prisoners. They are required to wear tunics and short trousers which provide inadequate protection against the cold of an approaching winter. They have been refused permission to accept jerseys which were knitted for them and which comply with prison regulations. On one occasion eighteen of the applicants were badly assaulted by prison warders using batons, and after that salt was thrown on the wounds. Criminal charges were laid and a number of warders have been arrested and charged.

[139] If these allegations are correct, and there is no evidence to contradict them, the applicants have been held in deplorable conditions. They have been humiliated, assaulted, abused and denied proper access to their lawyers. The persons alleged to be responsible for these abuses are officers of the Zimbabwean government. The applicants apparently attempted to address these complaints through court proceedings. In the founding affidavit reference is made to various court applications brought in connection with these matters. The outcome of the applications is not always referred to, though it is said that 13 favourable court orders have been obtained. It appears, however, that there have been occasions on which orders given in favour of the applicants were ignored by the authorities in control of them. Having failed to secure relief through the courts, the applicants have turned peremptorily to the South African government and demanded that it secure relief for them. The first time that this seems to have been raised is in the peremptory demand made the day before the proceedings were launched.

[140] In the founding affidavit it is said that despite various requests the government has been slow, unhelpful and ineffective in protecting the constitutional rights of the applicants. A bald allegation is then made that the “government’s response to the plight of the applicants has been most disappointing”. The affidavit goes on to say that “except for a few isolated consular services provided by [the] government
recently, it has been most unresponsive to the violation of the applicants’ constitutional rights.” No specific allegations are made in the founding affidavit that the applicants requested assistance from the South African High Commission to address their complaints, and that this was refused.

[141] It appears from a letter dated 24 March 2004 written by an attorney acting for the applicants to the South African National Director of Public Prosecutions, that attorneys for the applicants met the South African Minister of Justice and Constitutional Development and the National Director of Public Prosecutions and others on 23 March 2004. This was the date on which the applicants were charged in Zimbabwe. There is no evidence as to what took place at this meeting. In the letter written the following day, the National Director of Public Prosecutions is requested to intervene to ensure that the applicants have proper access to lawyers of their choice and that full consular services be rendered to them. It is conceded in the founding affidavit that the High Commission did provide assistance to the applicants to get access to their lawyers. The letter also requests that consideration be given to applying for the extradition of the applicants to South Africa. No reference is made in the letter to the assaults or the conditions in which the applicants were being detained, and no request is made for assistance by the government to alleviate those conditions. What contact there was after that is not clear. The founding affidavit mentions that there have been various discussions with the Deputy National Director of Public Prosecutions, Mr Henning SC. It seems that they were concerned with the request to be extradited to South Africa, but no details are given about what took place. We were also informed by counsel for the applicants that there have been confidential discussions with the government, but we do not know when they commenced or what they addressed.

[142] The government disputes the allegation that it has been unhelpful, and says in its answering affidavit that it and its agencies continue to do what, in law and its foreign policy, they are entitled to do regarding the conditions of the applicants in Zimbabwe. A supporting affidavit from the Director General of the Department of Foreign Affairs made on 23 May gives details of the assistance that has been given, including, on occasions, formal interventions with the Zimbabwean government, on 10 March, 11 March, 12 March, 13 March, 4 April, 15 April, 19 April, 26 April, 11 May, 13 May and 14 May 2004. The Director General then summarises the averments made saying:

“From the above it is thus clear that when the family members, the applicants themselves and their legal representatives requested assistance of the officials of the South African Embassy in Zimbabwe, in regard to food, clothing, stationery and access by the legal representatives to the applicants, the South African Embassy addressed official requests to the Zimbabwean authorities in order to provide the necessary assistance to the applicants. At times, the requests were approved immediately by the Zimbabwean authorities and other times the requests were not approved immediately. In cases of delays the South African Embassy addressed appropriate complaints to the Zimbabwean authorities and thereafter the approvals were given. I am not aware of any request for assistance made by the applicants and which was not taken up by the South African Embassy. To the extent that the applicants allege that the South African Embassy and its diplomats did not provide assistance to them, I deny those allegations.”
In their reply the applicants do not deny this. They say that they do not contend
that there was a failure on the part of the South African Embassy to provide
assistance. Their complaint is that the Embassy did not act pro-actively. The claim as
formulated by the applicants is misconceived. There is moreover nothing to show that
the government has not provided assistance to the applicants in Zimbabwe when it
was requested to do so. The claims made in this regard must be dismissed.

Conclusion

To sum up, therefore, the findings I make in the light of the evidence on record,
the provisions of the Constitution and South Africa’s obligations under international
law, are:

1. The application raises complex questions of law, of vital importance not only
to the applicants but to our society as a whole. In the circumstances the
application for leave to appeal directly to the Constitutional Court should be
granted.

2. South Africa had an obligation to cooperate with Zimbabwe and Equatorial
Guinea in the prevention and combating of crime, including, in particular, the
duty to share information on suspected coup attempts or mercenary activity.

3. South Africa is under no obligation to apply for the extradition of the
applicants from Zimbabwe.

4. The applicants’ claims as formulated in the notice of motion that the court
direct and order the government to ensure that the rights that the applicants
have in terms of the South African Bill of Rights are at all times respected and
protected in Zimbabwe, and if extradited to Equatorial Guinea, that they be
respected and protected there have no basis in law and cannot be granted.

5. South African nationals facing adverse state action in a foreign country are,
however, entitled to request the South African government to provide
protection against acts which violate accepted norms of international law. The
government is obliged to consider such requests and deal with them
appropriately.

6. Decisions made by the government in these matters are subject to constitutional
control. Courts required to deal with such matters will, however, give
particular weight to the government’s special responsibility for and particular
expertise in foreign affairs, and the wide discretion that it must have in
determining how best to deal with such matters.

7. Stated government policy concerning nationals in foreign countries, who are
required to stand trial there on charges for which capital punishment is
competent, is to make representations concerning the imposition of such
punishment only if and when such punishment is imposed on a South African
This policy adopted by South Africa in its relations with foreign states is not inconsistent with international law or any obligation that the government has under the Constitution.

8. Stated government policy concerning the conditions of detention and the conduct of trials of nationals in foreign countries is to ensure that all South African citizens are detained in accordance with international law standards, have access to their lawyers and receive a fair trial. This policy adopted by South Africa in its relations with foreign states is not inconsistent with international law or any obligation that the government has under the Constitution.

9. The applicants’ uncontradicted evidence is that whilst in detention in Zimbabwe some of them have been assaulted, all of them have been held in deplorable conditions, and at times humiliated, abused, and denied proper access to their lawyers. Criminal charges have been brought against the warders alleged to have committed the assaults. It is not disputed that all requests for assistance by the applicants to the South African High Commission have been taken up, and that the South African High Commission made representations to the Zimbabwean authorities about these matters.

10. How to respond to the events which have taken place requires great sensitivity, calling for government evaluation and expertise. It would not be appropriate in the circumstances of this case for a Court to require or propose any approach with regard to timing or modalities different to that adopted by government.

11. The applicants have failed to establish that the government’s response to requests for assistance is inconsistent with international law or the South African Constitution.

12. In the circumstances the appeal must be dismissed. Because of the importance of the case and the complexity of the issues raised this is not a case in which a costs order should be made in respect of the application for leave to appeal, or the appeal.

[145] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed and the order made by Ngoepe JP in the High Court is confirmed.
3. No order as to costs is made concerning the application for leave to appeal and the appeal.

Langa DCJ, Moseneke J, Skweyiya J, van der Westhuizen J and Yacoob J concur in the judgment of Chaskalson CJ.
NGCOBO J:

Introduction

[146] I have read the judgment prepared by the Chief Justice. I am in substantial agreement with the broad theme of the judgment and therefore concur in the order he proposes. However, my approach to the issues confronting us differs to that of the Chief Justice. In particular, my approach to and treatment of section 3(2), including the emphasis I place on its proper approach, differ to that adopted by the Chief Justice.

[147] The central question presented in this case is whether, under international law or our Constitution, the government has a legal duty to provide diplomatic protection to South African nationals who are arrested and imprisoned in a foreign country.

International law

[148] One of the greatest ironies of customary international law is that its recognition is dependent upon the practice of states evincing it. Yet at times states refuse to recognise the existence of a rule of customary international law on the basis that state practice is insufficient for a particular practice to ripen into a rule of customary international law. In so doing, the states deny the practice from ripening into a rule of customary international law.

[149] The practice of imposing a legal duty to exercise diplomatic protection\(^1\) for an injured national or a national threatened by an injury by a foreign state, upon the national’s request, is a victim of this irony. Despite numerous countries which impose this legal duty in their constitutions, there is still a reluctance to recognise this practice as a rule of customary international law.\(^2\) It remains a matter of an exercise in the progressive development of international law.

[150] The position in international law is summed up by the International Court of Justice in the following passage in the Barcelona Traction case:

“The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress . . .

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\(^1\) The International Law Commission has described diplomatic protection to mean “action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State” (see article 1 of the draft articles contained in the “First report on diplomatic protection” by John R Dugard, Special Rapporteur, 7 March 2000, published as a General Assembly document, A/CN.4/506 at 11 (Special Rapporteur’s Report)). The *Encyclopaedia of Public International Law* gives a substantially similar definition of diplomatic protection and defines it as “the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law” (Dugard at 14, citing Geck “Diplomatic Protection” *Encyclopaedia of Public International Law* (1992) at 1046). For the purpose of this judgment I will use the term diplomatic protection to refer to the diplomatic intervention by a state to protect its nationals against a violation or threatened violation of the internationally recognised human rights of its nationals.

\(^2\) Countries that have constitutionalised the duty to provide diplomatic protection include Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People’s Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Vietnam and Yugoslavia. The Special Rapporteur’s Report above n 1 at 30.
The state must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.\footnote{Barcelona Traction Light and Power Company Limited 1970 ICJ Reports 3; 46 ILR 178 at paras 78-9.}

It is true that customary international law is part of our law, but it can be altered by our law and, in particular, by our Constitution. Section 232 of the Constitution says that customary international law is the law in South Africa, “unless it is inconsistent with the Constitution or an Act of Parliament.” It follows therefore that the next inquiry is whether a duty exists under our Constitution.

\textit{Is there a duty under our Constitution?}

Both the applicants and the amicus contended that such a duty exists and that it derives from the Constitution. In support of this contention, reliance was placed upon section 7(2) of the Constitution. In addition the amicus also relied on section 3(2).\footnote{See paras 174-179 for further discussion of these sections.}

For its part, the government contended that no such duty exists under our Constitution.

[154] The question whether there is a constitutional duty contended for is essentially one of a proper construction of the relevant provisions of the Constitution, in particular, sections 3(1), 3(2) and 7(2). These provisions must be construed in the light of, amongst other things, the Constitution as a whole and international and regional human rights instruments to which the government is a party. Before construing these constitutional provisions, it is necessary to discuss some of the considerations that are relevant in determining whether there is a constitutional duty to provide diplomatic protection to nationals abroad. These considerations provide the context in which the applicable constitutional provisions must be construed and understood.

\textit{Relevant considerations}

\textit{(a) The constitutional context}

[155] The question whether the government has a constitutional duty to provide diplomatic protection in this case must be determined in the light of our Constitution, and, in particular, the provisions of the Bill of Rights. To paraphrase Mohamed J in \textit{S v Makwanyane},\footnote{S v Makwanyane and another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262.} our Constitution articulates our shared aspirations; the values which bind us, and which discipline our government and its national institutions; the basic premises upon which all arms of government, and at all levels, are to exercise power; the national ethos that defines and regulates the exercise of that power; and the moral and ethical direction which our nation has identified for itself. The founding values
upon which our constitutional democracy is founded are especially relevant in this context.

[156] As a nation, we have committed ourselves to establishing “a society based on democratic values, social justice and fundamental human rights”. The very first provision of the Constitution sets out the founding values upon which our constitutional democracy is founded. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms. Our democratic state is therefore committed to the advancement and protection of fundamental human rights. This commitment is immediately apparent in the Bill of Rights, which is the cornerstone of our constitutional democracy and which affirms democratic values of human dignity, equality and freedom.

[157] In this sense our Constitution must be seen as a promissory note. Indeed, in peremptory terms, section 7(2) provides that “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

[158] The commitment to the advancement and protection of fundamental human rights is also apparent in the ratification of the African Charter on Human and Peoples’ Rights (African Charter) and the International Convention on Civil and Political Rights (ICCPR). These international instruments enshrine the fundamental human rights that are generally to be found in our Constitution.

[159] It is this commitment to the promotion and protection of fundamental human rights that binds us and defines us as a nation and which must discipline our government and inform the duty which it owes to its nationals. This commitment “must be demonstrated by the State in everything that it does.” It must inform its foreign relations policy. Indeed the principles that underpin the government’s foreign policy include a commitment to the promotion of human rights, democracy, justice and international law in the conduct of relations between nations.

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6 Preamble to the Constitution. See also Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism Others 2004 (7) BCLR 687 (CC) at para 73:

“South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed ‘to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms.’ This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution ‘recognises the injustices of our past’ and makes a commitment to establishing ‘a society based on democratic values, social justice and fundamental rights’. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.”

7 Section 1(a) of the Constitution.

8 Section 7(1) states: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”


11 Above n 5 at para 144.

12 See paras 198-202 and 207-208 which discuss state policy.
[160] In construing the provisions of the Constitution we are enjoined to consider, amongst other things, international law. International law consists, inter alia, of the international human rights instruments to which the government is a party. These instruments are also relevant to the question whether there is a constitutional duty to provide diplomatic protection to nationals who are abroad. By ratifying the African Charter, the government “recognises the rights, duties and freedoms enshrined” in the African Charter, and it assumed the “duty to promote and protect human and peoples’ rights and freedoms” enshrined in the African Charter. These rights and freedoms include the right to a fair trial, fair detention and the right against torture.

Article 7 provides:

“1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.”

Article 6 provides:

“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

And article 5 provides:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

[161] Also, by ratifying the ICCPR, the government recognises that:

“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

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13 See para 223 in the judgment of O’Regan J.

14 Article 1 of the African Charter states that: “The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.” Zimbabwe and Equatorial Guinea have also ratified the African Charter.

15 Id at Preamble.

16 Above n 10 article 9.
And:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”17

[162] The ratification of the African Charter and the ICCPR are an unequivocal commitment by the government to the promotion and protection of fundamental international human rights and to do so in co-operation with other nations.18 Indeed ratification of international human rights instruments is a positive statement by the government to the world and to South African nationals that it will act in accordance with these instruments if any of the fundamental human rights enshrined in the international instruments it has ratified are violated. These international instruments should therefore inform the government’s foreign policy. They provide the government with a tool to protect the internationally recognised human rights of South African nationals. What is more, these instruments are binding under our Constitution.

[163] These international instruments make provision for steps that member states can take when any of the rights contained therein are violated or threatened with violations.19 Consistent with its commitment to the protection and promotion of

17 Id article 7.

18 Zimbabwe did not ratify the ICCPR but there was an accession on 31 August 1991. Equatorial Guinea also submitted to an accession on 25 December 1987. Zimbabwe ratified the African Charter on 30 May 1986 and Equatorial Guinea ratified it on 7 April 1986.

19 Thus under the African Charter, the government is entitled to take action against another state party where it has reason to believe that that State has violated a provision of the African Charter. Article 47 provides:

“If a State party to the present Charter has good reasons to believe that another State party to his Charter has violated the provisions of the Charter, it may draw, by written communication,

fundamental human rights, the government cannot therefore remain silent when a member state commits the most egregious violations of any of the fundamental human rights enshrined in these instruments.20

[164] It is true that these provisions are permissive in that they provide that the state “may” take action. That in my view does not detract from the obligation to promote and protect the rights in these instruments, an obligation which the state has assumed by ratifying these instruments. I would venture to suggest that the state is obliged to take some steps when an egregious violation of the very fundamental human rights, enshrined in the document it has ratified, is being committed by a member state.

[165] Apart from the procedures for the protection of the rights enshrined in these instruments, there may be other effective means available to member states to protect human rights. Diplomatic intervention is another important tool in the protection of international human rights.

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19 Written Statement Submitted by the Government of the Republic of South Africa, on 30 January 2004, to the International Court of Justice in the matter of the request by the United Nations General Assembly for an Advisory Opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory.
Diplomatic protection

[166] International human rights instruments such as the ICCPR and the African Charter are important documents in that they extend protection to both aliens and nationals in the state parties. However, the remedies they provide are said to be somewhat weak and they are at times slow in providing the remedy.  

An individual may lodge a complaint with the African Commission concerning the violation of a fundamental human right guaranteed in the African Charter. However, in circumstances where urgent action is required, the procedure that has to be followed in processing the complaint may result in delays. What is more, its powers are to make recommendation to the offending state. This points to the urgent need to establish a court of justice to enforce the rights guaranteed in the African Charter.

[167] Having regard to this, Dugard submits that diplomatic protection, albeit only to protect individuals, offers a more effective remedy. According to him, states “will treat a claim of diplomatic protection from another State more seriously than a complaint against its conduct to a human rights monitoring body”. Diplomatic protection therefore is an important weapon in the arsenal of human rights protection. In certain circumstances, where urgent action is required, it may prove to be one of the most, if not the most, effective remedy for the protection of human rights.

