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Fifth Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur

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STATE RESPONSIBILITY

[Agenda item 3]

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International responsibility. Fifth report by F. V. García Amador, Special Rapporteur

RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS—
MEASURES AFFECTING ACQUIRED RIGHTS (*continued*) AND CONSTITUENT ELEMENTS OF INTERNATIONAL RESPONSIBILITY

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Introduction

1. In the introduction to his fourth report (A/CN.4/119)¹ the Special Rapporteur indicated that he had been unable because of lack of time to deal with other aspects and matters of relevance to measures affecting acquired rights, in particular the extraterritorial effects of such measures and the methods and procedures applicable to the settlement of international disputes arising in consequence of them. The present report is largely concerned with these matters.

2. Part B of the report deals with the constituent elements of international responsibility. During the brief discussion at the previous session and on various other occasions, members of the Commission raised the question of the imputability of acts or omissions, in particular whether fault or some other subjective element is required. The Special Rapporteur has hitherto preferred to avoid raising this question, which is in his view chiefly academic and largely resolved in international case-law. A brief discussion of the matter is, however, included in the present report in the hope that it will be of value if the point is raised again. Another subject which, in the Special Rapporteur's opinion, deserves particular attention in connexion with the constituent elements of international responsibility is the applicability of the "doctrine of abuse of rights". In his first three reports,² the Special Rapporteur, following the prevailing view in the matter, discussed international responsibility as arising solely in consequence of "the non-performance of an international obligation". On further review, it became clear, however, that acceptance of the principle which prohibits the abusive exercise of rights by the State would strengthen the notion of international responsibility in the draft to be prepared by the Commission.

3. As in the previous report, certain conclusions are reached which point to the need for revision of the relevant portions of the preliminary draft submitted to the Commission. The suggested amendments and additions to the original preliminary draft are set out in the last part of the report.

A. MEASURES AFFECTING ACQUIRED RIGHTS

I. Extraterritorial effects of measures affecting acquired rights

4. The question of the extraterritorial validity of the law is, in general, studied as part of the subject usually known as "private international law" or conflict of laws. The phrase "in general" is used advisedly because the subject as a whole is normally considered an integral

part of municipal law, although from a strictly legal viewpoint the basic principles governing it are international in nature and are therefore necessarily principles of *public* international law. This aspect of the question, which continues to be debated by the proponents of nationalist and internationalist theories,³ need not detain us, since we are concerned in this section to determine the extraterritorial effect of measures involving expropriation, nationalization or confiscation, the latter being the type of act most frequently encountered in practice in this context.

5. It may be useful first to consider briefly the "doctrine of acquired rights" in private international law. It should be pointed out that the approach is, of course, different from that taken in the study of this doctrine in the fourth report (principle of respect of acquired rights); in the present context we are concerned with the international validity of rights acquired "under foreign laws" or, more specifically, of rights acquired by a State (or its assignees) as a consequence of measures taken by it with respect to the property of private persons, whether national or alien. As will be seen below, the case or situation considered is basically, if not exclusively, that of the individual as holder of the right and that of rights acquired under legislation in force in any country or under rulings of its courts.

35. RIGHTS ACQUIRED UNDER A FOREIGN LAW

6. The "doctrine of acquired rights" occupies a special place in private international law, particularly in the writings of scholars. However, whereas in intertemporal or transitional law its application affects only the temporal validity of legislation, in private international law it has been applied in various ways.⁴ One of the earliest of these is, in fact, simply a derivation of the theory of non-retroactivity of law. Vareilles-Sommières, for instance, held that, if a person who had committed certain acts in the territory of one State moved to the territory of a third State, he was in the same position as a person to whom two laws were successively applied in a single State, the second law being at variance with the first. By analogy with the principle of non-retroactivity, the law of the third State should respect the rights acquired by the person concerned under the law of the first State.⁵

7. On the basis of certain ideas expressed by the Dutch authors, notably Ulrich Huber, a group of Anglo-American jurists developed a new theory of conflict of laws entirely based on the doctrine of acquired rights. In the opinion of Dicey, their principal spokesman, any

¹ *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II).

² *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/96; *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No.: 57.V.5, Vol. II), document A/CN.4/106; and *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II), document A/CN.4/111.

³ See García Amador, *Introducción al Estudio del Derecho Internacional Contemporáneo* (Madrid, 1959), pp. 80-85.

⁴ With regard to the precursors of the modern doctrines, particularly among the Dutch authors of the seventeenth century, see Arminjon, "La notion des droits acquis en droit international privé", *Recueil des cours de l'Académie de droit international* (1933-II), vol. 44, pp. 8 *et seq.*

⁵ *Synthèse du droit international privé*, vol. I, Nos. 40-41. See also by the same author, "La quintessence du droit international privé", *Journal Clunet* (1900), pp. 5 and 58.

right duly acquired under the law of a civilized country is recognized and, in general, sanctioned by English courts.⁶ This theory was subsequently accepted by other writers, some of whom developed it considerably. One of these was Beale in the United States. In his explanation and reaffirmation of the territoriality of law, as reporter for the American Law Institute's *Restatement of Conflict of Laws*, he considers every right to be created by a given law, by which law alone it can be changed. If it is not so modified, the right must be recognized everywhere, such recognition being merely recognition of the existence of a fact.⁷ The conception of the conflict of laws as a system of rules applicable to the recognition and enforcement of foreign acquired rights has gained some acceptance in Anglo-American case-law, although it has been severely criticized by some publicists.⁸