[168] Therefore, states that are committed to the protection and promotion of international human rights have an important tool at their disposal to fulfil their commitment. Indeed a growing number of states now have provisions in their constitutions that recognise the right of individuals to have diplomatic protection for injuries sustained abroad. This reflects a growing recognition within the international community of the desirability of the need to protect human rights across the globe. Thus although the United Kingdom does not recognise the right of individuals to enforce a duty of diplomatic protection on the crown in the British courts, the recent decision of the Court of Appeals in the Abbasi case demonstrates that British nationals can rely on the doctrine of legitimate expectation to request that they be afforded diplomatic protection if certain conditions are met.

[169] In the light of the above, there is in my view, a compelling argument for the proposition that states have, not only a right but, a legal obligation to protect their nationals abroad against an egregious violation of their human rights. Those states that have ratified international human rights instruments and are committed to the promotion and protection of international human rights have a special duty in this regard. The Special Rapporteur’s Report concludes:

“Today there is general agreement that norms of jus cogens reflect the most fundamental values of the international community and are therefore most deserving of international protection. It is not unreasonable therefore to require a State to react

21 See the Special Rapporteur’s Report above n 1 at 10.

22 Id (footnote omitted).

23 Special Rapporteur’s Report above n 1 at 30.

24 Abbasi and Another v Secretary of State for Foreign and Commonwealth Affairs and Another [2002] EWCA Civ 1598.
by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*. If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.  

[170] This growing trend within the international community of providing diplomatic protection to nationals abroad is not an irrelevant consideration in determining whether such a duty exists under our law. It is particularly relevant for our country given our commitment to the promotion and protection of fundamental international human rights and freedoms as evidenced by our Constitution and our ratification of international instruments embodying such commitments. Diplomatic protection provides the state with a tool to protect the fundamental human rights that we have committed ourselves to promoting and protecting.

[171] But the exercise of diplomatic protection invariably implicates foreign relations.

The conduct of foreign relations

[172] The conduct of foreign relations is a matter which is within the domain of the executive. The exercise of diplomatic protection has an impact on foreign relations. Comity compels states to respect the sovereignty of one another; no state wants to interfere in the domestic affairs of another. The exercise of diplomatic protection is therefore a sensitive area where both the timing and the manner in which the intervention is made are crucial. The state must be left to assess foreign policy considerations and it is a better judge of whether, when and how to intervene. It is therefore generally accepted that this is a province of the executive, the state should generally be afforded a wide discretion in deciding whether and in what manner to grant protection in each case and the judiciary must generally keep away from this area. That is not to say the judiciary has no role in the matter.

[173] It is within this context that sections 3(2) and 7(2) of our Constitution must be construed and understood.

The construction of sections 3(2) and 7(2)

[174] The relevant provisions of section 3 provide:

“(1) There is a common South African citizenship. 
(2) All citizens are –  
(a) equally entitled to the rights, privileges and benefits of citizenship; and  
(b) equally subject to the duties and responsibilities of citizenship.”

While the relevant provisions of section 7 provide:

“(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. 
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

[175] The starting point in the determination of the question whether there is a duty to provide diplomatic protection is section 3(2)(a). This section provides that all South
African citizens are “equally entitled to the rights, privileges and benefits of citizenship”.

The obligation of the government is to consider rationally such request and decide whether to grant such request in relation to that citizen. If the government decides not to grant such request its decision may be subject to judicial review. This is so because such a decision is taken in the exercise of public power and the exercise of public power must conform to the Constitution. The question whether the exercise of public power conforms to the Constitution must be determined by the courts.27

What are the “rights, privileges and benefits” to which citizens are entitled?

Some of the rights to which citizens are entitled are spelt out in the Bill of Rights. These include “the right to enter, to remain in and to reside anywhere in, the Republic”, 28 and the “right to a passport”. 29

An important consideration in determining the content of the rights, privileges and benefits of citizens is that, in international law, individuals who are abroad generally have no right to protect themselves against foreign states. Any protection that they enjoy must be found in the municipal law of the foreign state concerned. In

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27 Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 51.

28 Section 21(3).

29 Section 21(4).
the absence of such protection it is only the state of which they are a national that can protect them against violations of fundamental international human rights. Therefore, unless the South African government grants South African nationals abroad diplomatic protection, they are likely to remain without a remedy for violations of their internationally recognised human rights. And if the government cannot protect South African nationals abroad against violations or threatened violations of their international human rights, it may well be asked, what then are the benefits of being a South African citizen? Or to put it differently, what are the obligations of the South African government towards its citizens?

[182] In *De Lange v Smuts NO and Others*, this Court made the following observations concerning the positive obligation on the government:

> "In a constitutional democratic State, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) ‘citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors.”

[183] Although these remarks were made in a different context, in my view, they underscore the positive obligation of the state to protect the rights of South African citizens. The question which arises is, does this obligation cease once a South African citizen leaves our borders? I think not.


Having regard to the absence of an obligation in international law to grant diplomatic protection; the commitment of our government to promote and protect fundamental human rights; the obligation of the government, in general, to protect South African citizens here and abroad; the fact that citizenship is a constitutionally entrenched right; the fact that diplomatic protection is one of the tools available to protect human rights; and the fact that there is a growing trend within international law to grant diplomatic protection to nationals abroad, I am satisfied that diplomatic protection is one of the benefits, if not the right, of citizenship. For the purposes of this judgment it is not necessary to decide whether this is a right or a benefit. The effect is the same because whether it is a right or a benefit both are constitutionally guaranteed in section 3(2)(a). This benefit accrues to South African nationals by virtue of their citizenship.

This benefit is constitutionally entrenched in section 3(2)(a). If South Africa is required to ensure that everyone within its borders enjoys the fundamental human rights contained in the African Charter and the ICCPR and has adequate means of redress, there is no reason why South Africa should not be obliged under our Constitution to protect its own nationals when their most basic human rights are violated or threatened with violation abroad.

I conclude therefore that diplomatic protection is a benefit within the meaning of section 3(2)(a). It follows therefore that sections 3(2)(a) and 7(2) must be read together as imposing a constitutional duty on the government to ensure that all South African nationals abroad enjoy the benefits of diplomatic protection. The proposition that the government has no constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the government’s own declared policy and acknowledged constitutional duty.

But what is the scope of this constitutional duty? In determining the scope of this duty it is necessary to bear in mind that the exercise of diplomatic protection has an impact on the conduct of foreign relations. As I have pointed out earlier, the conduct of foreign relations is a matter which is within the domain of the executive. When and how to intervene may be crucial to the outcome of the intervention. States are better judges of whether to intervene and if so, the timing and the manner of such intervention. At times there may be compelling reason why there should be no intervention at all or only at a later stage. It is for this reason that states are generally allowed a wide discretion in deciding whether and in what manner to grant diplomatic protection.

The width of the discretion that the state enjoys in the field of diplomatic protection is exemplified by two foreign decisions: the first is the decision of the German Federal Constitutional Court in the case of Rudolph Hess. The court accepted that Germany was under a constitutional duty to provide diplomatic protection but


35 See paras 198-204.

36 Hess decision BVerfGE 55, 349; 90 ILR 386 at 395.
emphasised that the government enjoyed a “wide discretion”. The second case is the decision of the English Court of Appeal in the Abbasi case. That court accepted that under a doctrine of legitimate expectation a British national may require diplomatic protection. However, it held that the Foreign and Commonwealth Office has “discretion whether to exercise the right, which it undoubtedly has, to protect British citizens.”37 The discretion enjoyed by the Foreign Office “is a very wide one.”38

[191] In my view, it must therefore be accepted that the government has discretion in deciding whether to grant diplomatic protection and if so, in what manner to grant such protection in each case. It must be left to the government to assess the foreign policy considerations in making its decision.39 However, that does not mean that the whole process is immune from judicial scrutiny. This must depend on the scope of the duty.

[192] In my view, the duty of the government entails a duty to properly consider the request for diplomatic protection. The government must carefully apply its mind to the request and respond rationally to it. This would require, amongst other things, the government to follow a fair procedure in processing the request and it may be required to furnish reasons for its decisions. The request for diplomatic protection cannot be arbitrarily refused.

37 Above n 24 at para 106(iii).
38 Id
39 Hess above n 36.

[193] The decision whether to extend diplomatic protection in a given case is the exercise of a public power and as such it must conform to the Constitution, in particular section 33 of the Constitution. Thus where the government were, contrary to its constitutional duty, to refuse to consider whether to exercise diplomatic protection, it would be appropriate for a court to make a mandatory order directing the government to give due consideration to the request.40 If this amounts to an intrusion into the conduct of foreign policy, it is an intrusion mandated by the Constitution itself.41

[194] It now remains to be considered whether on the facts of this case, the applicants are entitled to any relief in relation to the question of a fair trial and the death penalty.

_Fair trial_

[195] I agree with the Chief Justice that the claim relating to fair detention and fair trial based on section 35 of the Constitution is misconceived and that, as formulated, that claim cannot succeed. But the applicants have presented evidence of reports about the justice system in Equatorial Guinea by reputable international organisations, including Amnesty International, International Bar Association and a Special Rapporteur of the United Nations Commission on Human Rights. These reports raise

40 Above n 24 at para 104.
41 Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC); 2002 (10) BCLR 1075 (CC) at para 99.
serious concerns about, amongst other things, torture, fairness of trials, conditions of
detention and the independence of the judiciary in Equatorial Guinea.

[196] In response to these reports the government takes the attitude that its policy is
not to comment or criticise the legal systems of other countries “in particular, in the
circumstances such as the present.” No explanation is given for this statement. The
statement also seems to suggest that the government has not had adequate time to
enable it “to obtain expert opinion relating to the legal status of the Republic of
Equatorial Guinea”. But the government also states that the decision whether or not to
intervene will be made by a responsible authority once the applicants are extradited to
Equatorial Guinea.

[197] The right to a fair trial is a basic human right to which all those who are
accused of a crime are entitled. The nature of the crime charged is irrelevant. It is a
fundamental human right enshrined in both the African Charter and the ICCPR. A
South African national who is facing a criminal trial in a foreign country is entitled to
this most basic human right. When this right is threatened, the South African national
affected has a constitutional right to seek protection from the government against such
a threat. This right flows from section 3(2)(a) which confers a right on South African
citizens to request diplomatic protection against violations of fundamental human
rights. The government has a constitutional duty to grant such protection unless there
are compelling reasons for not granting it.

[198] The government has a policy regarding nationals facing criminal trials abroad.
Its policy is to ensure that such nationals get a fair trial within the framework of the
Geneva Convention and international law. This policy emerges from a statement by
the Deputy Minister of Foreign Affairs in an interview, a transcript of which was
attached to the papers submitted to this Court. In response to the question whether the
Deputy Minister was confident that the applicants would get a fair trial in Zimbabwe
and Equatorial Guinea, the Deputy Minister responded as follows:

“Well, as their government, we have to ensure that all South Africans citizens,
whatever offence they have carried out or are charged with, must receive fair trial,
they must have access to their lawyers, they must be tried within the framework of
the Geneva Convention, they must be held in prison within the framework of the
Geneva Convention and International Law and we will always, it is our constitutional
duty to ensure that this is getting out within the framework of the Geneva Convention
and International law and that there is a fair trial.”

[199] I should add that in the answering affidavit on behalf of the government, the
response is the following:

“Without admitting the correctness of the transcript referred to in this paragraph, I
wish to state that what the Honourable Deputy Foreign Affairs Minister is alleged to
have stated in the said transcript reflects the policy of the Republic in the conduct of
foreign relations with foreign states and confirms what has been stated in the affidavit
of Ntsaluba.”

[200] Dr Ntsaluba in turn states that:

42 Above paras 160-161.
“On 4 April 2004, the South African Embassy requested permission from the Zimbabwean ministry of foreign affairs to allow its staff to attend the criminal proceedings of the applicants. Permission was given to staff members to attend the court proceedings.”

According to him, “all the requests by the South African Embassy to attend court proceedings were granted and the accredited diplomats from the South African Embassy attended each and every court proceedings” in Zimbabwe. The applicants do not seriously dispute these allegations by Dr Ntsaluba. Mr Griebenow who deposed to a replying affidavit on behalf of the applicants stated that it was not necessary for anyone to request permission to attend the trial and that the South African diplomats did not attend all the trials. What Mr Griebenow seems to ignore is that a formal request from one government addressed to another government to attend a criminal trial of a national of the requesting government is one form of diplomatic intervention. It puts the requested government on notice that the requesting state is observing the trial.

[201] The request by the government for permission to attend the trial could only have been done with a view to ensuring that the applicants get a fair trial. What Dr Ntsaluba says is therefore consistent with the government policy as stated by the Deputy Minister of Foreign Affairs. In addition, the attendance of trials by South African diplomats in Zimbabwe is consistent with this policy.

[202] The declared policy of the government to ensure that nationals abroad who face criminal trials get a fair trial within the framework of fundamental international human rights is consistent with the government’s constitutional duty under section 3(2). If the applicants are extradited to Equatorial Guinea, the government will be expected to act in accordance with this policy in fulfilment of its constitutional obligation. There is nothing in the papers before this Court to show that the government will not comply with its policy and its constitutional duty. On the contrary the indications are that it will. The main deponent to the affidavit on behalf of the government, Ms Bezuidenhout, states that if the applicants are extradited to Equatorial Guinea, a responsible government authority will take a decision whether or not to intervene.

[203] We are dealing here with events that are rapidly evolving. These papers were prepared in May 2004. We have not been told what has been happening since then. In addition, as pointed out earlier, the government is in a better position to make judgment as to when to make a decision whether or not to intervene. It has a wide discretion in deciding whether, how and when to grant diplomatic protection. The government has not made such a decision. It has taken the attitude that the appropriate time to make that decision is when the applicants are extradited to Equatorial Guinea.

[204] I cannot, on this record, hold that this attitude of the government is in violation of its constitutional duty. More importantly, there is nothing on the papers to show that the applicants had previously requested diplomatic protection against an unfair trial and detention and torture. The government has not refused such protection. It
follows therefore that the relief sought in relation to an unfair trial and detention and torture is not only misconceived but is also premature. It must therefore be dismissed.

**The claims relating to the death penalty**

[205] Different considerations apply to the claims relating to the death penalty. As the Chief Justice holds, the death penalty does not violate international law. This is so notwithstanding a growing number of states which have outlawed the death penalty. However, that does not mean that a South African national who is facing the death penalty abroad cannot request diplomatic protection under section 3(2)(a).

[206] The death penalty is unconstitutional under our Constitution. It infringes the right to life. Our country is committed to a society founded on the recognition of human rights. We must give particular value to the right to life and this must be demonstrated in everything we do. This commitment requires the state to take steps to protect its nationals against the death penalty. A South African who faces the death penalty has a right to request the government for protection against it. This is one of the benefits of being a South African citizen. The government is obliged to consider such a request properly and to decide whether, how and when to intervene on behalf of such national.

[207] The government has a policy in respect of nationals who face the death penalty. Its policy is to intervene and make representations once the death penalty is imposed. Dr Ntsaluba states in his affidavit that:

“[T]he Republic would make representations to the executive authorities in the country concerned not to implement the sentence of death. The executive authorities in that country would then consider the representations made and decide either to implement the sentence of death or commute it to some other form of punishment.”

[208] This policy is consistent with the government’s constitutional duty. It was contended on behalf of the applicants and the amicus that to wait until the death penalty is imposed before making representations not to implement the death penalty will be too late. There is nothing on the record to support this contention. Similarly, the heavy reliance on the *Mohamed* case is misplaced. That case is distinguishable from the present. It follows that the claims relating to the death penalty must also be dismissed.

[209] The fundamental flaw in the applicants’ case is that it was premised on the proposition that the government has a constitutional duty to require Zimbabwe and Equatorial Guinea to comply with the rights contained in our Bill of Rights. The rights in the Bill of Rights bind this government and not foreign governments. Our government cannot require foreign governments to act in accordance with our Constitution. The applicants misconceived the nature of their rights and their remedies. I agree that none of the orders sought by the applicants can be granted.

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43 Above paras 174-179.
[210] The applicants did not seek a declarator. The question whether they are entitled to a declarator was therefore not debated in this Court. I therefore consider it sufficient in this case to hold that under section 3(2)(a) of the Constitution the government has a constitutional duty to grant diplomatic protection to nationals abroad against violations or threatened violations of fundamental international human rights. This duty entails an obligation to consider properly the request for diplomatic protection with due regard to the provisions of the Constitution. The government has a wide discretion in deciding whether, when and in what manner to grant such protection. The policy of the government is to grant such protection. The government says the appropriate time to consider whether to grant such protection is when the applicants are extradited to Equatorial Guinea. In all the circumstances of this case I have no reason to believe that the government will not do what it says it will do. I therefore consider it unnecessary to issue a declarator.

[211] In the event, I concur in the order proposed by the Chief Justice.

O'REGAN J:

[212] I have had the opportunity of reading the judgment prepared by the Chief Justice in this matter. I agree with his analysis of section 3 of the Constitution to the extent that he holds that it entitles citizens to ask government to make representations and seek diplomatic protection on their behalf. However, I am in respectful disagreement with him in relation to the question whether under our Constitution, and in the circumstances of the present case, the state bears an obligation (independent of a request by its citizens) to take steps to seek to protect the applicants against the conduct of other states that may amount to a fundamental breach of the human rights of the applicants as recognised in customary international law1 and the African Charter on Human and Peoples’ Rights.

[213] The Chief Justice has set out the facts of the case in some detail and they do not need to be restated at length here. Briefly, the applicants were arrested on 7 March 2004 shortly after they had landed at Harare International Airport in Zimbabwe on a chartered flight from South Africa. They have been charged with a variety of offences relating mainly to the possession of unlawful firearms and are currently being held in a prison near Harare. It is alleged by the applicants that Equatorial Guinea is seeking to extradite them from Zimbabwe to face charges in relation to a coup d’état that, it is alleged, they were going to launch. The applicants further allege that there is a real risk that, if extradited to Equatorial Guinea, their trial will not be fair and that following upon an unfair trial, the death penalty will be imposed upon them by the court there.

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1 Customary international law constitutes those binding rules of international law which are “evidence of a general practice [of states] accepted as law”. (Article 38 of the Statute of the International Court of Justice). See the discussion in Brownlie Principles of Public International Law 6 ed (Oxford University Press, Oxford 2003) at 6-12.
That states have the right to provide diplomatic protection to their nationals is a recognised principle of customary international law. The content of the right to provide diplomatic protection is closely related to the customary international law principle of the responsibility of states to avoid acts or omissions in respect of foreign nationals on their territory that would constitute a breach of the state's international law obligations.

Diplomatic protection has accordingly been defined as "the protection given by a subject of international law, i.e. natural or legal persons, against a violation of international law by another subject of international law." However, it is also clear that a state has the right to make representations to other states on behalf of its nationals even when there is no established infringement of international law, although this does not constitute diplomatic protection, but merely diplomatic or at times consular representations.

The precise content of what may be done pursuant to the right to provide diplomatic protection is the subject of some debate among international lawyers. It is clear that diplomatic protection embraces a range of actions, including consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals and severance of diplomatic relations.

Although international law confers the right upon states to provide diplomatic protection in respect of their citizens, at present, states are not obliged to provide diplomatic protection to their citizens under international law. As the International Court of Justice stated in the Barcelona Traction, Light and Power Company Limited Case in 1970:

"Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it may consider appropriate. Subject to the exclusive jurisdiction of the competent courts of the State in whose territory the injury has occurred, it has full discretion to determine the means and extent of its diplomatic protection and the conditions upon which it will be granted."

However, as Professor Dugard, Special Rapporteur to the International Law Commission noted in his first report to the Commission in 2000:


The protection given in the Barcelona Traction case by the International Court of Justice to the nationals of the United States who had been wronged by the actions of the respondents is a clear illustration of the right to provide diplomatic protection as understood today."

The International Court of Justice's decision in the Barcelona Traction case has been widely recognised as a significant development in the law of diplomatic protection.
to the International Covenant on Civil and Political rights and/or its regional counterparts in Europe, the Americas and Africa, which prescribe standards of justice to be observed in criminal trials and in the treatment of prisoners. Moreover, in some instances the individual is empowered to bring complaints about the violation of his human rights to the attention of international bodies such as the United Nations Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights or the African Commission on Human and Peoples' Rights.

It is indeed true that since 1945 the growth of international human rights law and principles has been remarkable. But as Professor Dugard also noted, despite the growth in the number of international conventions and treaties, the remedies available at international law to individuals whose human rights are violated or threatened still remain weak. One of the important mechanisms that can be used to protect and promote international human rights thus remains the right of states to make diplomatic representations on behalf of their nationals to other states which are threatening to infringe or have infringed the internationally recognised human rights of the nationals.

There can be no doubt then that at international law, the state is entitled to take diplomatic steps to protect its nationals against the violation of internationally recognised human rights standards. This entitlement in turn gives rise to two more difficult questions: does the state, under our Constitution, bear an obligation to exercise its international law rights in respect of its nationals? And if it does bear such an obligation, in what circumstances is that obligation justiciable in our courts? I shall consider these two questions separately.

Is there a constitutional duty upon the state?

Before considering this question, some preliminary remarks must be made. First, it must be emphasised that South Africa is a constitutional democracy. This has two clear implications: as the preamble to our Constitution asserts, government should be based on the “will of the people”; and secondly, the powers of government are delineated by the terms of the Constitution. So, the powers of all three arms of government arise from and are limited by the Constitution. All law and conduct inconsistent with the Constitution is invalid. Moreover, our Constitution embodies “an objective, normative value system” as is asserted in the opening clause of the Constitution which states that:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.

See, for example, President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 8-10, in which the Court held that the prerogative powers under previous constitutions were now those enumerated in our new Constitution; Pharmaceutical Manufacturers Association of South Africa: In re Ex parte the President of the RSA 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 19.

Section 2 of the Constitution.

Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.

The conduct of all three arms of government, the legislature, executive and judiciary must thus be consistent with the Constitution.

[219] Secondly, the Constitution not only sets a boundary within which the three arms of government must operate, but it also requires that the state must “promote and fulfil the rights in the Bill of Rights”.14 This constitutional injunction is not surprising in the light of the history of our country and the purpose of our Constitution. As Ngcobo J stated in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others:15

“South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed ‘to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms’. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution ‘recognises the injustices of our past’ and makes a commitment to establishing ‘a society based on democratic values, social justice and fundamental rights’. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.”

[220] The leitmotif of our Constitution is thus the promotion and protection of fundamental human rights. Again and again, our Constitution restates the foundational importance of human rights to our constitutional vision. In the Preamble, it speaks of the need to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”; in section 1, the founding values clause quoted above, the Constitution commits us to the “advancement of human rights and freedoms”; and in section 7(1), the Constitution asserts that the Bill of Rights is a “cornerstone of democracy in South Africa.”

[221] Our Constitution thus asserts as a foundational value the need to protect and promote human rights. This value informs all the obligations and powers conferred by the Constitution upon the state. The importance of that foundational value is to be understood in the context of a growing international consensus that the promotion and protection of human rights is part of the responsibility of both the global community and individual states, and that there is a need to take steps to ensure that those fundamental human rights recognised in international law are not infringed or impaired.

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14 Section 7(2) of the Constitution.
15 2004 (7) BCLR 687 (CC) at para 73.
Thirdly, our Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law. The Preamble of our Constitution states that the Constitution is adopted as the supreme law of the Republic so as to, amongst other things, “build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.” Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Courts, when interpreting the Bill of Rights, “must consider international law”, and, when interpreting legislation, must prefer any reasonable interpretation consistent with international law over alternative interpretations that are not.

In line with this constitutional acknowledgement of the importance of both international law and international human rights, South Africa has, since 1994, signed and ratified a range of international human rights conventions including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the African Charter on Human and Peoples’ Rights. In ratifying these international agreements and conventions, our government is promoting the protection of human rights in the international arena.

I turn now to consider the obligations imposed upon government by the Constitution. Counsel for the respondent argued that there could be no duty imposed upon the government to provide diplomatic protection to its nationals against the grave infringement of international human rights norms because this would constitute the extraterritorial application of our Bill of Rights. It is correct that the relief formulated by the applicants in prayers 6, 7, and 8 does suggest that they were seeking the extraterritorial application of the Bill of Rights. However, in argument, counsel for both the applicants and the amicus submitted that the government was under an obligation to provide diplomatic protection to its nationals under the Constitution.

17 Section 232 of the Constitution.
18 Section 39(1)(b) of the Constitution.
19 Section 233 of the Constitution.
22 Ratified on 15 December 1995.
25 Ratified on 9 July 1996.
26 These prayers sought the following:

"6. Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa (the Constitution) are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.
7. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants’ right to freedom and security of person including the rights not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.
8. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants’ right to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be."
Counsel for the applicants conceded that the formulation of the relief in the notice of motion may not have accurately reflected this submission.

[225] The ordinary principle of international law is that jurisdiction of states is territorial.27 In R v Cook, the Canadian Supreme Court had to consider the question whether an accused could rely on the provisions of the Canadian Charter of Rights and Freedoms in respect of her interrogation by Canadian law enforcement officials in the United States. The majority of the Court concluded (as the Chief Justice notes in his judgment) as follows:

“In our view, the reasoning adopted in both Harrer and Terry can accommodate a finding that on the jurisdictional basis of nationality, the Charter applies to the actions of Canadian law enforcement authorities on foreign territory (which satisfies s. 32(1), provided that the application of Charter standards would not interfere with the sovereign authority of the foreign state).”28

[226] In his judgment, Bastarache J convincingly explains that there is no threat to the sovereignty of the United States of America where the Canadian Charter is held by a Canadian court in Canadian criminal proceedings to be applicable to the conduct of Canadian law enforcement officers interrogating a suspect in the United States of America.29 The effect of the Charter, in such circumstances, has no impact whatsoever on the jurisdiction of the United States.

[227] It is obvious that the Bill of Rights in our Constitution binds the executive30 and that the state is under an obligation to “respect, protect, promote and fulfil the rights in the Bill of Rights.”31 It is also clear that the provisions of our Bill of Rights are not binding on the governments or courts of other countries. So, a South African may not rely on the provisions of our Bill of Rights before other courts in other jurisdictions. To this extent, then, our Bill of Rights has no direct extraterritorial effect.

[228] It does not follow, however, that when our government acts outside of South Africa it does so untrammelled by the provisions of our Bill of Rights. There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and the obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed, the contrary is the case. The executive is bound by the four corners of the Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act. It is not necessary to consider in this case whether the provisions of the Bill of Rights bind the government.

27 See, for example, The Case of the S. S. Lotus (1927) PCIJ Ser A, no 10 in which the International Court of Justice stated that:

“Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.”


29 At paras 142-144 of his judgment.

30 Section 8(1).

31 Section 7(2) of the Constitution.
in its relationships outside of South Africa with people who have no connection with South Africa.

[229] Were the enforcement of the Bill of Rights against the government in any particular case to constitute an infringement of international law, our Constitution would not countenance it. So, the extraterritorial application of the provisions of the Bill of Rights will be limited by the international law principle that the provisions will only be enforceable against the government in circumstances that will not diminish or impede the sovereignty of another state. The enquiry as to whether the enforcement will have this effect will be determined on the facts of each case. As a general principle, however, our Bill of Rights binds the government even when it acts outside South Africa, subject to the consideration that such application must not constitute an infringement of the sovereignty of another state.

[230] This case, however, does not concern a situation where a South African government official has acted outside of South Africa in a manner inconsistent with the provisions of the Bill of Rights. It concerns the question whether the South African government, to the extent that it has the right in international law to make diplomatic representations to another state on behalf of one of its nationals, is under an obligation under our Constitution to make such representations.

[231] It is quite clear that the right to provide diplomatic protection in this way does not involve the extraterritorial application of our Constitution. International law affords South Africa the right to provide diplomatic protection to its nationals in respect of the breach of the provisions of international law, not our Constitution. There will of course be some overlap between the provisions of our Bill of Rights and the principles of customary international human rights law and conventional human rights law. The international law right to take steps to protect nationals relates only to breaches of international law. The question whether a duty exists under our Constitution to take such steps does not raise the question of the extraterritorial effect of our Bill of Rights at all. I turn now to consider the question whether such a duty exists under our Constitution.

[232] As the Chief Justice points out, our Constitution contains no express provision conferring a right to diplomatic protection from the state, unlike some other recently adopted constitutions.\(^\text{32}\) Nor is there a right to diplomatic protection asserted in the Universal Declaration of Human Rights, nor in the ICCPR or the African Charter.

[233] However our Constitution does contain an express recognition of the rights of citizenship. Section 3 of the Constitution provides that:

\[(1) \text{There is a common South African citizenship.}\]

\[(2) \text{All citizens are –}\]

\[(a) \text{equally entitled to the rights, privileges and benefits of citizenship; and}\]

\(32\) See for example article 69(3) of the Hungarian Constitution which provides that: “Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary, during his/her legal staying abroad”, as cited in Lee Consular Law and Practice 2 ed (Oxford University Press, Oxford 1991) at 125. The Special Rapporteur on Diplomatic Protection to the ICJ also mentions the Constitutions of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Italy, Kazakhstan, Lao People’s Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Turkey, Ukraine, Vietnam and Yugoslavia. See First Report on Diplomatic Protection above n 2 at para 80.
citizens do enjoy some privileges and benefits in addition to the rights conferred by the Constitution, for otherwise the reference to “privileges and benefits” in section 3 would be meaningless. Moreover, in giving meaning to the words, it is important to bear in mind both the constitutional recognition of the importance of the international sphere and international law, as well as the priority given to the promotion and protection of human rights in our Constitution. We should also bear in mind the importance of the role of the state, under our constitutional democracy, in the protection of human rights. As Ackermann J stated in De Lange v Smuts NO and Others: 38

"In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights." 39

[236] The state is entitled to make diplomatic representations on behalf of its nationals under international law, even though at international law it is not obliged to do so. When it does so, the state clearly confers a privilege or benefit upon the person concerned. In my view, when section 3 speaks of the “privileges and benefits” of citizenship it includes within it the right of the state to make diplomatic representations on their behalf to protect them against a breach of international law. It is true that historically international law has taken the view that in making such diplomatic representations, the state acts in defence of its own interests, not in the

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33 Section 19.
34 Section 20.
35 Section 21(3).
36 Section 21(4).
37 Section 22.
interests of its nationals, who are not “subjects” of international law. However, it is increasingly being recognised that this is a fiction in the sense that the primary beneficiaries of diplomatic representations made by the state are those nationals in respect of whom the state makes representations. This has recently been acknowledged by the South African government in its representations to the International Court of Justice.

Given that it is widely accepted that the right to diplomatic protection does serve the interests of individuals, it seems appropriate to consider the provision of diplomatic protection by the state to fall within the “privileges and benefits” of citizenship as contemplated by section 3.

What then does section 3 mean when it states that a citizen is “equally entitled to the . . . privileges and benefits of citizenship”? It is quite clear that it means in the first place that the state may not act in respect of some citizens and not others, the state must treat citizens equally. However, the question that arises is whether the subsection imposes an obligation upon government to provide diplomatic protection to its citizens when it would be entitled to do so in terms of international law in the light of my conclusion that the provision of diplomatic protection constitutes a privilege or benefit of citizenship. In other words, are citizens entitled to diplomatic protection, in itself, or merely entitled to equal protection of it, which otherwise may be refused by the state, as long as it refuses it equally? The latter interpretation of course may add little to the protection of the equality clause in section 9 of the Constitution, but that does not seem to me to be the most powerful interpretative concern. The question has to be answered in the light of the normative commitment to human rights emphasised in our Constitution, the importance accorded to international law and human rights in our Constitution and the conception of democratic government that underlies our Constitution. Most importantly, our Constitution must be interpreted in a way that will promote rather than hinder the achievement of the protection of human rights.

[237] In the light of these constitutional imperatives, government would not be constitutionally permitted simply to ignore a citizen who is threatened with or has experienced an egregious violation of human rights norms at the hands of another

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40 See, for example, the classic reasoning in the Mavromattis Palestine Concession (Jurisdiction) Case, PCIJ Reports, series A, no 2, at 12 where the International Court of Justice reasoned as follows:

"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."

This traditional view has its origins in the writings of Vattel in the 18th century. See Vattel The Law of Nations (1758) chap VI at 136. However, see the more contemporary reasoning of the Umpire in the Mixed Claims Commission between the US and Germany quoted by Erasmus and Davidson in “Do South Africans have a right to diplomatic protection?” 2000 (25) SA Yearbook of International Law 113 at 119.

41 See the discussion in the First Report of the Special Rapporteur on Diplomatic Protection above n 2 at paras 18-19.

42 See the Written Statement submitted by the Government of the Republic of South Africa to the International Court of Justice on 30 January 2004 in respect of the request of the United Nations General Assembly for an advisory opinion on the legal consequences of the construction of a wall by Israel in the occupied Palestinian territory.

43 Section 9 provides that:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to promote or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”
state. Were government to be entitled to do so, the achievement of human rights would be obstructed and international human rights norms undermined. Accordingly, and in the light of my understanding of the values of our Constitution, I would conclude that it is proper to understand section 3 as imposing upon government an obligation to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms. Where a citizen faces or has experienced a breach of international human rights norms that falls short of the standard of egregiousness, the situation may well be different. Thus, I conclude that to the extent that section 3(2) states then that “citizens are equally entitled to the ... privileges and benefits” of citizenship, it is not only an entitlement to equal treatment in respect of the privilege and benefit of diplomatic protection, but also an entitlement to diplomatic protection itself.

[239] One final problem needs to be addressed. It might be thought that it would be inappropriate to interpret section 3 in this way given that the state’s right to make representations relates to its nationals as contemplated by international law, while section 3 speaks of citizens. The relationship between citizenship and nationality is often confused. Nationality is a term of international law. It is nationals who may be entitled to the protection of their state and to various other benefits under international law. It is generally accepted that there must be a “genuine link” between state and individual if conferral of nationality is to be recognised at international law.

[240] By contrast, citizenship is a concept of municipal law and concerns the rights and the obligations between citizens and the state at a domestic level. Its effect is internal. Problems arise only where the nationality of persons is contested by states on the international plane, at which point, the international law on “nationality” becomes decisive. However, when applying the international law test of “genuine link”, it is important to note that there is a presumption of validity of an act of naturalisation, and that the conferment of nationality as a status is not to be invalidated except in very clear cases.