8. The French approach differs from the Anglo-American in that it does not reduce the entire problem of the conflict of laws to the extraterritorial recognition and enforcement of acquired rights. Pillet, its first exponent, held that private international law is essentially concerned with the legal status of aliens and the solution of conflicts of laws in space and, subsidiarily, with the principle of international respect of acquired rights.⁹ This conception has been developed by various authors, notably by Niboyet. The latter considers that conflict of laws is concerned solely with determination of the law which is competent to "create" a right, but that this is not sufficient to ensure that the right will be effective internationally; the principle of international respect for acquired rights is absolutely necessary if laws are to have full effect everywhere.¹⁰ This view appears to have been reflected in the Inter-American Convention on Private International Law ("Bustamante Code"), article 8 of which provides explicitly that "the rights acquired under the rules of this Code shall have full extraterritorial force in the contracting States, except when any of their effects or consequences is in conflict with a rule of an international public order".¹¹

9. In private international law recognition of rights acquired under foreign laws involves another problem to which attention should be drawn. Problems of intertemporal or transitory law may arise in connexion with the "temporal" aspect of the application of the rules of conflict, i.e. in connexion with the retroactivity or non-retroactivity of rules of private international law. Attempts have been made to solve these problems by

applying the principle of retroactivity, modifying it where the juridical relationship had any contact with the *forum* while the former rule of conflict still applied; by employing the entirely opposite principle of non-retroactivity, or by applying the general principles and criteria governing questions of transitory law in the State in which the change in the rule of conflict occurs. Whatever the criterion applied, the substantive problem is to determine the effect of the new rule of private international law on rights acquired under the old.

36. VALIDITY OF MEASURES AFFECTING ACQUIRED RIGHTS

10. It will be seen that in private international law the "doctrine of acquired rights" is applicable in connexion with only some aspects of the problems raised by the extraterritorial validity of measures of confiscation, expropriation or nationalization. As will be seen below, the same is true of other notions, concepts or principles of private international law. The reason is not far to seek; the problems are not the same as those commonly dealt with by private international law. It follows that, in order to deal with the other aspects of the matter and to define the boundaries of the validity of such measures, further criteria must be invoked, and if these cannot be provided by private international law, they will be found in legal principles of another character.

11. Thus, in accordance with universally accepted principles, national courts apply foreign laws and recognize and enforce judgements or judicial decisions made by foreign courts, since the validity of municipal law is not exclusively circumscribed to the territory of the State concerned. Municipal law may in fact have extraterritorial effect. When and in what circumstances may a law of one country be relied upon in another? In more specific terms, when and in what circumstances may measures affecting patrimonial rights taken in one country be relied upon in another? What is the territorial validity of the laws governing private property?

12. Even the legal systems most heavily influenced by territorialist doctrines do not entirely exclude the application of foreign laws in property matters. Under the Anglo-American system whose territorialism is particularly marked, a distinction is still made between movable and immovable property and the former is not always subject to the *lex rei sitae*. Although the Code of Private International Law or "Bustamante Code" states that "All property of whatever description, is subject to the law of the place where it is situated" (article 105), it nevertheless provides that successions, both intestate and testamentary, shall be governed "... by the personal law of the person from whom the rights are derived, whatever may be the nature of the estate and the place where it is found" (article 144). Many further examples could be quoted, but these suffice to show that the law may have extraterritorial effects in property matters in certain cases. These cases and the conditions and circumstances in which laws or measures affecting patrimonial rights may have extraterritorial effect have in the past been determined

⁶ *A Digest of the Laws of England with reference to the Conflict of Law*, Introduction.

⁷ *Summary of the Conflict of Laws*, No. 47.

⁸ See, in this connexion, Arminjon, *loc. cit.*, pp. 29 *et seq.*; Nussbaum, *Principles of Private International Law*; Cheshire, *Private International Law* (3rd ed., 1947), pp. 46 and 52.

⁹ *Principes de droit International privé* (1903), p. 495.

¹⁰ *Manuel de droit international privé* (2nd ed., 1928), p. 429. See also, by the same author, *Cours de droit international privé français* (2nd ed., 1949), pp. 4 *et seq.*

¹¹ See *International Conferences of American States 1889-1928* (Carnegie Endowment for International Peace), p. 327. On the application of the theory of acquired rights in the Bustamante doctrine, see Bustamante, *Derecho Internacional Privado* (1934), vol. I, pp. 158, 169 and 394.

by reference to the rules and principles of private international law. The question that must be considered is whether these rules and principles can suffice to restore the specific problems that arise when it is necessary to determine the territorial validity of laws providing for the expropriation or confiscation of property which is situated in a third State or has been transferred to such State following the taking of such measures? In spite of the evident similarities which are found on examining judicial practice in this field, serious doubts must exist and the matter has been discussed by a number of authors.

13. Van Hecke, for example, finds no difficulty in setting aside the general rules of private international law when determining the territorial reach of confiscatory measures, as he considers that the question at stake is not the determination of the law applicable to private relations, but rather the determination of the sovereign power of the State. He points out that penal, revenue and political laws are outside the province of private international law because they are manifestations of State sovereignty and, as such, are part of public law.¹² Adriaanse, on the other hand, although he considers that determination of the extraterritorial effects of measures of confiscation, is in the domain of private international law, admits that the importance of State interference in such matters cannot be ignored in considering the rules of conflict to be applied.¹³ In another connexion, Hjerter wrote recently that if problems raised by foreign confiscations were solved in accordance with the normal or ordinary rules of private international law, it would be sufficient to apply the *lex rei sitae*. However, since this is not appropriate for various reasons and it is not the judicial practice, it is more appropriate to think in terms of the "law of confiscation" or of the "law of contract" in the case of measures affecting debts, in order that the court may decide the case in accordance with other factors which cannot be ignored.¹⁴

14. As will be seen in the next two sections, the problems involved in the extraterritorial validity of measures of confiscation or nationalization cannot be properly solved without resort to legal concepts and principles which do not always coincide with those of private international law. In view of the nature of systems of private international law, it is unlikely that decisions would be uniform and courts would perforce act with a strong localist bias in examining and resolving questions which, notwithstanding the form in which they are brought before the national courts concerned, involve clearly international substantive issues. It should be noted also that the reason for raising the question of the extraterritorial effects of a measure of confiscation or expropriation is that property situated abroad is considered an integral part of the assets affect-

ted by the measure. In these circumstances, the principle of territoriality must be conceived in a way different from that in which it has traditionally been conceived and applied. The position is similar with regard to other concepts taken over from national systems of private international law.

37. CIRCUMSTANCES IN WHICH MEASURES HAVE EXTRATERRITORIAL EFFECT

15. In examining the conditions or requirements that must be fulfilled for a measure of confiscation or expropriation to have extraterritorial effect it is necessary to classify the various cases and situations found in practice. A first distinction must be made between cases in which the property is situated in the State taking the measure and those in which the property is situated in a third State when the measure is taken. In the first case, the State is required merely to decide on the validity of the acquisition of the property, whereas in the second it must also make the title effective in respect of property situated within its territory. This distinction is reflected in the two parts into which this section is divided. Other distinctions or classifications may be made, of which one is of particular importance: that between measures of confiscation in the strict sense and measures of expropriation or nationalization accompanied by compensation. As will be seen below, the courts have dealt more frequently with cases of the first type than with those of the second.

(a) *Property situated in the State*

16. We are here concerned with cases resulting from the transfer to a third State of property which was situated in the territory of the State taking the action at the time when the action was taken. The cases of this type found in practice may be divided into the following categories: (a) cases in which the property is transferred to a third State by the acquiring State or by an assignee or new owner, and the former owner takes action in the local courts to recover the property (this in the most frequent case); and (b) cases in which the acquiring State (or an assignee or new owner) loses possession of the property and attempts to recover it in the courts of the State in which it is situated. The principle which appears to have been accepted by national courts in deciding such cases is that measures affecting property situated in the territory of the State, regardless of their nature (expropriation or confiscation), the nature of the property or the nationality of the former owners, must be "recognized" in other States. In other words, such measures have extraterritorial effect.

17. The courts have based their decisions on one or occasionally both of two principles: the principle of the immunity of foreign States ("Acts of State" doctrine) and the principle of territoriality (of laws governing property). The first of these principles, which has been invoked most frequently, is embodied in the decision of the United States Supreme Court in *Underhill v. Hernandez* (1897): "Every sovereign State is bound to respect the independency of every

¹² "Confiscation, Expropriation and the Conflict of Laws", *International Law Quarterly* (1951), vol. 4, pp. 349 and 354.

¹³ Adriaanse, *Confiscation in Private International Law* (1956), pp. 10 and 11.

¹⁴ "The General Approach to Foreign Confiscations", *Scandinavian Studies in Law* (1958), pp. 200-202.

other sovereign State, and the courts of one country will not sit in judgement on the acts of the Government of another done within its own territory." In a later case (*Oetjen v. Central Leather Co.*, 1909), the Court reaffirmed that action of a foreign Government "is not subject to re-examination and modification by the courts of this country". The decisions of English courts, although based on the same principle, differ in that they require recognition of the Government whose laws or acts are involved, as was shown in *Luther v. Sagor* (1921). In this case the confiscation was held invalid owing to the fact that the Soviet Government had not been recognized, although the validity of the confiscation was subsequently recognized with retroactive effect. Another decision of the same nature was that given in *Princess Paley Olga v. Weisz* (1929). The principle of the immunity of the State, whether or not coupled with the requirement of recognition, has been reaffirmed by innumerable court decisions in other countries.¹⁵

15. National courts have also recognized that confiscations may have extraterritorial effects through application of the *lex rei sitae*. This is the basis of certain German decisions.¹⁶ These and various Austrian and Belgian decisions are based on the principle that the territoriality of the laws governing property requires that title acquired under those laws to property situated in the enacting State should be recognized as valid in any other State.¹⁷ In *Luther v. Sagor* this principle was invoked together with the principle of the immunity of the State. However, as will be seen below, the principle of territoriality has chiefly been applied by the courts in determining the validity of confiscations of property situated outside the State.

19. In contrast to the many decisions recognizing the extraterritorial effects of confiscations in the case under consideration, some decisions have refused to recognize the extraterritorial effect of such measures on the ground that the measure was contrary to public policy or international law, quite apart from the fact of recognition or non-recognition of the confiscating Government, to which reference was made earlier. The first of these grounds—public policy—appears mainly in French decisions relating to Soviet confiscations. In the *Ropit* case (1925), for example, the court held that the Soviet legal provisions were of a political and social nature that conflicted with French law which was based on respect for private property.¹⁸ As regards the second of the grounds mentioned, the Supreme Court of Aden recently held that the Iranian Nationalization Act had no extraterritorial effect; the Act, being of a confiscatory nature, was illegal from an international point of view and could not be recognized as valid in other countries (case of the *Rose Mary*, 1953). The Court distinguished the case from the earlier