[241] Article I of the 1930 Hague Convention on the Conflict of Nationality Laws provides:

“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international

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45 Brownlie above n 1 at 388. See also the Nottebohm Case (Liechtenstein v. Guatemala) 1955 ICJ 4, which dealt with the issue of fraudulent naturalisation.
47 Iran-United States Case No. A/18 (1984-1) 5 Iran-USCTR 251, Iran-United States Claims Tribunal discussed in Aldrich The Jurisdiction of the Iran-United States Tribunal (Clarendon Press, Oxford 1996) at 56-7. The issue was whether the Tribunal had jurisdiction over claims against Iran by persons who were, under US law, citizens of the US and who were, under Iranian law, citizens of the Islamic Republic of Iran. The Tribunal held that it did have jurisdiction where the dominant and effective nationality of the claimant during the relevant period was that of the United States. For further discussion of the case, see Dixon & McCorquodale Cases and Materials on International Law 4 ed (Oxford University Press, New York 2003) at 423.
48 Brownlie above n 1 at 388.
In practice, save where a state’s claim that persons are its nationals is contested in an international forum, a state’s citizens are its nationals, as international law generally leaves it to states to determine who their nationals are. For the purposes of this case, there is nothing to suggest that the applicants, who are all South African citizens, are not also South African nationals.

In my view, therefore, to the extent that section 3 entitles citizens to the privileges and benefits of citizenship, this obliges the state to provide diplomatic protection to citizens at least in circumstances where citizens are threatened with or have experienced the egregious violation of international human rights norms binding on the foreign state that caused or threatened to cause the violation. It is interesting that this conclusion of law is echoed in the statement made by the Deputy Minister of Foreign Affairs in an interview with a journalist on 11 May 2004, a transcript of which was made available to the Court. In response to questions concerning the likelihood that the applicants would receive a fair trial in Zimbabwe and Equatorial Guinea, the Deputy Minister responded as follows:

“As their government, we have to ensure that all South African citizens, whatever offence they have carried out or are charged with, must receive a fair trial, they must have access to their lawyers, they must be tried within the framework of the Geneva Convention and International law and we will always, it is our constitutional duty to ensure that this is getting out within the framework of the Geneva Convention and that there is a fair trial”. (own emphasis)

Such a statement, of course, cannot be constitutive of the meaning of the Constitution, which remains a matter for this Court. It must also be noted that in this Court counsel for the respondents firmly resisted the proposition that the respondents bore any constitutional duty that would require them to provide diplomatic protection to the applicants. The legal submissions of counsel must of course be taken to represent the attitude of their clients, the respondents in the case. The question that now needs to be considered is the question of the extent to which that obligation is justiciable.

The justiciability of the duty to make diplomatic representations

The obligation to provide citizens with diplomatic protection conferred by our Constitution is one that must be construed within the terrain in which it is operative. That terrain is the conduct of foreign relations by the South African government. It is clear, though perhaps not explicit, that under our Constitution the conduct of foreign affairs is primarily the responsibility of the executive. That this is so, is signified by a variety of constitutional provisions including those that state that the President is responsible for receiving and recognising foreign diplomatic and consular representatives, appointing ambassadors, plenipotentiaries and diplomatic and consular representatives, and that the national executive is responsible for negotiating and signing international agreements. The conduct of foreign relations is...

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49 Shaw above n 44 at 463.
50 Section 84(2)(h).
51 Section 84(2)(i).
52 Section 231(1).
therefore typically an executive power under our Constitution. This is hardly surprising. Under most, if not all constitutional democracies, the power to conduct foreign affairs is one that is appropriately and ordinarily conferred upon the executive,\footnote{See, for example, article 32 of the German Basic Law; article 73(2) of the Constitution of Japan; and article 29.4 of the Irish Constitution. In many countries, the foreign policy power arises from the prerogative and is therefore not expressly set out in the Constitution. This is so in the United Kingdom, see de Smith Constitutional and Administrative Law 5 ed (Penguin Books, Middlesex 1985) at 151.} for the executive is the arm of government best placed to conduct foreign affairs.

[244] It is clear from the existing jurisprudence of this Court that all exercise of public power is to some extent justiciable under our Constitution,\footnote{See Hugo above n 11; President of the Republic of South Africa and Others v South African Rugby Football Union and Others (3) 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC); Pharmaceutical Manufacturers above n 11.} but the precise scope of the justiciability will depend on a range of factors including the nature of the power being exercised.\footnote{Id SARFU at para 143.} Given that the duty to provide diplomatic protection can only be fulfilled by government in the conduct of foreign relations, the executive must be afforded considerable latitude to determine how best the duty should be carried out.

[245] Like other powers of the executive, the power must be exercised lawfully and rationally.\footnote{See Pharmaceutical Manufacturers above n 11 at paras 20 and 90.} It may be subject to other requirements as well, but in any proceedings in which the exercise of the power is challenged, a court will bear in mind that foreign relations is a sphere of government reserved by our Constitution for the executive and it will accordingly “be careful not to attribute to itself superior wisdom”\footnote{Bato Star above n 15 at para 48.} in relation to it.

[246] Similar considerations obtain in Germany where the Federal Government is under a constitutional duty to provide diplomatic protection to German nationals and their interests in relation to foreign states. In giving effect to this duty, the Court has been at pains to acknowledge the importance of recognising that the conduct of foreign policy is primarily the constitutional task of the executive. In the leading case of Rudolf Hess, the applicant asked the Court, amongst other things, to compel the Federal Government (a) to take all possible initiatives to persuade the four occupying powers to grant his immediate release; and (b) to refer the complainant’s case to the International Court of Justice for an order declaring that his continued imprisonment was in breach of the United Nations Charter. The Constitutional Court, whilst acknowledging that there was a constitutional duty on the government, dismissed his application for relief. The Court held that:

"[I]n the sphere of foreign policy, the Federal government, as all other organs with responsibility for political dealings, generally has more room for political manoeuvre and consequently wider discretion.

The scope of discretion in the foreign policy sphere is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control. In order to enable current political objectives of the Federal Republic of Germany to be achieved within the framework of what is permissible under international and constitutional law, the Federal Basic Law (GG) grants to the organs of foreign affairs wide room for manoeuvre in the
The Court continued:

“The Federal Government has maintained . . . that it has already undertaken the necessary steps to obtain the release of the Complainant, whose detention is a matter beyond its control. The Federal Government also wishes to continue to undertake further similar initiatives with the Occupying Powers. In so doing it is clearly aware of the Complainant’s personal situation and the nature of his constitutional rights which are at issue . . . . The mere fact that the steps hitherto taken by the Federal Government have failed to produce the Complainant’s release is certainly not, of itself, sufficient to give rise to a duty under constitutional law for the Federal Government to take specific further measures of possibly greater scope and consequence. It must be left to the Government to assess the foreign policy considerations in order to decide how far other measures are appropriate and necessary, bearing in mind the Complainant’s interests as well as the interests of the community as a whole.”  

[247] The approach adopted by the German Constitutional Court in this regard seems correct. In enforcing the obligation of the state to provide diplomatic representations, a court will pay due regard to the sensitivities of the conduct of foreign affairs and not presume knowledge and expertise that it does not have, nor substitute its opinion for the rational and lawful opinion of the government in respect of how best the obligation should be honoured.

The reliance on Mohamed’s case

[248] Before I turn to the facts of this case, I wish to deal with one further issue. The applicants relied upon the judgment of this Court in *Mohamed and Another v President of the RSA and Others* 60 and argued that the facts of this case were no different to the facts of that case. In *Mohamed*, South African officials had colluded with officials from the United States of America to remove Mr Mohamed from South Africa and take him to the United States where he was wanted on charges of terrorism. No extradition proceedings were launched, and the court found that Mr Mohamed was not lawfully deported to the United States. After he had arrived in the United States, he launched urgent proceedings in the South African courts seeking a declaratory order that the conduct of the South African officials had been unlawful and in conflict with the Bill of Rights, and mandatory relief requiring the government urgently to intercede on his behalf with the authorities in the United States.

[249] This Court held that the government was ordinarily under an obligation to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country. 61 It also held that the procedure by which Mr Mohamed had been removed from South Africa was unlawful. The Court made a declaratory order to these effects, and instructed that it be brought to the attention of the court in which Mr Mohamed was being tried in the United States.

58 See *Rudolf Hess* case (Case No 2 BvR 419/80) reported in 90 ILR 386 at 395-396.

59 Id. See also the *Cruise Missile* case 66BVerfGE 30 (1983).
[250] In this case, the applicants submitted that they had been apprehended in Zimbabwe as a result of information passed to the Zimbabwean authorities by South African law enforcement officials. Although this was disputed on the papers, we were informed from the Bar by the respondents’ counsel that it was admitted by them that an exchange of information had occurred between South African and Zimbabwean authorities. Given that the applicants were arrested immediately upon landing it seems likely, and I am prepared to assume in favour of the applicants, that their arrest in Zimbabwe did result from this exchange of information.

[251] The applicants further argued that the conduct of the South African officials in informing the Zimbabwean authorities of the imminent arrival of the applicants was conduct sufficient to give rise to an obligation upon the South African government to seek assurances from the other jurisdictions to which they were proffering information that the death penalty would not be imposed upon the applicants. This obligation, it was submitted, like the obligation in Mohamed, arose from the action of government officials.

[252] The Chief Justice rejects this argument and distinguishes Mohamed on the basis that the action of the state officials in that case had been unlawful and wrongful. He points to the fact that the exchange of information in this case is lawful, and indeed, a failure to pass information of a suspected coup to another state might constitute a breach of South Africa’s international law obligations. Accordingly, the Chief Justice concludes that as the state officials had not acted unlawfully or wrongfully, the reasoning in Mohamed was not relevant.

[253] In my respectful opinion, this is not a valid basis upon which to distinguish that case. On my reading of Mohamed, it is clear that the Court would have held that there was an obligation upon the state to seek assurances that the death penalty would not be imposed or, if imposed, not carried out even were the extradition to have been otherwise lawful. This conclusion, it seems to me follows from passages such as the following in the judgment:

“It [The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] makes no distinction between expulsion, return or extradition of a person to another State to face an unacceptable form of punishment. All are prohibited, and the right of a State to deport an illegal alien is subject to that prohibition. That is the standard our Constitution demands from our government in circumstances such as those that existed in the present case.”

[254] Nor on my reading of Mohamed, can the facts in that case and this be distinguished on the basis that all the relevant facts took place in South Africa, for as in the case at hand, the application to this Court was only made after Mr Mohamed had arrived in the United States. Nor can the facts be distinguished on the ground that the applicants left voluntarily, for in Mohamed too, the Court was willing to accept that Mr Mohamed had consented to his removal from South Africa.

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62 Id at para 59. See also para 63 where the Court reasoned as follows:

“An indispensable component of such consent would be awareness on the part of Mohamed that he could not lawfully be delivered by the South African authorities to the United States without obtaining an undertaking as a condition to such delivery that if convicted the death sentence would not be imposed on him or, if imposed, would not be carried out.”
In my view, there is a ground for distinguishing *Mohamed* from the present case, but it is not based on the lawfulness or otherwise of the conduct of state officials. It is based on the different types of state conduct in issue. When a state takes steps to deport or extradite a person to another country, it is an appropriate and practical time for the state to seek assurances to prevent the imposition or execution of the death penalty. On the other hand, when law enforcement officials exchange information about potential criminal conduct, it is not an appropriate time to seek such assurances. The need for the exchange of such information in our rapidly globalising world is indisputable. Without the timely exchange of information between different law enforcement agencies, international crime such as terrorism, drug trafficking, money laundering, crimes against humanity and unlawful mercenary activities will flourish. This has been recognised by the international community and a range of conventions and bilateral treaties have been adopted to foster such co-operation. Were an obligation of the sort argued for by the applicants to be imposed upon South African government officials every time they engaged in such co-operative endeavours, the co-operative endeavours themselves might severely be hampered if not stalled entirely. The same cannot be said of imposing such obligations in respect of extradition or deportation. It is not necessary to decide in this case what legal consequences may flow from such co-operation were it to be established that it was undertaken mala fide or for an unconstitutional purpose. There is no suggestion that that was the case here.

Application to facts of this case and the prayers for relief sought by the applicants

In this case, I agree with the Chief Justice’s reasoning in paragraphs 82-95, that the applicants have not made out a case to compel government at this stage to institute proceedings to extradite them from Zimbabwe to South Africa, or to obtain the release of the applicants by Zimbabwe.

63 See, for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, article 9(1) of which provides that:

“The Parties shall co-operate closely with one another, consistent with their respective domestic legal and administrative systems, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of offences established in accordance with article 3, paragraph 1. They shall, in particular, on the basis of bilateral or multilateral agreements or arrangements:

a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences established in accordance with article 3, paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities;
b) Co-operate with one another in conducting enquiries, with respect to offences . . . having an international character . . .;
c) In appropriate cases and if not contrary to domestic law, establish joint teams, taking into account the need to protect the security of persons and of operations, to carry out the provisions of this paragraph . . .;
d) Provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;

e) Facilitate effective co-ordination between their competent agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers.”

See also article 10 of the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970.

64 This relief was sought in prayers 2 and 3 of the notice of motion as follows:

“2. Directing and ordering the Government of the Republic of South Africa (“the Government”) to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

3. Declaring that the Government of the Republic of South Africa (“the Government”) is, as a matter of law, entitled to request the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.”
that a prima facie case on a criminal charge has been established against those whom
the government wishes to extradite. On the papers before us, the prosecuting
authority indicates that it has not completed its investigations, and accordingly the
prayers of the applicants compelling government to seek to extradite them cannot
succeed. Nor is it clear at this stage (particularly given that it is not clear what
offences, if any, the applicants would be charged with in South Africa) that the double
criminality principle would be met. 65

[258] Prayers 4 and 5 of the notice of motion read as follows:

"4. Directing and ordering the Government to seek an assurance as a matter of
extreme urgency from the Zimbabwean Government that the applicants will not be
released or extradited to Equatorial Guinea.
5. Directing and ordering the Government to seek assurance as a matter of extreme
urgency from the Zimbabwean and Equatorial Guinea Governments, as the case may
be, to not impose the death penalty on the applicants." 66

It is clear that at international law the state is only entitled to institute diplomatic
protection on behalf of its nationals when internationally recognised human rights
norms have been infringed.

65 Section 14 of the Revised Edition of the Extradition Act of 1996 (Zimbabwe) makes it a requirement that
extradition may not take place unless the offence for which the person is extradited is an offence both under
Zimbabwean law and under the law of the extraditing country.

66 At the hearing, applicants’ counsel asked for the relief sought in paragraph 4 of the notice of motion to be
modified. The reformulated relief is set out in the judgment of the Chief Justice at para 109. The reformulation
of the relief does not affect the reasoning in these paragraphs.

[259] As the Chief Justice makes clear in his judgment (at para 98), at this stage of
the development of international law, capital punishment is not inconsistent with the
principles of international law. Accordingly, the applicants cannot make out a claim
based on the state’s obligation to provide them with diplomatic protection that the
South African government should seek assurances from the Zimbabwean and
Equatorial Guinean governments in respect of the death penalty. To the extent that
the applicants have a right to request government to make diplomatic representations
on its behalf under section 3 of our Constitution, short of diplomatic protection, I
agree with the reasoning of the Chief Justice (at paras 110-113) that the applicants
have not established a basis for the grant of prayers 4 and 5.

[260] I also agree with the Chief Justice that prayers 6, 7 and 8 to the extent that they
require the state to take steps to require another state to apply the provisions of our
Constitution are not competent prayers. Concluding that the applicants are not
entitled to relief on these prayers as formulated, however, is not the end of the
enquiry.

[261] I have found that section 3 of the Constitution read in the light of the other
provisions of our Constitution imposes an obligation upon government to take
appropriate steps to provide diplomatic protection to its citizens who are threatened
with or who have experienced egregious violations of international human rights
norms by a foreign state upon whom the international rights norms are binding.
Article 5 of the African Charter on Human and Peoples’ Rights provides that:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

And Article 7 of the same Charter provides:

“1. Every individual shall have the right to have his cause heard. This comprises:
(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
(b) the right to be presumed innocent until proven guilty by a competent court or tribunal;
(c) the right to defence, including the right to be defended by counsel of his choice;
(d) the right to be tried within a reasonable time by an impartial court or tribunal.”

South Africa, Zimbabwe and Equatorial Guinea have all ratified the African Charter.67 They are all therefore bound by its provisions.

Article 7 of the International Covenant on Civil and Political Rights provides that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

And Article 9 provides that:

“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.”

And Article 10 that:

“1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.”

South Africa, Zimbabwe and Equatorial Guinea have also all ratified this convention68 and all are accordingly also bound by these provisions. Moreover, it is clear that the right of an accused person to a fair trial is a fundamental international human rights norm69 that forms part of customary international law.

67 South Africa signed and ratified the Charter on 9 July 1996; Zimbabwe signed the Charter on 20 February 1986 and ratified it on 30 May 1986; and Equatorial Guinea signed the Charter on 18 August 1986 and ratified it on 7 April 1986.

68 Equatorial Guinea ratified the Covenant on 25 December 1987; Zimbabwe ratified it on 13 August 1991 and South Africa ratified it on 10 March 1999.

69 Article 10 of the Universal Declaration of Human Rights provides that: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”
The European Court of Human Rights has recently held that it is a breach of customary international law where accused persons who face the possibility of the imposition of the death penalty are prosecuted in proceedings that fall short of the requirement of a fair trial. As we do not know what charges the applicants will face in Equatorial Guinea, it is not necessarily the case that such a breach of customary international law may arise. It is however a consideration that renders the need for diplomatic protection for the applicants more acute.

The Chief Justice has set out in his judgment in some detail at paras 116-121, the information that has been placed before this Court concerning the criminal justice system in Equatorial Guinea. I agree with him that this information originating as it does from well-respected international agencies concerned with the protection and promotion of human rights raises serious concerns about the criminal justice system in Equatorial Guinea and the question whether the applicants, should they be extradited to Equatorial Guinea, would face a fair trial in that country.

The respondents’ response to that evidence is that it constitutes the “opinion” of the agencies concerned, that it is not sufficient to “prove” the inadequacies of the criminal justice system in Equatorial Guinea and further that it is not the government’s policy to comment on the criminal justice systems of other countries. In argument before us the government persisted in this position, and argued that it was under no constitutional obligation to provide diplomatic protection to the applicants either at present, or if they face trial in Equatorial Guinea.

Although it is quite clear that the consideration and assessment of another country’s criminal justice system is a sensitive matter for our government, the demands of comity and sensitivity should not mean that government remains blind to the risk of egregious violation of human rights of its nationals by other jurisdictions. It is not only its constitutional obligation to take appropriate steps to provide diplomatic protection to its nationals that requires government to consider this matter, but the developing global and regional commitment to the protection of human rights also requires government to be responsive to these issues. It is not satisfactory therefore for government merely to say that it is not its policy to comment on the criminal justice system of other countries. Counsel for the respondents did make it clear during argument that government was taking some steps in relation to this matter. However, no details of these steps were provided. In argument before this Court, and despite the contrary statement of the Deputy Minister of Foreign Affairs to the media, counsel for the respondents continued to assert that government was under no constitutional obligation to take any steps on behalf of the applicants.

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[264] See, Öcalan v Turkey Application 46221/99, 12 March 2003, in which the European Court on Human Rights held at para 207 that:

"[T]o impose the death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence."

[267] It is true that the attitude of the respondents as set out in the answering affidavits is different to the attitude taken by the Deputy Minister of Foreign Affairs in the television interview referred to in para 242 above.

[266] Counsel for the respondents did make it clear during argument that government was taking some steps in relation to this matter. However, no details of these steps were provided. In argument before this Court, and despite the contrary statement of the Deputy Minister of Foreign Affairs to the media, counsel for the respondents continued to assert that government was under no constitutional obligation to take any steps on behalf of the applicants.
I also do not agree, with respect, that the application is premature in relation to the relief sought in respect of Equatorial Guinea. It is not disputed on the papers that Equatorial Guinea has sought the extradition of the applicants, though the charges that they will face in Equatorial Guinea, if they are extradited there, are not clear at this stage. In my view, the extradition application gives rise to an appreciable risk that the applicants will be extradited to Equatorial Guinea, sufficient to give rise to an obligation upon the state to provide diplomatic protection. In the light of the constitutional obligation imposed upon government, and in the light of the range of evidence put before the Court to suggest that there may be a real risk that the applicants, if extradited to Equatorial Guinea might not receive a fair trial, and may then face the death sentence, there is a clear obligation upon government to take some appropriate steps to provide diplomatic protection to the applicants. It is not for this Court to determine what the appropriate steps should be, that is, at least in the first place, a matter for government.

In my view, the appropriate relief would therefore be that a declaratory order be made by this Court with regard to the obligations of government. I am satisfied that declaratory relief is appropriate as the central issues argued in this Court were the question whether government bore such an obligation; and if it did so, the scope of its obligation and its justiciability. A declaratory order would assist government by delineating the constitutional obligation that exists. It would not, however, be appropriate for mandatory relief to be ordered, at this stage, as government is already taking steps to protect the applicants, and it is best placed to determine what steps should be taken to provide appropriate protection to the applicants in the circumstances.

In conclusion, it should be stated that there can be no doubt that it is important that South African law enforcement agencies co-operate with the law enforcement agencies of other states to prevent the commission of crime and to facilitate the detection and effective prosecution of crime. Included within this injunction must be the obligation upon our government to take steps to minimise the threats that mercenary activity often presents to the independence, sovereignty and security of other governments. Nothing in this judgment suggests otherwise. However, in carrying out these tasks, it is imperative that internationally recognised human rights norms must not suffer. As part of a growing global commitment to the protection and promotion of fundamental human rights, our Constitution requires government to take appropriate steps to protect citizens who face the infringement of such norms. That obligation is an important one that reaffirms the primacy of human rights in our constitutional order, and the principle of constitutional democracy in South Africa.

I would propose therefore that a declaratory order in the following terms be made:

It is declared that the First to Sixth Respondents are under a constitutional obligation to take appropriate steps to provide diplomatic protection to the
applicants to seek to prevent the egregious violation of international human rights norms.

Mokgoro J concurs in the judgment of O’Regan J.

SACHS J:

Section 198(b) of the Constitution makes it clear that one of the principles governing national security is:

“The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.”

Mercenary activities aimed at producing regime-change through military coups violate this principle in a most profound way. As the main judgment trenchantly establishes, the government is under a duty to act resolutely to combat them, the more so if they are hatched on South African soil.

At the same time, section 199(5) provides that:

“The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.”

This section emphasises that in dealing with even the most serious threats to the state, a noble end does not justify the use of base means. On the contrary, as I stated in S v Basson

“none of the above should be taken as suggesting that because war crimes might be involved, the rights to a fair trial of the respondent as constitutionally protected are in any way attenuated. When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom.”

[270] The values of our Constitution and the human rights principles enshrined in international law are mutually reinforcing, interrelated and, where they overlap, indivisible. South Africa owes much of its very existence to the rejection of apartheid by the organised international community and the latter’s concern for the upholding of fundamental human rights. It would be a strange interpretation of our Constitution that suggested that adherence by the government in any of its activities to the foundational norms that paved the way to its creation was merely an option and not a duty.

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1 S v Basson 2004 (6) BCLR 620 (CC).
2 Id at para 128.
I believe that the main judgment, with which I agree, as well as the two complementary judgments all underline the importance and correctness of the acceptance by the government of its constitutional obligations in the present matter. In my view, in their basic outline the judgments of Ngcobo J and O’Regan J are compatible with and give added texture to the principal judgment of Chaskalson CJ. I do not think that the present matter calls for a definitive position on all the doctrinal nuances of *Mohamed*. Nor do I believe that a declarator concerning the government’s obligations is required. Subject to keeping an open mind on *Mohamed*, I accordingly concur in the principal judgment, and with the order it makes. I also agree with the additional points of substance made in the two separate judgments. In my opinion, the government has a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair trials and capital punishment. At the same time, the government must have an extremely wide discretion as to how best to provide what diplomatic protection it can offer.

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3. *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).
The Hague, The Netherlands
28 June 2013

RECOGNITION OF STATES AND GOVERNMENTS
PROFESSOR JOHN DUGARD

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PROFESSOR JOHN DUGARD

Outline

Case Law


Legal writings [Documents not reproduced in electronic version]

7. John Dugard, The Secession of States and their Recognition in the Wake of Kosovo, (to be published in Hague Academy Pocketbook, 2013), (excerpts)
RECOGNITION OF STATES AND GOVERNMENTS: COURSE OUTLINE
PROFESSOR JOHN DUGARD

A. Recognition of States and Governments Distinguished
B. Criteria for States
C. History of Recognition of States
D. Secession of States and Recognition
E. Unilateral versus Collective Recognition of States
F. Unilateral Recognition of States as a Political Art
G. Constitutive versus Declaratory Theories of Recognition of States
H. Collective Recognition of States
I. Collective Non-Recognition of States
J. Recognition of Governments
K. Recognition Before National Courts
Supreme Court of Bophuthatswana

S v. Sando Johannes Banda and Others,
6 February 1989

[1989] (4) South Africa Law Reports
S v BANDA AND OTHERS

BOPHUTHATSWANA GENERAL DIVISION

FRIEDMAN J

1988 October 17 1989 February 6

Criminal law—Treason—Requirement of majestas—Bophuthatswana a sovereign State possessing majestas—High treason can therefore be committed against it—Court adopting declaratory theory of international law as to when an entity becomes a State.

Bophuthatswana—Sovereignty of—Fact that Judge appointed under constitution of Bophuthatswana not precluding him from considering whether Bophuthatswana a sovereign State or not.

International law—Recognition of international conventions—Bophuthatswana Courts may take judicial notice thereof.

International law—Recognition of international customary law—Bophuthatswana Courts will take judicial cognisance of international law and apply such where it is not in conflict with law of Bophuthatswana itself.

The State of Bophuthatswana is a sovereign State which possesses majestas. The crime of high treason can therefore be committed against the State of Bophuthatswana.

In a criminal trial, the accused were charged with high treason, in that they had attempted to overthrow the Government of Bophuthatswana. They objected to the indictment on the basis that because Bophuthatswana was not a sovereign, independent State, it possessed no majestas and that the indictment therefore disclosed no offence against them. Before dealing with this contention, the Court decided the following three issues: (1) there was no authority or logical reason precluding the Court, whose members were appointed under and in terms of the Constitution of Bophuthatswana, from considering whether Bophuthatswana is a sovereign State or not; (2) there was ample authority for the proposition that the Court can consider and take judicial notice of international conventions; (3) Bophuthatswana Courts will and do take judicial cognisance of international law and it is the Courts' duty to establish and apply the appropriate rule of international law, provided it is not in conflict with the law of Bophuthatswana. The Court thereafter analysed various theories of international law in regard to the question of when an entity can be considered a State, and, on an application of the declaratory theory, which holds that an entity becomes a State on meeting the requirements of statehood postulated in the Montevideo Convention on Rights and Duties of States 1933, which are (1) a permanent population; (2) a defined territory; (3) independent government; (4) the capacity to enter into relations with other States, held that Bophuthatswana satisfied these requirements and was therefore a sovereign independent State possessing majestas not only according to the law of Bophuthatswana and that of South Africa, but also according to the principles of international law. The Court accordingly dismissed the objection to the indictment.

S v Mokwe 1982 (3) SA 117 (A) approved and applied.

Ruling on an objection to an indictment. The allegations contained in the indictment appear from the reasons for judgment.

C J Dugard (with him Y G H Vanker) for the accused.
J J Smith SC (Attorney-General) for the State.
Cur vult.
Postea (February 6).

A Friedman J: The 195 accused are charged with the crime of high treason, alternatively contravening s 22(1)(a) of Act 32 of 1979 (the Bophuthatswana Internal Security Act); alternatively contravening s 45(2)(a) of Act 32 of 1979, alternatively contravening s 45(2)(b) of Act 32 of 1979.

For the purposes of this judgment, I need only consider the charge of high treason in the indictment.

Concerning the crime of high treason, the indictment avers:

'The accused are guilty of the crime of high treason in that whereas during the whole period covered by this indictment the said accused owed allegiance to the Republic of Bophuthatswana (hereinafter referred to as the State) the said accused did unlawfully and with hostile intent against the State, to overthrow or coerce the Government of the State, commit certain acts on 10 February 1988 in the district of Molopo, the particulars whereof are as follows:

(1) During the early hours of the morning the President of the State’s house was attacked and the President was captured. An unsuccessful attempt was made to force the President to resign his post.

(2) During the early hours of the morning certain Cabinet Ministers of the State’s houses were attacked and they and their families were captured. The Ministers were coerced into signing resignation papers.

(3) The command of the Molopo Military Base was taken over and the base was occupied. Movements in and out of the base were restricted.

(4) Certain Ministers and military personnel of the State were captured and unlawfully detained at the military base.

(5) The Bophuthatswana Broadcasting Centre was occupied. The announcers were coerced into broadcasting a communication concerning the overthrowing of the State. All further broadcasting was restricted to this communication.

(6) The President, Ministers, Commissioner of Police, military personnel and personnel of other forces of the State, were kept hostage inside the National Independence Stadium. They were guarded at gun point.

(7) An attempt was made to remove the hostages from the National Independence Stadium to the Molopo Military Base, to frustrate the liberation of the said hostages by the South African Defence Force.

(8) Garona Government building was occupied. Public servants were refused entry at gun point and told to go home.

(9) Meetings were held at the Molopo Military Base during which soldiers and officers were informed that the Government had been overthrown by the Defence Force, that the President and all Cabinet Ministers had resigned their posts, that a new President had been sworn in and a new Cabinet appointed. The “new” President and a number of “new” Cabinet Ministers were introduced.

(10) During the early hours of the morning the Commissioner of Police and other officers of various forces of the State were captured and unlawfully detained at the National Independence Stadium.
(11) Attempts were made to force the Chief Justice of the State to swear in a new President.

(12) The Molopo Military Airfield was occupied. Military personnel of the State were captured when reporting for duty, and unlawfully detained inside the Airfield. They were later taken to the National Independence Stadium where they joined the other hostages."

A. Objection to indictment

Mr Dugard, on behalf of the accused, has submitted that, in respect of the charge of high treason, the indictment discloses no offence against the accused. This objection has been raised in terms of s 85(1)(c) of the Criminal Procedure Act 51 of 1977, before the accused have been called on to plead. He is entitled to raise the objection in this way. See R v Neumann 1949 (3) SA 1238 (Sp Crim Ct) at 1245.

The foundation of the objection is, and I quote:

'It is clear from the definition of high treason that the crime of high treason can only be committed against a State possessing majestas, that is a sovereign State. It is furthermore submitted that the Republic of Bophuthatswana is not a sovereign independent State. It is accordingly submitted that the indictment discloses no offence against the accused.'

The substance of the objection has been directed to the crime of high treason, and no objection has been lodged as to the alternative offences.

In support of the objection, I have had the benefit of detailed and comprehensive heads of argument from Mr Dugard. In addition thereto, there has also been full argument on the issue, with clarity, and an exhaustive examination of the authorities relevant on this aspect.

I now propose to consider the gravamen of the objection.

B. High treason

This has been defined as follows:

'High treason consists in any overt act unlawfully committed by a person owing allegiance to a State possessing majestas, who intends to impair that majestas by overthowering or coercing the Government of that State.'

(Hunt South African Criminal Law and Procedure vol II 2nd ed by J R L Milton at 14.) For the purposes of deciding on the objection, I need only consider the element of majestas in the aforesaid definition.

Majestas, according to the Roman-Dutch jurists and the law of South Africa, in the context of the crime of treason, has been equated with and is synonymous with sovereignty. (See R v Gonas 1936 CPD 225 at 230 and Harris and Others v Minister of the Interior and Another 1952 (2) SA 428 (A) at 467–8.)

The common law of this country is no different to that of South Africa and, from the authorities that I have consulted and intend following, it appears in our law, therefore, that, in order for the State to succeed on a charge of treason, it must establish the existence of a State having sovereignty (majestas). In other words, treason is a crime that can only be committed against an entity being a State having sovereignty. (See van der Linden Koopmanshandbook (Institutes of the Law of Holland) 2.42; R v Christian 1924 AD 101 at 105–8 (per Innes CJ), 116, 120 (per De Villiers JA), 124–7 (per Kotze JA) and 135 (per Wessels JA); R v Erasmus 1923 AD J...
counteract the onslaught of external threats (the unifications in Germany and Italy). Historically new States were founded and created out of existing ones (Great Britain, which comprises England, Wales and Scotland). Subdivision of existing States also occurred (Norway and Sweden; the Netherlands and Belgium). (See Basson and Viljoen South African Constitutional Law 1st ed at 16–18.)

Bophuthatswana became independent by a process of evolution. The territories comprising Bophuthatswana were initially:

(i) Part of the Cape Colony and of the independent Republics of the Transvaal and of the Orange Free State, which were in existence prior to 1902.
(ii) Later they became an integral part of the Union of South Africa.
(iii) In 1961, when South Africa became a Republic, they became part of the Republic of South Africa.

Bophuthatswana, in progressing to full independence, passed through the following intermediary stages:

(a) On 26 May 1972, it became a self-governing territory, pursuant to the South African National Constitution Act 21 of 1971. This Act provided for a Legislative Assembly, and also a Cabinet consisting of a Chief Minister, and five other Ministers, which comprised an Executive Government.
(b) The South African Status of Bophuthatswana Act 89 of 1977 (the ‘Status Act’) was signed by the State President of the Republic of South Africa and assented to on 20 June 1977, and came into operation on 6 December 1977.
(c) In terms of the Status Act, on 6 December 1977 Bophuthatswana became a sovereign, independent State, by a legislative act of the Legislature of the Republic of South Africa.
(d) On 6 December 1977, the Republic of Bophuthatswana Constitution Act 18 of 1977 (the Constitution Act) was promulgated by the Legislative Assembly of Bophuthatswana, and it became sovereign and independent, its Parliament having unfettered legislative powers, and over which the Republic of South Africa ‘shall cease to exercise any authority’.
(e) The relevant sections of the Status Act, in creating the State of Bophuthatswana, and according its Legislative Assembly supreme power to legislate over its territory and for its people, read as follows:

1(1) The territory known as Bophuthatswana and consisting of the districts mentioned in Schedule A, is hereby declared to be a sovereign and independent State and shall cease to be part of the Republic of South Africa.
(2) The Republic of South Africa shall cease to exercise any authority over the said territory.

2(1) Subject to the provisions of s (2), any rule of law which was in force in Bophuthatswana immediately prior to the commencement of this Act, including the National States Constitution Act 21 of 1971, shall continue in force as a rule of law of Bophuthatswana until repealed or except insofar as it may be amended by the competent authority in Bophuthatswana.
(2) Unless otherwise agreed between the Government of the Republic and the Government of Bophuthatswana and subject to the provisions of s 5(2), no authority or person in the Republic shall in terms of any law which by virtue of s

The Constitution Act provides, inter alia, in chaps 1, 3, 4 and 5:

1(1) Bophuthatswana is a sovereign independent State and a republic which accepts the principles of democracy and an economy based on private and communal ownership and free enterprise.