English cases (*Luther v. Sagor* and *Princess Olga v. Weisz*) pointing out that the case involved subjects of the country of the *forum*, not nationals of the confiscating State. In this connexion it has been pointed out that the Aden Court disregarded the fact that the English courts had not refused to recognize confiscations of credits situated in Russia even when the creditor was a British subject; similarly United States courts had not refused to recognize certain Mexican acts even when the persons affected had the nationality of the *forum* and the acts themselves were held inconsistent with international law.¹⁹ Subsequent decisions of Italian and Japanese courts on similar claims concerning the extraterritorial effects of Iranian nationalization reaffirmed the principle of recognition of such effects, the latter not being considered contrary to public policy.²⁰

20. Finally, with regard to measures other than measures of confiscation, *stricto sensu*, such as expropriations or nationalizations in which compensation has been provided but is not deemed adequate, the situation cannot and should not present any difficulty. Since such measures are wholly consistent with international law and should not be contrary to local public policy, their extraterritorial effect might necessarily be recognized. However, the distinction between these two categories of measures (confiscation *stricto sensu* and expropriation or nationalization with compensation) is, to the extent that it can be made in practice, of great importance when the measure affects property which was not situated in the territory of the State when the measure was taken.

(b) Property situated in a third State

21. This sub-section differs from the preceding one in that it deals with cases in which the property intended to be affected by the measure was situated in a third State when the measure was taken. Owing to this fact—the *situs* of the property—and others which will be indicated in due course, the principle followed by national courts is, except in certain special cases or situations, that measures taken by a State to affect property situated in a third State are not, if of a confiscatory nature, "enforceable" (or recognized) in the place in which the property is situated, regardless of the nationality of the owners or the nature of the property. In other words, such measures are without extraterritorial effect. In the case of measures of expropriation this principle is applied less strictly, as will be seen below.

22. Judicial decisions in this matter are based on two principles, which are frequently invoked simul-

¹⁵ See Adriaanse, *op. cit.*, pp. 64–75.

¹⁶ *Ibid.*, pp. 75 and 76.

¹⁷ See Seidl-Hohenvelden, "Extraterritorial Effects of Confiscations and Expropriations", *Michigan Law Review* (1951), vol. 49, p. 859.

¹⁸ See this and other French, Italian and German decisions in Adriaanse, *op. cit.*, pp. 62 and 63.

¹⁹ Seidl-Hohenvelden, "Recognition of Nationalizations by Other Countries", *International Bar Association, Fifth Conference* (Monaco, 1954), pp. 35–36. For the legal, political and commercial reasons advanced for recognizing the extraterritorial validity of such confiscations, even with respect to nationals of the *forum*, see the article by the same author referred to in footnote 17, p. 861.

²⁰ See D. P. O'Connell, "A Critique of the Iranian Oil Litigation", *International and Comparative Law Quarterly* (1955), vol. 4, pp. 280 *et seq.*

taneously, the principle of public policy and the principle of the territoriality of laws governing property. The latter principle is applied in a dual sense which is explained below. Other factors which have been taken into account on occasion are the territorialist intent or purpose of the measure, although these factors appear not to have constituted the basis of the court's decision. The position is similar with regard to non-recognition of the Government taking the measures, in cases or decisions in which this factor was taken into account in denying the extraterritorial validity of a confiscation.

23. Public policy appears to be the principle most frequently applied by national courts, taking into account the frequency of explicit or implicit references to it in judicial decisions based primarily on the principle of territoriality. Following the *Ropit* case, which was mentioned earlier, many subsequent decisions have been based on, or have taken into account, the fact that the measure in question was inconsistent with the principles of private property. *Bessel c. Société des auteurs*, etc. (1931) and other French decisions are implicitly based upon the principle of public policy, and in others, such as the decision of the Cour d'Appel of Paris in *Crédit National Industriel c. Crédit Lyonnais* (1926), the principle is expressly mentioned. In one of the Belgian decisions relating to Nazi anti-Jewish measures, the court stated that the measure in question "... in fact, authorized expropriation without prior compensation and therefore conflicted with the Belgian principle of international order". Similar decisions were given in Germany and Switzerland in regard to the confiscation of the property of the Carthusian Congregation; also in Switzerland in the case of *Banque internationale de commerce de Pétrograd c. Hausner* (1924). Several similar decisions in the United States were given in cases concerning the Russian confiscations. To this group may be added the decisions of courts in other countries based on the maxim *odiosa sunt restringenda*, as for example the decision of the court of Buenos Aires in *Lecouturier v. Rey* (1905).²¹

24. The principle of the territoriality of the law has not always been expressed in the same way in the decisions, the reason being that, in each case, due regard has to be paid to the particular nature of the measure in question. Thus, for example, one set of decisions is concerned with laws on police and security matters, the scope and validity of which is confined to the territory of the State which enacted them. Another set deals with criminal laws, which have been held to be similarly limited in scope; this was the view taken, for instance, in the English and Italian judgements relating to the confiscation of the property of ex-King Alfonso. Lastly, there is a further set of decisions, including some given in the Netherlands and in Switzerland, which deal with the political character of the measures whose application was being considered. Decisions in which it was held that a measure could not be applied on the ground that it had never been intended or designed to be applied *extra territorium* should also be included

among those which rely on the principle of territoriality.²²

25. Consideration should now be given to the exceptional cases or circumstances referred to above. As nearly all the authorities rightly point out, the decisions in question were given for special reasons. Often, although not always, the "special reasons" were a treaty which specifically provided for the extraterritorial enforcement of the law in question. In fact, some court decisions in the Netherlands, Italy, Tunis and Georgia (prior to its incorporation in the Soviet Union), recognized that confiscatory measures had extraterritorial effect.²³ The other judgements, however, were based on treaty stipulations. The practice began with the treaties signed by the Soviet Union with a number of East European countries shortly after the end of the First World War. Under these treaties, property belonging to Russian nationals was transferred to the State in whose territory the property was situated, the object being that, once the transfer had been completed, the steps contemplated in each of these treaties could be taken as between States. What made the practice famous, however, was the so-called Litvinov Assignment, which took the form of an exchange of letters with the United States, dated 26 November 1933, whereby the Federal Government was recognized as the successor to the property of companies nationalized by the USSR. In the well known *Pink* case (1942), the Supreme Court held "that the right to the funds of property in question became vested in the Soviet Government as the successor to the First Russian Insurance Co.; that this right has passed to the United States under the Litvinov Assignment; and that the United States is entitled to the property as against the corporation and the foreign creditors".²⁴ When one considers these cases, the most noteworthy feature is in some respects not so much the extraterritorial recognition or execution of confiscatory measures relating to property situated in a third State as the surrender and transfer of the property to that third State by the confiscating State. The extraterritorial recognition and execution of the measure did of course take place, but rather as a preliminary step which was necessary before the surrender and transfer of the property could be effected.

26. Where it is not a matter of confiscation *stricto sensu*, nor of measures which may be said to partake of that nature, the question of recognition and execution does not arise in the same way. For, even though a strict interpretation of the principle of territoriality would lead to the same conclusions, there is a difference with regard to the doctrine of public policy since the taking of private property for a public purpose, against payment of compensation, is a universally recognized right of the State. Nevertheless, as has been rightly pointed out, until comparatively recently it was

²² *Ibid.*, pp. 84-88.

²³ *Ibid.*, p. 89. Consequently, contrary to what certain authorities have maintained (e.g. Seidl-Hohenveldten, *loc. cit.*, p. 853, note 6), it is not correct that the sole legal basis for such exceptions is the existence of a treaty between the two countries concerned.

²⁴ Cf. Adriaanse, *op. cit.*, pp. 90-96.

²¹ See Adriaanse, *op. cit.*, pp. 81-84 and 86-87.

considered in most States that the enforcement of foreign expropriations of domestic assets was just as incompatible with their sovereignty as the enforcement of confiscations. Yet, during the Spanish Civil War, France tolerated the requisitioning of Spanish vessels which, though begun on the high seas, had been completed in French ports. During the Second World War, courts in the United Kingdom and the United States recognized decrees of the Norwegian and Netherlands Governments in exile, whereby those Governments acquired property belonging to their respective nationals which was situated in foreign territory. The best known cases belonging to this period are *Lorentzen v. Lydden* (1942) and *Anderson v. Transandine, etc.* (1941), together with the decision of the Supreme Court of Sweden in the *Rigmor* case (1941), particularly if the neutral status of the country in which that judgement was given is borne in mind. In it, the Court held that a Norwegian decree transferring the ownership of a Norwegian tanker did not depart from the principles of Swedish law. After the war, the Austrian Supreme Court and English and Canadian courts declared their readiness to grant foreign expropriations effect on domestic assets provided that the indemnity was found to be just.²⁵

27. Although practical instances of it have not yet come to their notice, some authors have drawn attention to the problem which would arise as the result of a lump-sum agreement between the expropriating State and the State of nationality of the person concerned, if some of the property affected by the expropriation or nationalization was to be found in the territory of the latter State. According to Seidl-Hohenvelden, the terms of such agreements do not have any effect on assets situated in the State of nationality. Since the sum agreed on as compensation does not presuppose an "adequate" indemnity, there can be no question of considering such assets as having passed into the ownership of the other State by virtue of expropriation.²⁶ Van Hecke considers the matter from another angle. In his view, the courts of the State of nationality would be free to ascertain whether the lump sum was an adequate compensation and, if it was found not to be, to consider the measures confiscatory and contrary to public policy. Even though the agreement, as is usually the case with such instruments, includes a final renunciation by the claimants, the courts would still be free to ascertain whether their consent had not been given under duress.²⁷ With regard to this question, it must above all be borne in mind that in the circumstances here envisaged, in contrast with the previous cases, the persons in question are nationals of the State of the *forum* and, where their interests are concerned, the courts will necessarily have to conform more strictly to the public policy followed in that country. But, apart from this consideration, which is more or less of a practical nature, the situation must be considered in the light of the practice which has received

conventional endorsement in the lump-sum agreements. If, as was stated in the fourth report²⁸ nationalization need not necessarily be accompanied by the payment of "adequate, prompt and effective" compensation, why should it be supposed that the courts would examine and adjudicate the question on the basis of criteria applicable to expropriations of the ordinary and common type?

38. SOME OBSERVATIONS CONCERNING THESE REQUIREMENTS

28. In the first place, attention should be drawn to the contention of some authors that judicial precedents regarding the legal concepts and principles to be followed in considering and adjudicating problems of the extraterritorial validity of confiscations and expropriations are not as consistent as one might wish.²⁹ If it had been possible to give a more lengthy account here of judicial practice on this point, the truth of this observation could have been demonstrated; and its importance should not be underestimated, should codification of the subject of responsibility eventually be extended to cover this subsidiary aspect of the right of expropriation. In any case, this factor justifies certain general observations with regard to the requirements or conditions on which the extraterritorial application of measures affecting patrimonial rights has been made to depend. In this connexion, reference will be made in turn to the principle of territoriality, the notion of public policy and the immunity of the foreign State, i.e. the doctrine of acts of State.