(2) Mmabatho shall be seat of government.

7(1) This Constitution shall be the supreme law of Bophuthatswana.

(2) Any law passed before or after the commencement of this Constitution, which is inconsistent with the provisions of this Constitution, shall, to the extent to which such an inconsistency exists, be void.

‘19 The Head of State of Bophuthatswana is the President who shall represent and serve its people.

31 The executive government of Bophuthatswana is vested in the President who shall consult the Ministers in Executive Council.

32 The Executive Council shall consist of the President and the Ministers of State appointed under s 35(1).

38(1) The legislative power of Bophuthatswana shall vest in Parliament consisting of the President and the National Assembly.

(2) Parliament shall, subject to the provisions of s 7, have full power to make laws for the peace, order and good government of Bophuthatswana.

(3) The emphasis is mine.)

(g) It is beyond question that the Republic of South Africa is a sovereign State having majestas, and is recognised as such internationally. Sovereignty has been defined in international law by Max Huber, Arbitrator on Territorial Sovereignty, in Island of Palmas Arbitration (1928) 22 AJIL 867 at 874, 875, 876 as follows:

‘... Sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. ... Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way to make it the point of departure in settling most questions that concern international relations. ...

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial

sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points in the minimum of protection of which international law is the guardian. . . .

An incident of the general right of sovereignty is the right of a State to deal with its territory. According to the Journal of American Jurisprudence:

'it is part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective limits. The boundaries so established and fixed by compact between nations become conclusive on all the subjects and citizens thereof, and bind their rights; they are to be treated, to all intents and purposes, as the real boundaries. Included within the territory of a nation are all such islands as are natural appendages of the coast on which they border and from which they are formed. It is immaterial whether they are formed of earth, sand, rock, or some other substance, or whether they are of sufficient firmness to be inhabited or not. Islands of alluvion are within the rule. Governments as well as private persons are bound by the practical line that has been recognised and adopted as their boundary. A settlement of national boundaries is not a judicial, but a political, question. The courts are bound by the decisions of the executive and legislative departments of the government in this respect, and judicial notice may be taken of the territorial extent of the nation whose laws the courts administer.'

(See 45 Am Jur 2d S 23 at 363.) 'Sovereignty' has been further defined in 45 Am Jur 2d S 37 at 378 as follows:

"Sovereignty", in its full sense, imports the supreme, absolute, and uncontrollable power by which an independent State is governed. (Moore v Smuts 17 Cal 399, 218; M Salomo & Co v Standard Oil Co 237 App Div 686, 262 NYS 639, affd 263 NY 220, 186 NE 579, 89 ALR 345. For other definitions, see Brandon v Mitering 67 Ariz 349, 196 P2d 464; Bethea v Cochise County 52 Ariz 1, 78 P2d 982; Antonik v Chambalais 81 Ohio App 465, 37 Ohio Op 305, 78 NE2d 752.)

In addition thereto, each State legislates for itself, but its legislation can operate on itself alone, and except as otherwise provided by statute or government, only within its own territory.

It is recognised as an established principle of international law that there exists an equality of nations. The largest and the smallest have equal rights, whatever may be their relative power.

From the aforesaid authorities, it is therefore the position that the authority of a State, within its own territory, is, and with respect to most of its concerns, exclusive, and is subject only to the constraints imposed by itself.

Consequently, therefore, the Republic of South Africa as a sovereign State has the power to divide its land and to allocate its territory to a specific group of people.

In addition thereto, it is also a unitary State and according to Strong:

'The essence of a unitary State is that the sovereignty is undivided, or, in other words, that the powers of the central government are unrestricted, for the constitution of a unitary State does not admit any other law-making body than the central one.'

(Modern Political Constitutions (1972) at 71.) See South African Constitutional Law (op cit at 28).

A Since World War II new States were created by colonial empires, such as Britain and France, in granting independence to their former colonies over which they had sovereignty, and which, in turn, became independent States. The independence of new States in Africa and elsewhere evolved through this process and these States have received international recognition.

B In the seminal decision in the case of S v Marwane 1982 (3) SA 717(A), the Appellate Division of South Africa, in a majority judgment, recognised, accepted, and applied the principle of the sovereign independence of Bophuthatswana, by holding that, and I quote from the headnote:

'C Held, further, that the conclusion appeared to the Court to be irresistible that the legislation specified in the Schedule was expressly repealed by name, not with the intention that that was to be the final and exclusive determinant of laws which would not continue to operate in Bophuthatswana, but because such legislation, by reason of its nature, immediately came to mind as being inappropriate or unsuitable or unacceptable in the new State.

'held, further, that the clear indications were that certain specified Acts were repealed by name and that s 93(1) was the mechanism by which other Acts, if they were in conflict with the Constitution, were repealed to the extent of such conflict by being rendered inapplicable in Bophuthatswana. There was no question here of the effect of the retrospective effect of such a law excluded by s 93(1) from the body of existing law taken over by the new State.

'held, further, that s 7(1) of the Constitution clearly proclaimed that it "shall be the supreme law" in the State. From the moment of its coming into operation, the rules of law laid down by the Constitution were therefore to take pride of place over other laws which might be in conflict with them, unless the Constitution itself clearly directed otherwise in any particular respect.

'held, further, that, in all the circumstances, the Court was unable to construe the words "subject to the provisions of this Constitution", in the context of s 93(1), in any way other than that laws in conflict with the Constitution were to be excluded from the laws which in terms of that section were to continue in operation. Any other construction would constitute an unjustifiable departure from their natural, ordinary meaning in the context of s 93(1), and in the context of the Constitution Act as a whole, and would defeat the purpose of their inclusion in the provisions of s 93(1).'

This decision is of weighty persuasive authority, bearing in mind the eminence and status of the members of the Court and, although not binding on me, I am in respectful agreement with it.

Clearly, then, according to the law of this country and that of South Africa, Bophuthatswana is an independent sovereign State having majestas and is not subject to the restraints of South Africa, or any other country. The Legislative Assembly, the President and Cabinet determine its progress and future, subject only to its constitution.

Mr Dugard has submitted that Bophuthatswana is not a State possessing majestas or sovereignty, and the fact that its Constitution declares in s 1 that Bophuthatswana is a sovereign and independent State is not conclusive proof of the statehood of Bophuthatswana. He argues that the question whether or not Bophuthatswana is a State for the purposes of the J crime of high treason must be determined by international law.

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Before dealing with this contention, it is necessary and propitious to consider certain accessory and supplementary matters. They are:

(i) Does the fact that I am appointed as a Judge under, and in terms of the Constitution of Botswana, preclude me from considering the issue whether Botswana is a sovereign State or not?

(ii) May a Court in this country take judicial notice of international conventions such as the Covenant of the League of Nations, the Mandate for South West Africa and the United Nations Charter and of Resolutions of the General Assembly and of the Security Council?

(iii) Is international customary law part of our law and may it be applied by the Courts of this country?

Ad (i)

I cannot find any authority or logical reason precluding me from considering whether Botswana is a sovereign State or not. On the contrary, in order for the State to succeed on the charge of high treason, I must be satisfied that an integral part of the offence, namely that the State possesses sovereignty or majestas, has been proved by the State.

Courts in South Africa have examined the status of their respective Governments in South West Africa to determine whether the Government had the requisite internal sovereignty to convict the accused on a charge of high treason. (See R v Christian (supra).) In R v Leibbrandt and Others, a Special Criminal Court which comprised Schreiner, Ramsbottom and De Beer JJ, heard in 1942–3, Schreiner J, in delivering the judgment of the Court said that:

‘For the purposes of the law of treason the Government is wholly identified with the State, the land, and the people.’

In certain constitutional cases in South Africa, the Court dealt with and examined ‘Motions of Parliament’ ‘High Court of Parliament’ and Senate. (See Harris and Others v Minister of the Interior and Another 1952 (2) SA 428 (A) at 463–5 and 467–8; Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A) at 781–5 and Collins v Minister of the Interior and Another 1957 (1) SA 552 (A).)

A Court in this country can pronounce on whether the Republic of Botswana has the requisite sovereignty in respect of the crime of high treason, because it is germane to the offence with which the accused are indicted. I must decide where the quality of majestas resides. A State must have a territorial existence, that is, a territory, and its administration is provided by its government. The issue of sovereignty or majestas is therefore of cardinal significance, as an element of the crime of high treason. I am therefore prepared to consider and adjudicate on this issue.

I may also mention that in what was formerly Rhodesia, now Zimbabwe, the majority of the Appeal Court rejected the contention that Judges appointed under the 1961 Constitution of Southern Rhodesia were precluded from pronouncing on the constitutional validity of a Constitution which appointed them. (See Madzimbamuto v Lardner-Burke NO and Another NO; Baron v Ayré NO and Others NNO 1968 (2) SA 284 (RA) at 326–33.)

Ad (ii)

There is ample authority for the proposition which I am prepared to follow, that this Court can consider and take judicial notice of international conventions such as the Covenant of the League of Nations, the United Nations Charter, and the Mandate for South West Africa. By doing so, it must not be construed that I regard these Charters and Mandates as being part of the law of this country, or in any way binding on me. I have a discretion whether to apply them or not. I must, however, apply the law of this country in the final analysis.

Ad (iii)

The Courts in South Africa, and in England, as well as our Courts, will and do take judicial cognisance of international law, and it is my duty to establish and apply the appropriate rule of international law, provided that it does not conflict with the law of this country. The law of this country must take precedence over international law, where they are in conflict. (See South Atlantic Islands Development Corporation Ltd v Buchan 1971 (1) SA 234 (C) at 238; Nduli and Another v Minister of Justice and Others 1978 (1) SA 893 (A) at 906 and Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mocambique 1980 (2) SA 111 (T) at 124.)

In Nduli’s case supra at 905D, Rumpf CJ said:

‘It was conceded by counsel . . . that according to our law only such rules of customary law are to be regarded as part of our law as are either universally recognised or have received the assent of this country . . . I think that this concession was rightly made.’

Mr Dugard has submitted, that irrespective of South African law, and the law of this country, in order to decide whether Botswana is an independent sovereign State, it is necessary to examine its status, having regard to the principles of contemporary international law, with special reference to the United Nations. He founded this argument on the basic assumption that in traditional international law there are two approaches as to when an entity becomes a State: the declaratory and the constitutive theories.

D. Constitutive theory

Protagonists of this school of thought emphasise the act of recognition itself. They maintain that it is the act of recognition itself which creates a State, and determines the legal personality of a new government. To put it another way, it is an act of recognition which establishes (is constitutive of) the international personality of the entity in question.

According to Sir Hersch Lauterpacht in his work on Oppenheim vol 1 at 125:

‘A State is, and becomes an International Person through recognition only and exclusively.’

In other words, international personality is held to be conferred only through recognition by the community in question. This theory has amongst its adherents writers and experts on international law such as Kelsen, Oppenheim, Lauterpacht, Anzalisi, Le Normand, Tripel, Liptak and Lawrence. (See Kelsen Recognition in International Law (1941); 35 American Journal of International Law at 605; Lauterpacht
Recognition in International Law at 476; Devine 1973 Acta Juridica at A 90–143; Gerhard von Glahn Law among Nations 2nd ed at 91–2 and Wallace International Law—A Student’s Introduction at 69–70.)

E. The declaratory theory

This school of thought regards recognition as only a formal acknowledgment of an already existing state of circumstances. The act of recognition, according to this view, is not one which brings a State into being which did not previously exist.

According to the adherents of this theory, an entity becomes a State on meeting the requirements of statehood postulated in the Montevideo Convention on Rights and Duties of States 1933, which are:

(i) a permanent population;
(ii) a defined territory;
(iii) independent government;
(iv) the capacity to enter into relations with other States.

This view has also been referred to as the evidentiary school of thought.

This theory posits that statehood exists objectively if the requirements of sovereignty are present, irrespective of recognition. According to this school, recognition means no more than a declaratory act and is at most a formal admission of already existing facts.

Therefore such an entity is regarded as having international personality without recognition. According to this view, recognition has the effect of being declaratory or evidentiary. The act of recognition therefore gives the imprimatur to an entity that already exists.

In contradistinction the constitutive theory is that, even if an entity satisfies the objective indicia of statehood, international personality is not thereby created. Recognition is required to create international personality.

The declaratory view is supported by writers and experts on international law such as Borchard, Hall, Rivier, Fischer-Wills, Chen, Erich, Vattel, Westlake, Moore, Brierly, Fauchille, Fisco, the Institute of International Law and the American Law Institute.

According to Erich in La Aisance et la Reconnaissance des Etat’s 1926 HR 431 at 460–61, ‘the recognition of government and State is declaratory, but the recognition of belligerents is constitutive’. (See Briefly Law of Nations 6th ed (1963) (1) at 39, Boosvien Volkerw.—n Inleiding (1980) at 169; Chen The International Law of Recognition (1951); Devine (op cit at 90–2); Restatement of the Foreign Relations Law of the United States ss 107–8; Wallace (op cit at 69–70); Wheaton Elements of International Law cited in Mdzimbantu’s case supra at 368E; and Von Glahn (op cit at 91–2)).

Before embarking on an evaluation of these conflicting theories, it is necessary to consider what is regarded as representing, in general terms, the requirements of statehood prescribed by customary international law.

According to the 1933 Montevideo Convention on Rights and Duties of States, which was adopted by the Seventh International Conference of American States, which comprised the United States and 15 Latin-American States, article 1 provided:

‘The State as a person of international law should possess the following qualifications:

(A) a permanent population;
(b) a defined territory;
(c) government; and
(d) capacity to enter into relations with other States.’

According to the American Law Institute Restatement of the Law—Foreign Relations Law of the United States (revised) Tentative draft No 2 at 20, a ‘State under international law is an entity which has a defined territory, a permanent population, is under the control of a government and engages in, or has the capacity to engage in formal relations with other entities’.

Examining these elements, it would appear therefore, that an entity constitutes a sovereign independent State if it has a permanent population, and in this respect, the number of its inhabitants is irrelevant (eg Nauru, with a population of 6,500, has been considered a State as has Liechtenstein with a population of 20,000).

There must also be a defined territory, because States are considered territorial units, and in respect of the sovereignty thereof, I refer to what Arbitrator Huber said in the Island of Palmas case at 829 (supra).

In other words, to constitute an entity as a State, it must have a national territory. According to article 9 of the Montevideo Convention,

‘the jurisdiction of States within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.’

Even if the entity’s territorial boundaries are not precisely demarcated, or are to some extent in dispute (eg Israel in 1948, Kuwait in 1963), the requirement of territory may still be satisfied.

An entity to constitute a State under international law must have an effective government, that is, a government independent of any other external or internal authority and one which has legislative and administrative competence. In other words, the government must be the supreme legislative body over its territory, un fettered by external authority or constraints.

It is also noteworthy that, to constitute a State, an entity must have the capacity to enter into international relations. This is an element that is not within its own competence, but depends on other international States. If a State has the capacity to enter into international relations with other States, but is unrecognised, in my view the fact that it has the capacity to enter into relations with others is not nullified by the refusal of other States to enter into relations with it.

According to article 3 of the Montevideo Convention:

‘The political existence of the State is independent of recognition by the other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The existence of these rights has no other limitation than the exercise of the rights of other States according to international law.’
In determining these criteria, the *indicia* of a permanent population, A
defined territory and government are objective, whilst the criterion of capacity to enter into relations with other States depends on the approach and attitude of other States.

Therefore an entity may well have the capacity to enter into foreign relations, but if other States fail to recognise it, then it is denied the opportunity to demonstrate its ability to enter into relations with other States.

The above-mentioned criteria are accepted by the Convention that I have mentioned and by most experts on international law as constituting the *indicia* or elements of statehood.

Therefore, according to the constitutive school, if a State is not recognised despite the presence of these objective criteria of statehood, it is not a sovereign independent State for the purposes of international law. According to the declaratory school of thought, if these elements of statehood are present, it is considered a sovereign independent State according to international law, irrespective of recognition.

F. An evaluation of the constitutive and declaratory theories

(a) According to *Lauterpacht*, and after consulting the authorities that I have referred to, the declaratory theory is supported by a greater number of experts than the constitutive theory. The *Montevideo Convention* (supra) clearly predates the declaratory theory.

(b) The constitutive theory is postivistic in nature, in that sovereignty is determined on an arbitrary basis. It is therefore left to each State, that is an existing international State, to determine when a new international entity exists. This function is performed by each State recognising new States.

"Recognition is a consensual act on the part of existing sovereign States so that the personality of the new State depends upon the will of existing States. The declaratory theory on the other hand is a natural law doctrine which assumes an objective system of law apart from the assent of States."

(See Devere *op cit at 91.)

Recognition should follow when a new State fulfils the conditions of statehood according to the *Montevideo Convention*, but, as a number of examples will prove, if one adopts the constitutive view, a new State is not recognised, not because it does not fulfil the objective criteria, but because there exists an element of arbitrariness and political expediency in the attitude of other States.

The examples that I cite hereunder also indicate that, notwithstanding the aforesaid *indicia* of statehood, which are regarded by most authorities as an objective standard of statehood, conduct by States reveals inconsistency and politically motivated consequences of adopting the constitutive theory. Notwithstanding the fact that new entities or existing entities fulfill the conditions of statehood as adumbrated by the *Montevideo Convention*, for political reasons, they are denied the privilege of statehood.

The following list relating to the conduct contains some of the more important instances, but certainly is not exhaustive.