29. So far as the principle of territoriality is concerned, possibly because judicial decisions have basically tended to identify it with the *lex rei sitae*, there has been some inconsistency in its application. Thus, for example, whatever the interpretation given to it or whatever the aspect from which it is considered—non-extraterritoriality of the measures in question or the exclusive authority of a State over assets in its territory—application of this principle is in fact inconsistent with recognition of the validity of the title acquired by confiscation to assets brought to the State of the *forum* subsequently, and still more so with the execution of acts of expropriation affecting assets abroad. Neither the existence of compensation in the latter case nor the immunity of the foreign State in the former—these being the reasons advanced in the respective cases for abandoning the principle—has any logical connexion with it. From another point of view, as Hjerner has pointed out, not even with respect to tangibles is there any unanimity as to how this territoriality operates, and this is still less the case where

²⁸ See *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), document A/CN.4/119, pp. 16-24.

²⁹ See in this connexion Seidl-Hohenvelden, *loc. cit.*, p. 868; O'Connell, *loc. cit.*, pp. 267 and 293. Hjerner says "If only those reasons which are openly stated in the judgements were to be taken into consideration, the attitude of courts towards foreign confiscations would make a contradictory and confusing impression." (*Loc. cit.*, pp. 205 and 206).

²⁵ Cf. Seidl-Hohenvelden, *op. cit.*, p. 865.

²⁶ *Ibid.*, pp. 867 and 868.

²⁷ *Loc. cit.*, p. 350.

debts and industrial and literary property rights, which can have no *situs* in the strict sense of that word are concerned.³⁰ In the view of Seidl-Hohenveldten, the principle is further weakened by another doctrine, which in his opinion is controversial, namely that, on the strength of the allegiance which a national owes to his home country, that country may require him to hand over his assets held abroad and may gain a title to such assets, which should be recognized everywhere.³¹ For these and other reasons, it is clear that the principle of territoriality cannot be more than a relative factor in determining the extraterritorial effect of confiscation and expropriation. This only applies, of course, to territoriality in the orthodox sense, i.e. purely and simply as an expression of the *lex rei sitae*, for if it were conceived in different terms and given a more flexible character, it could undoubtedly serve as a basis for sound rules offering logical and adequate solutions for the problems in question.

30. The notion of public policy has, in some ways, even more serious drawbacks. The principle of territoriality undoubtedly has the very great advantage that, intrinsically, it does not constitute a legal obstacle to the extraterritorial recognition of measures affecting patrimonial rights or to the enforcement of such measures. But in practice this advantage is offset by the fact that the doctrine of public policy is not merely affected by domestic legal concepts and principles, but is also liable to arbitrary interpretation by the courts of the State where the issue arises. For example, as Van Hecke has pointed out, where questions of expropriation are concerned, it would be the foreign judge's task to appreciate whether the amount and the terms of compensation are so unjust that they impart a confiscatory character to the expropriation.³² When it is a question of a confiscatory measure properly so called, it will be alleged that its penal or fiscal character justifies the application of the principle *odiosa sunt restringenda*.³³

31. With regard to expropriations, should the question of the powerfulness of an indemnity really be submitted to the judgement of a foreign court, which will necessarily decide it according to the principles and legal doctrine prevailing in its country, not to mention the extra-judicial considerations which might affect its decision if the persons concerned were of the same nationality as the court? Nor would recourse to the principle of public policy be justified in all circumstances in cases of confiscation. Although such cases might be exceptional, it is possible to visualize confiscatory measures taken in the form of penal sanctions fully justifiable under any legal system, or fiscal or taxation measures, required by the higher interests of the State, which would also be consistent with very generally

accepted principles and practices. With regard to the first of these suppositions, it is also necessary to take into account the special case of a Government which takes a given measure in order to lay claim to and recover misappropriated assets which have been deposited abroad. It is usual in extradition treaties and practice to request and obtain the delivery of the offender and of the specific goods which are the proceeds of his crime; and a foreign court could not refuse to enforce such a measure without being manifestly guilty of an abuse of the principle of public policy. If it is true, as is often asserted,³⁴ that the real basis of the court decisions in such cases is the "protection of private property" situated within the jurisdiction of the judging country against confiscatory measures which the court deems contrary to the principle of respect for acquired rights, could the same courts extend that protection to goods or assets obtained through manoeuvres involving acts punishable in any part of the world? In this connexion, it should be remembered that, in two well-known judgements, the courts went so far as to say that "public policy" required the extraterritorial recognition and execution of decrees of expropriation.³⁵

32. Lastly, consideration should be given to a problem which has recently arisen in connexion with the principle of the immunity of the foreign State from domestic jurisdiction (the "Act of State" doctrine). The problem derives from the tendency to advocate the abandonment of this principle on the ground that its application prevents domestic courts from protecting the acquired rights of private individuals which have been affected by confiscatory measures or by acts which do not provide for the payment of adequate compensation. Predominant among those supporting this tendency is the American branch of the International Law Association.³⁶ In section 37 (a) reference was made to the cases or circumstances in which the principle is applied and to the results to which its application leads in practice; bearing that in mind, it is not difficult to see that the aim of this new tendency is to restrict the extraterritorial effect of foreign measures by permitting domestic courts to examine them and to amend them if they find them to be contrary to the principle of respect for private property which such tribunals are bound to uphold. But is there in fact any real justification for abandoning this principle when, in this case, the measures in question are classifiable as acts done *jure imperii*? In other words, is it right for a foreign court to determine the validity of State acts of this kind solely from the point of view of establishing whether the patrimonial rights of private individuals have been respected? Judge Lauterpacht, after examining the

³⁴ Seidl-Hohenveldten, *loc. cit.*, p. 860; and Hjerner, *loc. cit.*, p. 207.

³⁵ The reference is to *Lorentzen v. Lydden* (1942) and *Anderson v. Transandine* etc. (1941), mentioned earlier.

³⁶ Cf. International Law Association, *New York University Conference (1958), International Committee on Nationalization (Report)*, pp. 16-17. For a more detailed defence of this tendency, see J. N. Hyde, "The Act of State Doctrine and the Rule of Law" *American Journal of International Law* (1959), vol. 53, pp. 635-638.

³⁰ *Ibid.*, pp. 202 and 203.

³¹ *Loc. cit.*, p. 866.

³² *Loc. cit.*, p. 349.

³³ Cf. B. A. Wortley, "Expropriation in International Law", *Transactions of the Grotius Society of International Law* (1947), vol. 33, pp. 33 and 34.

whole question with his customary thoroughness, reaches the conclusion that immunity must remain the rule with respect to legislative acts and measures taken in pursuance thereof. This would include, for instance, immunity of a foreign State—as distinguished from persons who acquire title from it—in respect of nationalization of property of aliens by virtue of a general statute or decree even if considered to be contrary to international law.³⁷ While the advantages which might be derived from a gradual revision of this principle should not be overlooked, the form of revision advocated by this new school of thought does not seem appropriate, at any rate so long as domestic courts persist in determining the validity of such measures on the basis of domestic public policy.

33. Before concluding this section and in connexion with the matters referred to above, attention should be drawn to a tendency which seems to be developing among authors who specialize in this question. This school holds that problems connected with the extraterritorial application of measures affecting patrimonial rights should be considered and solved in accordance with the principles and rules of (public) international law governing the validity of such measures. For instance, F. Morgenstern has drawn attention to the increased significance of a State's refusal to follow legislation emanating from another on the grounds that such legislation is incompatible with international law.³⁸ In Van Hecke's view, it is quite obvious that progress of the law in this matter will only be achieved by the "international judicial protection of the rights of man".³⁹ In a recent study, Professor Wortley surveys all the problems arising from the extraterritorial application of confiscation, expropriation and nationalization measures in the light of one basic requirement, namely, whether or not such measures are in conformity with (public) international law.⁴⁰

34. The above-mentioned considerations, together with many others which have been omitted here, show that the whole question of the theory and practice of the extraterritorial application of measures affecting patrimonial rights needs to be reconsidered. It is not for the Special Rapporteur even to essay such a task, especially on the basis of a study so superficial as this. Nevertheless, at the end of this chapter of the report, it would seem appropriate to make some general observations. The principle of territoriality should be entirely divorced from the traditional doctrine of the *lex rei sitae*, thus, *inter alia*, enabling all assets, of whatever kind and wherever they may be located, which are affected by a given measure to be conceived of as constituting a single "patrimonial unit". In this way alone can the right of expropriation, which the State

is universally held to possess, be rendered truly effective. And as to the doctrine of public policy—also transplanted without any appreciable change from domestic concepts of private international law—this should be replaced *in toto* by those principles and rules of (public) international law which determine the conditions governing the lawful exercise of the right of expropriation. If these factors establish that measures affecting acquired rights are valid in international law, then there is no reason whatever why the extraterritorial effect of such measures should remain subject to other factors of a domestic nature, more especially when it is remembered that several judicial decisions based on the doctrine of public policy also place occasional reliance on concepts and principles pertaining to the relevant branch of international law.

II. Systems for settlement of disputes

35. During the past few years, as is evident from the increasing number of proposals made to deal with it, growing importance has been attached to the problem of settling disputes relating to acquired rights. Amongst other things, this is due to the fact that such disputes possess a number of characteristic features which distinguish them from other controversies.

36. In the first place—except in cases covered by treaties and certain contracts or concessions of the type referred to in the fourth report—disputes relating to acquired rights differ from those concerning injuries caused to aliens (including cases of injury to aliens' property) by illegal acts or omissions imputable to the State in that, in the case of acquired rights, international responsibility does not derive from the mere existence of the measure affecting those rights but from the conditions and circumstances in which it was adopted or enforced. In other words, save in the exceptional cases referred to, it is not an "unlawful" act or omission, but the "arbitrary" exercise of the State's right to take measures affecting private patrimonial rights which gives rise to international responsibility. Consequently, although the commonest cases are those dealing with the amount of compensation to be paid, such disputes can arise in connexion with any of the conditions or requirements to which the lawful exercise of this right is subject in international law. With regard to "contractual claims", a special situation arises where the dispute is over the non-fulfilment, interpretation or application of a contract or concession containing a Calvo Clause.

39. SETTLEMENT BETWEEN THE STATES CONCERNED

37. The methods and procedures most frequently employed in settling such disputes are the orthodox ones, i.e. those where the attempt at settlement is made by the States concerned—the respondent State and the State of nationality of the private individual who has suffered the injury. Sometimes this method of settlement takes the form of direct negotiations between the two States which, if successful, usually result in the conclusion of a treaty or agreement setting out the

³⁷ "The Problem of Jurisdictional Immunities of Foreign States", *British Year Book of International Law* (1951), p. 237.

³⁸ "Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts which are Contrary to International Law", *International Law Quarterly* (1951), vol. 4, p. 344.

³⁹ *Loc. cit.*, p. 357.

⁴⁰ "The General Principles of Private International Law", *Recueil des cours de l'Académie de droit international* (1958-II), vol. 94, pp. 192 *et seq.*

terms of the settlement. In other cases, however, the parties agree to submit the matter to arbitral bodies, which hear the case and decide it. In the last-mentioned instance, the settlement is still one between the States concerned, provided that they appear as the parties to the dispute.