(i) The Government of the People's Republic of China, which governs a population of over one billion people, living on a land mass of approximately 9,200 square miles in area, remained unrecognised by the United States until 1979. This reveals the influence of political factors whether to recognise an entity or not.

(ii) According to international customary law, the government of Peking was the sovereign Government of China, and not the Government of Taiwan. When the United States deemed it necessary and expedient to establish relations with Communist China, it was recognised.

Despite the non-recognition, however, the United States dealt directly with the Chinese People's Republic since 1955 by means of an arrangement known as 'Ambassadorial Talks', held in Geneva and in Warsaw. Significantly, the participants were the American and Chinese ambassadors accredited to Poland. An agreement relating to the return of American prisoners of war was concluded. This illustrates the inconsistency of the constitutive school in that, despite non-recognition of the People's Republic of China, the Government of the United States could negotiate only with the Government of the People's Republic of China. In negotiating with it, it clearly presupposes the existence of a sovereign independent entity and no disclaimer, however subtly and skilfully worded, can avoid this inescapable fact. (See Von Glahn *op cit at 100–11.)

(iii) Historically it is known that, concerning recognition, States have adopted a subjective and ideological approach, motivated to a large extent by political and economic considerations. This is the reason why monarchical governments refused to recognise French revolutionary Governments between 1789 and 1793 and also for the hesitation by many States to ignore the Government of the USSR when it became the Government of Russia consequent to the 1917 revolution, as well as the former reluctance on the part of the Government of the United States to recognise the communist Government of China.

(iv) Apart from political considerations, economic motives also enter into the recognition-picture. This concerns a number of concessions or debts granted or incurred by a previous government. This approach related primarily to Latin-American governments, where a practice developed on the part of some governments to demand or extract a formal pledge to honour past obligations as a precondition to recognition. According to Von Glahn, 'the power to grant or to withhold recognition thus came to represent an effective method of interfering in the internal affairs of another country without violating, technically at least, the duty of non-intervention'. (See Von Glahn *op cit at 101.)

According to him, 'recognition of a new government represents, generally speaking, an individual political act on the part of the recognising government, just as in the case of the recognition of new States'.
area on the globe, with a population in excess of 200 million people, and yet, it remained unrecognised by the USA till 1932. The British Government accorded recognition to the Soviet Union in 1921 but, when recognition was granted, it was retroactive to 1917.

(v) India and many other States have refused to recognise the Government of Taiwan, notwithstanding the fact that it fulfils the requirements of a sovereign State.

(vi) The State of Israel has been in existence since 1948 and has all the attributes of statehood according to customary international law, yet it has been unrecognised by Arab States with the exception of Egypt.

Professor Nathan Feinberg, in his article in Studies in International Law, with special reference to the Arab–Israel conflict, at 484 states as follows:

"Several writers have also pointed out how illogical and inconsistent it is to talk of non-recognition and, at the same time, assert that a "state of war" exists. Dr Brownlie mentioned cases in which States were not prepared to acknowledge that they were at war with another State because they refused to recognise that other's international personality; and he adds that "Egypt and other Arab States have maintained a state of war with Israel, though they do not recognise its existence as a State". Professor Verzil even regards the Arab States' claim that they are in a "state of war" with Israel as "a clear, if tacit, admission of Israel's international personality; for, how is it possible, from a legal point of view, to be at war with a non-existent State?"

The constitutive theory has been subjected to trenchant criticisms, in my view correctly, by many experts on international law. These can be summarised as follows:

(a) 'It is very doubtful that even the most extreme advocates of the constitutive theory will derive much satisfaction from the fact that such far-reaching conclusions are sought to be drawn from it—conclusions that are likely simply to derogate from any validity which the theory may have and by bare the absurdity of it. "The attempts to regard a State which is not recognised as legally non-existent", writes Quadri, "appear to us truly incongruous or mere political expediency... No one, for example, could raise any doubts today as to the existence of... the State of Israel. . . . (A) new State, from the very fact of its existence, enjoys all the benefits deriving from general international law."' (See Feinberg (op cit at 479–80.).)

(b) According to Judge Sir Gerald Fitzmaurice 'the extreme constitutive theory fell into disrepute, at any rate with jurists. Since... it is generally agreed by all schools of thought that the new State or member... is automatically bound by international law, and since the existence of an obligation necessarily entails the enjoyment of any corresponding rights, it follows that the new State or member must have the right to claim the observance of international law in respect of itself'. (See Sir Gerald Fitzmaurice The General Principles of International Law, Considered from the Standpoint of the Rule of Law RADI tome 92 (Leyde, 1958) at 25.)

(c) Professor Waldock points out that the 'effects (of the constitutive theory) when applied to the very existence of a State are really quite inadmissible. For a State, by merely declining to recognise a new State, could logically claim that no rules of international J

law, not even those concerning respect for territorial sovereignty and maritime law, are in force between it and the unrecognised State'. (See Sir Humphry Waldock General Course on International Law RADI tome 106 (Leyde, 1963) at 148.)

In this connection too, Professor Sørensen holds that:

"(Un) no circumstances can the new State, which has not yet been recognised, be regarded as a non-existent entity. Its authority may be so manifest that it would be absurd not to acknowledge its status as a subject of international law.' (See M Sørensen Principes de droit international public, cours general RADI tome 101 (Leyde, 1961) at 132.)

(d) According to Brierly, a highly regarded authority on international law, as is contained in the last edition of his book The Law of Nations, an Introduction to the International Law of Peace 6th ed (edited by Sir Humphry Waldock) (Oxford, 1963) at 139:

"The practice of States... does not support the view that they have no legal existence before recognition... A State may exist without being recognised, and if it does exist in fact, then, whether or not it has been formally recognised by other States, it has a right to be treated by them as a State.'

(e) An African authority on international law, P J Nkobo Mugwana, has put it this way:

"It is generally admitted that an unrecognised State cannot be completely ignored. Its territory cannot be considered to be no-man's-land; there is no right to enter without permission; ships flying its flag cannot be considered Stateless, and so on.' (See Manual of Public International Law edited in 1968 by Max Sørensen at 269.)

(f) According to Professor Waldock's view, the majority of writers hold that recognition of a new State is essentially declaratory. It would appear that this is the view accepted not only in the Western World, but by the Eastern bloc as well. In fact, in the textbook on international law, published by the Soviet Academy of Sciences in 1967–69, the declaratory theory is described as a "truly scientific" one, and the constitutive theory is attributed to "reactionary circles". (See Feinberg (op cit at 481) and Waldock (op cit at 149.)

"The declaratory doctrine was adopted in 1936 by the Institute of International Law in a resolution on the recognition of new States and new governments.

(H Weihberg Institut de droit international, tableau general des resolutions (1873–1956) Bâle 1957 at 11–13.) It was also endorsed in the Convention on Rights and Duties of States, signed in Montevideo at the Seventh Conference of American States in 1933. See also the Academy of Sciences of the USSR, Course on International Law III (Moscow, 1967) at 11 (in Russian), referred to by Feinberg at 481.

(g) According to Feinberg, like many Western jurists, the authors of the textbook Studies in International Law (op cit at 481) are of the view that there is a duty to recognise a new State.

"A new sovereign and peace-loving State", they say, "no matter where it is or what the extent of its territory, the size of its population, the character of its public regime, the form of its government and of its
political structure, has the right to full and unreserved recognition in accordance with the principle of equal rights. To withhold recognition is, in their opinion, not only an “unfriendly act; in view of para 2 and 3 of article 1 of the Charter of the United Nations . . . it is also an illegal act”.

(b) According to Boosens in his work Volkereg: ‘n Inleiding (op cit at 169):

Die deklaratiewe teorie lyk toereëries die aanvaarbaarste. Indien ’n Staat in feite bestaan, dwa ‘n grondgebied met ‘n regering wat onafhanklik is van enige eksterne gesag, kan ander State verdrae daarmee sluit of diplomaatiese bande daarmee aangaan. Dit beteken dat die regseboeiging is het om hiehe handelinge te vertrig, moet bestaan voordat die verdrag as sleg word. Indien die konstituutiewe teorie aangehang word en indien mera aanvaar dat die sluiting van ’n verdrag op stilswyse erkenning kan neerkom, ontsluit logiese probleme. Die sluiting van die verdrag is erkenning en skep dus die subjek waarom die verdrag te kon gesluit het, moes daar toeg alregs regseboeiging aan die kant van die nie-erkenke Staat bestaan. Die konstituutiewe teorie lewer ook probleme op die geval waar party State ’n nuwe Staat erken en ander nie. Logies gesproke beteken dit dat die nuwe Staat ’n regseboek is teenoor die Staat wat dit erken maar nie teen die wat dit nie erken nie. Die doel is egter juist om vas te stel wanneer ’n nuwe Staat objektiewe reg/subjectiewe verkry en die vraag kan nie beantwoord word volgens die konstituutiewe teorie waar slegs konstituutiewe State ’n nuwe Staat erken nie.

(i) According to Ian Brownlee in his work Principles of Public International Law 2nd ed, the emphasis on the concept of recognition has led to contradictory and unreasonable consequences. As he states at 90:

“In international relations it is the recognition of States, governments, belligerency, and insurgency which has been the most prominent aspect of the general category, and legal writing has adopted the emphasis and terminology of political relations. The dominance of the category “recognition” has led to some perversive doctrine. When a State is in dispute over legal title to territory, for example, a legal forum will examine all the legally significant conduct and declarations of either party. It is the party that does not “recognise” the title of the other that will largely determine the issue, and may be worth very little if it is simply a declaration of political interest and antagonism.”

Furthermore, he highlights the difficulties inherent in the constitutive view by what he states at 91:

“Absurdly, the complexity one may expect of legal issues in State relations is compacted into a doctrinal dispute between the declaratory and constitutive views on recognition of States and (insofar as the two matters are interdependent) governments. According to the declaratory view, the legal effects of recognition are limited, since recognition is a mere declaration or acknowledgment of an existing state of law and fact, legal personality having been confirmed previously by operation of law. As Hal says: “States being the persons governed by international law, communities are subject to law . . . from the moment, and from the moment only, at which they require the marks of a State.” Thus, in a relatively objective forum, such as an international tribunal, it would be entirely proper to accept the existence of a State although the other party to the dispute, or third States, did not recognise it.”

His view is therefore that it is, as a matter of principle, impossible to accept the constitutive theory for the reasons advanced by him at 92 and I quote:

“The declaratory theory of recognition is opposed to the constitutive view. According to the latter, the political act of recognition is a precondition of the existence of legal rights: in its extreme form this is to say that the very personality of a State depends on the political decision of other States. The result is as a matter of principle impossible to accept: it is clearly established that States cannot by their independent judgment establish any competence of other States which is established by international law and does not depend on agreement or concession.”

(c) According to Von Glahn (op cit at 93):

“On the whole, non-recognition appears to pose more disadvantages than benefits to States adopting such a policy. It has been employed on many occasions as a gesture of protest against the extinction of a previously existing State. The purpose of such a policy obviously was an attempt to harass the successor State and to prevent prescription from creating legal effects.”

In his view, too, most writers agree that non-recognition of an existing State represents rather an ineffectual political measure.

(See Von Glahn (op cit at 92)).

(k) Further difficulties in the theory of the recognition school—that is to say the constitutive theory—are delineated by Professor R C Hingorani in his work Modern International Law 2nd ed at 83, and I quote:

“It is said that recognition is granted when some conditions are fulfilled (1). Nothing can be farther from the truth than this statement. It must be admitted that there are no illusions as to that. Undoubtedly in most cases, recognition follows when the new State fulfils the conditions of statehood as given elsewhere. Similarly, a new government is recognised when it fulfils the conditions which are being discussed in subsequent pages. But the fallacy of the above statement lies in a few important cases where despite the fact that new aspirants fulfil the conditions of recognition, they are, nevertheless, denied that privilege due to political motivations. No one could doubt the statehood of Southern Rhodesia after its Unilateral Declaration of Independence in November 1965. But not many States recognised it as a member of the international community. The State of Israel has not been recognised by the Arab States despite its existence as an international person for more than a generation. Similarly, no one could challenge the existence of the communist government of China on the legal plane. Yet it remained unrecognized by the United States of America until 1979. The Union of Socialist Soviet Republics was established in 1917. Yet it was only recognised by the United States of America in as late as 1932. India and many other States have not recognised the nationalist government of China in Formosa, although it fulfils the requirements of a State.”

In his view, recognition is an acknowledgment of the prior existence of some entity; if this is not so, what is sought to be acknowledged through recognition? See Hingorani (op cit at 97):

“Besides, when recognition takes place it is naturally an acknowledgment of prior existence of some entity. Otherwise what is sought to be acknowledged through recognition?”
Article 9 of the Charter of the Organisation of American States signed at Bogotá in 1948 provides: “The political existence of State is independent of recognition by other States.”

Prior existence of State or government can well be understood by the statement of the Department of State of the United States of America in 1933, in New York Court of Appeals where it said: “The Department of State is cognisant of the fact that the Soviet regime is exercising control and power in the territory of the former Russian Empire and the Department of State has no disposition to ignore that fact (25).”

From the above discussion, it is clear that the declaratory theory is more correct than the constitutive theory which is also partly correct. An anomaly which is significant is that the legislation of a non-recognised government may not always be treated as invalid and of no force and effect. In the well-known case of M Salinoff and Co v Standard Oil Co of New York, the New York Court of Appeals gave consideration to the nationalisation decrees of the Soviet Government, not yet recognised by the United States, as being valid, operative and in force. (See M Salinoff and Co v D Standard Oil Co of New York 262 NY 220 (69 ALR 345).)

According to Branimir M Jankovic, in his work Public International Law, he accepts the declaratory theory as being essentially correct. He puts it as follows at 98:

“The declaratory theory, according to Chatelain, is based on the collective phenomenon of international solidarity rather than on the system of State particularism, like the constitutive theory. This theory considers that a new State coming into existence in any way whatever (either by separation, as was the case with Belgium in 1921, or by the creation of a new national State), automatically acquires the rights inherent in an international person. Louis le Fur thought that this theory was first elaborated by the Scottish writer Lorrimer, and, according to him, the recognition of a State is a kind of birth certificate of the State in question. Provided all the mentioned elements are present, the State exists under international law. If one of the elements is missing, such a community is not an international person. Consequently, it is not established by recognition; only an acknowledgment is made that a State has been created and exists.

We believe this concept to be essentially correct. The fact remains, however, that a newly created State (and even new governments) are extremely anxious to be recognised by other States, particularly the great powers. Consequently, individual recognitions are accorded through the central international organisation, the United Nations, of which more will be said later.

Today the declaratory theory is predominant in international law and diplomatic practice, although views widely differ. The American Republics concluded a convention in Montevideo in 1933, in which the declaratory view of recognition was given preference. The same formulation of recognition was accepted in the Bogota Charter, passed in 1948.”

Having examined the authorities that I have cited, as well as others on the relative merits of the constitutive and declaratory theories, I conclude that the declaratory view is the more valid and acceptable one for the following reasons:

A (a) It is objective, and considers the requisites of statehood and sovereignty, on well-established criteria of international law. That is, a State has sovereignty if it possesses the following qualifications:

B (b) The constitutive theory, founded on recognition, contains variables which are rooted in political, ideological and economic motives which cannot, in law, serve as a basis for determining the existence of a legal entity.

C (c) Examples I have referred to, and indeed others that exist, clearly indicate that certain States are not moved by legal and objective considerations in according recognition to governments and new entities.

D (d) The substantial element of the constitutive view is subjective, and what is in accordance with the recognising State’s interests. It is not unknown that commercial interests, the likelihood of receiving a concession or monopoly, domestic political interests and repercussions of the possibility of enlisting the new entity as a political or military ally, have been weighty factors in according recognition to a new entity. Conversely, if a new entity exhibits all the fundamentals of a State, on what principle may recognition be withheld?

Therefore, as long as extraneous interests, other than legal considerations, are applied in determining the status of a new entity international law is vague, uncertain and cannot in this respect approximate to an objective standard.

E (e) Recognition has also been used as a lever to extract concessions from a government.

F (f) If the constitutive theory is correct, then clearly a position could, and does arise that a given entity exists as a State for some States which have recognised it, but not for others who do not recognise it. Surely, this is an anomalous position.

G (g) The practice of States has revealed that, once recognition is accorded, it has retrospective effect (eg the Government of the United States recognised the communist Government of China only in 1979, although it existed since 1949). Recognition must therefore be an acknowledgment of the entity’s prior existence. If not, what is accepted or acknowledged by recognition? It is surely the existence of an entity. Therefore recognition is only an acceptance, a response to, an acquiescence of what already exists. An acceptance of a pre-existing entity cannot, therefore, give it legal status. Either an entity has legal status or not. The enquiry must be a factual and objective one, and cannot be sustained on the vagaries or notions of extraneous and extra-judicial political consideration of other States.

H (h) It is not unknown that recognition has been granted unilaterally. If this is the position, then according to Kelsen, this has no legal competence and constitutes only a bare statement. An example that
comes to mind is the recent recognition by approximately 60 States of an independent Palestine State in the so-called Occupied Territories of Israel. Can it be argued that by this act of recognition a Palestine State exists? I think clearly not. It has no government over this territory, and in fact, none of the incidents of statehood and sovereignty is present. This illustrates the anomaly of the constitutive theory. This is a clear case of unilateral recognition and, consequently, has no legal effect. In fact, all the incidents of government are exercised by the Government of Israel and not by the Palestine Liberation Organisation.

(i) It would also appear that recognition has only a diplomatic function without any specific legal effects.

(j) Recognition also brings into operation the concept of political power because rights of international law are thus reduced to the area of political considerations, and the principle of equality of States, and of international order, are impinged on.

(k) What is the position of unrecognised entities? Are they free to set as they choose, without the constraints of international law? Surely not. If they are still subject to international law, their existence must be acknowledged as a subject or object of law. For after all, a non-existent entity cannot be the subject of law. If an entity satisfies the formal factual requirements of a State, to contend that it does not exist is unrealistic and absurd.

(l) If the constitutive theory is valid, then it has the practical effect of international States determining on their own independent judgment whether a new entity exists or not. A State which meets the requirements of international law does not depend on agreements, recognition and concession.

(m) The concept of recognition is devoid of any principle of uniformity, and is basically inconsistent. There exists de jure recognition, de facto recognition, implied recognition, express recognition. Is there a duty of recognition? These features, inherent in the constitutive theory, represent matters of convenience rather than of principle.

(n) According to customary international law, the declaratory theory is supported by the provisions of the Montevideo Convention, and if entities satisfy the requirements thereof, recognition should be granted.

Accepting the declaratory theory as being in accordance with the principles and norms of customary international law concerning statehood, it is necessary to determine the status of Bophuthatswana in this connection to ascertain whether it conforms to the essentials of a State, as accepted by the said Montevideo Convention, and the doctrine of the declaratory view.

G. The status of Bophuthatswana

(1) A permanent population

This country has a population of approximately three-four million people. Its population is basically permanent. They are in the main citizens of the country and exercise their political and other rights in
There are examples where human rights are restricted here, as in other democracies, but only on grounds allowed in the Constitution. Restrictions on the rights of privacy and family life may be restricted if it is necessary in a democratic society in the interests of national security, public safety or the economic well-being for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

(See South African Constitutional Law (op cit at 235–6.))

The Constitution is stated to be the supreme law of Bophuthatswana. However, s 18 provides that:

'(1) The rights and freedom referred to in ss 9–17 may be restricted only by a law of Parliament and such a law shall have a general application.
(2) Except for the circumstances provided for in this Declaration, a fundamental right and freedom shall not be totally abolished or in its essence be encroached upon.'

It is, however, significant that the requirement that everybody be equal before the law is not subject to any restrictions and the Supreme Court is given the power to, and does, enforce the provisions of the Bill of Rights.

The legislative Assembly passes legislation which governs the country. There is an Executive President with Cabinet Ministers and Deputy-Ministers and various departments of State.

Concerning the legal system, there is an Appellate Division of this country, a Supreme Court, regional courts, magistrates' courts and tribal courts.

This country has an army, a police force, an airline, para-statal agencies and various administrative boards which serve to facilitate the process of governing.

Generally, the instruments of government which exist in a modern democratic State are present. The Government governs the population, by its authority derived from the people of the country, in accordance with its Constitution and laws without dependence on any foreign power.

Free and open democratic elections are held whereby citizens can exercise their democratic rights and the Government represents the will of the majority of the citizens of Bophuthatswana, and is accordingly elected as such.

The inhabitants of this country pay their taxes and other levies in accordance with law and the State derives its income in the main from taxation.

The Government of Bophuthatswana exercises, in terms of its Constitution, de jure control of the country, and acts and functions as a sovereign Government.

In considering the concept of exercising 'de facto administrative control', or 'exercising effective administrative control', in contradistinction to the exercise of full sovereign control, which is the position as obtained in this country, Lord Atkin, in the case of Government of the Republic of Spain v SS Arantza Mendi [1939] AC 256, a House of Lords decision, stated as follows at 264–5:

"By 'exercising de facto administrative control' or 'exercising effective administrative control'; I understand exercising all the functions of a sovereign..."
sovereign entity, although he concedes that on the basis of the declaratory theory it may be a sovereign independent State. The Attorney-General, Mr Smit, in reply to these contentions, has argued that the question of non-recognition is inspired by political considerations. Mr Smit has based his argument on the fact that Bophuthatswana is recognised as an independent State according to the law of South Africa and this country, and that it complies with the essentials of statehood according to the norms of international law.

I disagree with Mr Dugard's submissions, as I do not accept the constitutive theory of international law, and have found that Bophuthatswana possesses the elements of statehood that I have delineated up to this stage.

In regard to its capacity to enter into relations with other States, Bophuthatswana has a Foreign Minister, a Department of Foreign Affairs, trained diplomatic personnel and an infrastructure to implement relations with other States should it be given the opportunity to do so.

It clearly has the capacity and ability to enter into foreign relations. The fact that it is precluded from doing so due to political considerations in no way detracts or derogates from its ability to do so. The realisation of its entering into relations with other States, although it has the capacity to do so, depends on the attitude and response of other States.

The fulfilment of this criterion rests on recognition. If I follow and apply article 3 of the Montevideo Convention, as I do, which provides:

"The political existence of the State is independent of recognition by the other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its Courts. The exercise of these rights has no other limitations than the exercise of the rights of other States according to international law."

the question of recognition is immaterial in terms thereof and on the views of the declaratory school in that 'the political existence of the State is independent of recognition by other States'.

An entity possessing all the other essentials of being a State cannot be regarded as not having the capacity to enter into relations with other States if it is denied the opportunity to demonstrate this capacity in practice.

Furthemore:

'An entity which possesses the ability to conduct foreign relations does not terminate its statehood if it voluntarily hands over all or part of the conduct of its foreign relations to another State, eg San Marino (Italy) and Monaco (France). Another mini-European State is Liechtenstein, which operates within the Swiss economic system, and has delegated a number of sovereign powers to Switzerland, but nevertheless is still recognised as a sovereign State.'

(See Wallace (op cit at 56–7).)

The people of Bophuthatswana have a right to self-determination, like other people. The people have expressed their will to self-determination by electing a President and Government to govern them. In the Western Sahara Advisory Opinion reported in 1975 ICJ Rep 12, it was acknowledged...
There is no question of aggression. Bophuthatswana has no aggressive posture or stance and Mr Dugard has correctly conceded that this aspect is of no application.

There is clearly no systematic racial discrimination and apartheid in Bophuthatswana. There are no discriminatory laws in this country. There is equality before the law. The different races live in this country in a spirit of amity and co-operation and racial hostility is non-existent.

As far as the prohibition of the denial of self-determination is concerned, there is no evidence of this. The majority of the people of Bophuthatswana are Batswanas, and their self-determination is ensured by being citizens of the State of Bophuthatswana.

The main thrust of Mr Dugard’s argument in this connection has been against the creation of Bophuthatswana by the Status Act. The many authorities, the Charter of the United Nations and Resolutions of the United Nations that he cited in this respect, all voice disapproval of the creation of Bophuthatswana. They are mainly politically inspired in nature and are directed at attacking South Africa for what it terms its ‘Bantustan’ policy. Resolutions of the General Assembly condemn ‘the establishment of Bantustans as designed ... to destroy the territorial integrity of the country’.

Resolutions of the General Assembly do not have the force of law in my view, and, although I am entitled to take judicial notice of them, they certainly do not form part of the law of this country.

Resolutions of the United Nations have been frequently disregarded by its members. In this respect, the superpowers have ignored resolutions of the General Assembly if they impinge on their national interests. The less powerful members of the body are no exception in this regard.

To argue that by the creation of Bophuthatswana South Africa was perpetuating its apartheid policy is unrealistic and manifestly incorrect. A country is entitled to diminish its territory. In doing so, it acts fully within the incidents of sovereignty and, as stated by Lord Atkin (supra), ‘it does not appear to be material whether the territory over which it exercises sovereign powers is from time to time increased or diminished ...’

It is a well-known practice in international law that a State can acquire new territory in various ways. Annexation and cession are only two of the more general means whereby States extend their sovereignty over new areas. As was stated in the case of Janin Vaginginji v Vorawasingi v Secretary of State for India, reported in 1924 (51) Ind App 357 at 360:

‘When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by an unrecognised ruler. In all cases the result is the same.’

See also Boonsen (op cit at 159–66).

However, it is unnecessary for me to express an opinion on this aspect since it is not an issue in the case. I refer to it merely as illustrating the converse, namely if a State is entitled to acquire new territory by the means I have referred to, surely the antithesis must then also apply.

Namely that it is entitled to diminish its territory by granting a portion thereof to the inhabitants who occupy that portion.

Weighing up therefore the views of international experts of the constitutive theory, the adherents of the peremptory nature of the jus cogens, coupled with resolutions of the United Nations, which I have found not to have legal effect, as against the objective norms of the said Montevideo Convention and my acceptance of the declaratory theory, and that Bophuthatswana is recognised as independent and sovereign in terms of the Status and Constitution Acts, and the case of S v Marwane (supra), I cannot but conclude that it is a sovereign independent State, notwithstanding the doctrines of the jus cogens, and the resolutions of the United Nations.

Taking into account the reality of Bophuthatswana in its incidents of sovereignty, it is beyond question that, objectively viewed, it must be regarded as a sovereign and independent State.

To ignore the sovereignty of Bophuthatswana is a way of dismissing reality in favour of political advantageousness, and convenience. It favours of abstract theory and rhetorical formulations, divorced from the reality of the situation.

To rely on the constitutive theory as a basis for denying sovereignty to Bophuthatswana is to divest the tenets of international law of recognisable norms. It is a case of selective memory which dwells more in non-recognition than positive achievements. There is no causal equilibrium between the politically motivated stance of non-recognition and the elements of statehood which this country possesses. Reality cannot be transformed by ideas based on false premises.

Deeply imbedded in every nation and people is the desire for full development—the urgent longing for self-expression. Equal opportunity for all people, nations, as for individuals—that is the essential of international as well as national justice. This is a right that must be recognised and granted universally. To achieve this, justice must be applied, for as Judge Brandeis said:

‘Justice can be attained only by a careful regard for fundamental facts, since justice is but truth in action.’

Traditions of sovereignty, and established norms of international law, based on objective factors, are the most reliable guides to determine the sovereignty of an entity.

As already referred to, when and under what circumstances established States shall accord recognition to new States is entirely a matter of policy, actuated by a multiplicity of motives. It may be granted at once, may be delayed, or withheld indefinitely, for a variety of reasons, political, good, bad or indifferent.

Considerations of convenience, and the obvious benefits of making diplomatic contacts with a de facto State, however, as history has illustrated, will usually dictate its recognition by other States as soon as its existence is firmly and soundly established.

According to international practice, new States may be recognised individually or collectively by other States. Greece was recognised by the powers of the Central Conference of 1830. Belgium was recognised collectively in 1831, and Czechoslovakia and Poland in 1918.
No good cause or reason exists and indeed little is to be gained by denying recognition to a functioning government.

It would be interesting to observe, merely as a passing thought, what the stance of the adherents of the constitutive theory, and the textbook writers who advocate non-recognition, and the General Assembly, would have been, had Bophuthatswana declared unilateral independence and repudiated the Status Act.

It is not realistic to assume that in these circumstances it would have been recognised. Therefore, to regard Bophuthatswana, despite its sovereignty and conforming to the international norms that I have accepted, as an agent or an extension of South Africa, is ingenious and manifestly without substance.

(b) Mr Dugard has cited the case of GUR Corporation v Trust Bank of South Africa Ltd (Government of the Republic of Ciskei, third party) [1986] 3 All ER 449 (CA) as authority for the proposition that, because in that case the Court of Appeal held that Ciskei is 'a subordinate body set up by the Republic of South Africa to act on its behalf' (at 466a–b), and therefore is not an independent State, by implication the same holds true for Bophuthatswana. I cannot agree.

Having carefully considered the judgment and the ratio of that case, for reasons that appear hereinafter, I have come to the conclusion that that decision does not support Mr Dugard's argument that, because Bophuthatswana is unrecognised, save for South Africa, it does not have the necessary majestas or sovereignty, or is an agent of South Africa.

The facts of the case are that in 1983 the plaintiff contracted with the Republic of Ciskei to build a hospital and two schools. Under the contract with the plaintiff, a guarantee of ten per cent of the contract price was required to be made available in respect of claims by the Republic of Ciskei for the cost of repairing defects in the structures. The sum of US $300 000 was lodged with the Bank as defendant in respect of security given by the Bank to the Republic of Ciskei. Ciskei made a claim on the guarantee, but this was disputed, the point being whether the claim had been made in the proper form before the expiration of the guarantee.

The defendant Bank refused to return the said amount to the plaintiff, its contention being that the question of the validity of the claim must first be settled. GUR sued the Bank, claiming a return of the deposit. The Bank in turn served a third party notice on the Republic of Ciskei, and sought to have determined as against it the validity of its claim.

Ciskei counterclaimed for a declaration that it was entitled to the deposit.

In the Court a quo Steyn J raised the question whether the Ciskei, as an unrecognised foreign State, had standing to sue and be sued in an English Court. Steyn J in his judgment held that the Ciskei had no standing as a 'person' or 'party' before the Courts of the United Kingdom, and that the possible exceptions to the lack of standing of an unrecognised foreign State were of no application in the matter. Accordingly he held that the Court lacked jurisdiction to decide on the third party proceedings, but it did have jurisdiction as between the plaintiff and defendant.

Steyn J held that the purported claim by the Republic on the deposit did not comply with the terms of the guarantee and was therefore ineffective.
of South Africa and s 1(2) which declares that the Republic of South Africa will
case to exercise any authority over the territory since this subsection is clearly
consequential upon ss (1) of the Republic of Ciskei Constitution Act 1981.
However, we can, and I think I must, take cognisance of the remainder of those
Acts, notwithstanding that, absent those sections, they may take on somewhat a
different character. Thus s 3(1) of the Status of Ciskei Act 1981, which provides

"The Legislative Assembly of Ciskei ... may ... make laws (including a
constitution) for the Ciskei in the manner prescribed by the said Act, and may
in any such law provide for the making of such laws by any authority other than
the said Legislative Assembly"

becomes a straightforward delegation of legislative power which could be revoked
in the same way as it has been conferred, namely by a subsequent legislative Act
of the Republic of South Africa."

The Court of Appeal therefore allowed the appeal and declared that the
Government of the Republic of Ciskei had "locus standi" in the Courts of the
United Kingdom as being a subordinate body set up by the Republic of
South Africa to act on its behalf.

With great respect to His Lordship, on my reading of the Status of
Ciskei Act 1981, I cannot see how it is possible to sever and to disregard
s 1(1) of the Act, which declares Ciskei to be a sovereign and independent
State, and disregard s 1(1) of the Republic of Ciskei Constitution Act
1981, and then hold that s 3(1) of the Status of Ciskei Act 1981, which provides

"The Legislative Assembly of Ciskei ... may ... make laws (including a
Constitution) for the Ciskei in the manner prescribed by the said Act, and may
in any such law provide for the making of such laws by any authority other than the
said Legislative Assembly ...",

is a delegation of legislative power by the Republic of South Africa to the
Republic of Ciskei. The distinction appears to me to be strained and
artificial and results in a fiction. This decision has been subjected to
serious criticism by Professor James Crawford in the 1986 British Yearbook
of International Law at 405–9.

As already indicated, the decision in this case does not assist Mr Dugard
in that it relates to the interpretation of a certificate filed by the Foreign G
Office of the Government of the United Kingdom in regard to whether it
recognises the Government of the Ciskei or not.

It is well known that in English law the Courts accept the certificates
filed by the Foreign Office relating to the question of recognition. That,
however, does not meet the issue in point since I accept that the United
Kingdom does not recognise Bophuthatswana, but that Steyn J correctly put
it in the Court a quo:

"After all, recognition has in the past from time to time been withheld by Her
Majesty's Government on political grounds unrelated to the question whether the
entity is in truth an independent State...."

(See at 591.) According to Professor Crawford,

"the new policy of the UK with respect to recognition does not involve an
abandonment of the idea that recognition is decisive.... The UK government has
merely decided not to inform the Courts of its attitude to new governments,
leaving them to infer from what will usually be partial or incomplete information
what the attitude is."

A (See British Yearbook of International Law at 409–10.)
(c) Finally, Mr Dugard has maintained that the proper procedure in this
case would have been to charge the accused with violating the majestas
of the Republic of South Africa in that the indictment discloses no offences
as Bophuthatswana is not a State possessing majestas.

I have already found that Bophuthatswana is an independent sovereign
State possessing majestas. Apart from the foregoing, if one has regard to
the particulars to the indictment, it is clear that the indictment does not
allege any act committed against the Republic of South Africa. If acts of
high treason were contained in the indictment relating to the Republic of
South Africa, in other words an attempt to overthrow the lawful
Government of the Republic of South Africa, then, clearly, this Court
would not have jurisdiction. Conversely, if the accused were indicted in a
South African Court, such Court in South Africa would decline to hear
the matter on the grounds that it has no jurisdiction to try an offence
committed in an independent sovereign State.

The Status Act clearly provides that:

1. Bophuthatswana ... is hereby declared to be a sovereign and independent
State and shall cease to be part of the Republic of South Africa.
2. The Republic of South Africa shall cease to exercise any authority over the
said territory.

These provisions are clear and unambiguous and I must apply them. It
would be incorrect and contrary to legal principle to disregard the clear
declaration of the sovereignty of Bophuthatswana and I cannot accept the
argument that Bophuthatswana is an agent of or an extension of the
Republic of South Africa. I therefore reject this contention.

Accordingly, the objection raised by Mr Dugard, namely that
Bophuthatswana has no majestas or sovereignty so that the crime of high
treason cannot be committed against the State of Bophuthatswana, is
dismissed.

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