(a) *Diplomatic settlement (direct negotiation)*

38. Excellent examples of settlements of this type can be found in the treaties and conventions concluded between the States involved in the nationalization of Mexican petroleum, and in the context of the nationalizations carried out after the war by the East European States. The settlements referred to here are not so much the so-called lump-sum agreements considered in the fourth report as other agreements where no stipulation was made as to the total amount of compensation which would be paid for assets expropriated from the nationals of the two contracting parties. Although these other agreements were also primarily designed to settle the matter of compensation, there were differences in the procedures and methods which they envisaged for the ultimate solution of that problem.

39. In one set of conventions of this type, the settlement of the dispute arising out of nationalization was not the sole purpose of the instrument; sometimes indeed it was not even the chief purpose. Thus, for example, the intention of the conventions concluded in 1946 between the United States and Czechoslovakia, and between the United States and Poland, appears to have been, in the former case, to establish commercial relations and, in the latter, to make arrangements for a loan. However that may be, they contained a clause whereby the contracting parties undertook to pay "adequate and effective compensation" to nationals of the other party with respect to their rights or interests in properties which had been or might be nationalized. In another variety of convention belonging to this group, also concluded in connexion with commercial negotiations, it is stipulated that the party which has nationalized property or assets belonging to nationals of the other shall grant them "most favoured nation" rights with respect to procedure, the basis for the calculation of compensation and the determination of the amount thereof.⁴¹

40. Under the arrangements made in a second group of agreements of this kind, it is the private individual concerned who must lodge a claim with the competent authorities of the State which has nationalized his property; but at the same time he is granted certain specific facilities to enable him to do so, such as the right to visit nationalized undertakings, to obtain information regarding their condition and value and to participate in preparing inventories. Moreover, some of these agreements provide for the setting up of mixed

commissions to watch over the implementation of the terms of the agreement. Lastly, there is a third type of agreement, the provisions of which, as Foighel points out, are in close conformity with those traditionally used to obtain compensation for injuries suffered by foreigners as a result of acts or omissions imputable to the State. Some of these agreements provide for the appointment of a group of experts who are to give an estimated valuation of the nationalized property. On the basis of the reports submitted by these experts, the two Governments concerned then agree on the sum payable as compensation to the owners of the expropriated property. This practice was followed, in particular, in the Mexican nationalizations.

(b) *Claims commissions and arbitration clauses*

41. In the past, the method adopted in most cases for the settlement of disputes relating to patrimonial rights was to submit them to claims commissions consisting of representatives of the States parties to the dispute, under the chairmanship of a third person appointed by agreement between the representatives in question or by some other procedure. But this statement needs qualification: the settlement of disputes of this nature was not the sole *raison d'être* for these joint commissions, which were usually set up for the purpose of examining a number of pecuniary claims arising from acts or omissions of a very different kind. What is more, it has on occasion been argued that commissions empowered to decide "all claims for loss or damage" were not competent to deal with claims of a contractual nature. Generally speaking, however, commissions have dismissed these demurrers relating to competence and have proceeded to settle claims of this nature as well.⁴² In addition to commissions of this nature and arbitral tribunals which have ruled on claims affecting patrimonial rights, mention should also be made of the former Permanent Court of International Justice, to which some disputes on matters of this kind were submitted for judgement; these were considered in the previous report.⁴³

42. In recent times, provision for settlement between the States directly concerned has often been made through an expedient which is of particular interest in connexion with disputes over patrimonial rights. We are referring to the insertion in some post-war instruments of arbitration clauses specifically related to disputes which might arise in connexion with the exercise of the right of expropriation. Typical instances of such undertakings are to be found in the economic co-operation agreements concluded between the United States and a number of other countries under the Economic Co-operation Act of 1948. These agreements contain provisions whereby any dispute regarding the compensation due to a United States citizen as a consequence of governmental measures affecting his

⁴¹ This is the type of convention which was concluded by the Scandinavian countries with Czechoslovakia, Poland and Hungary. On such instruments and the others mentioned below, see Foighel, *Nationalization* (1957), pp. 88 *et seq.*

⁴² In this connexion see Feller, *The Mexican Claims Commissions, 1923-1934* (1935), p. 173.

⁴³ For a general account of the organization and working methods of these claims commissions and of other arbitral bodies, see Hudson, *International Tribunals, Past and Future* (1944), chaps. II and VI.

patrimonial rights is to be submitted to arbitration. The so-called Agreements relating to Guaranties authorized by the Mutual Security Act of 1954 contains similar arbitration clauses.⁴⁴ It is hardly necessary to point out that, under the arrangements for arbitral settlement envisaged in these instruments, it is the State of nationality which will be a party to the dispute, not the private individual affected by the measure in question.

40. DIRECT SETTLEMENT BETWEEN THE STATE AND THE PRIVATE INDIVIDUAL

43. Under the arrangements now to be considered, in contrast to those referred to in the preceding section, the attempt to settle the dispute is made directly between the State and the private individual affected. Sometimes this takes place only at a late stage in the claim, but in other instances it does so from the very beginning of the dispute. This difference is reflected in the two practices at present followed, namely, the conclusion of treaties under which private individuals are given the right to lodge a claim direct, and the insertion of arbitration clauses in contracts between the State and a private individual.

(a) *The system of treaties under which powers are vested in private individuals*

44. This practice will already be fairly familiar, since it was referred to in previous reports in connexion with the *locus standi* before international tribunals conferred on private individuals by a number of treaties.⁴⁵ No purpose would therefore be served by reverting to what has already been stated there, especially as it is not always relevant to the type of dispute now under consideration. Nevertheless, the arbitral tribunals set up pursuant to articles 291 and 304 of the Treaty of Versailles, and more especially that established by the German-Polish Convention of 15 May 1922 which heard numerous disputes relating to acquired rights, should be borne in mind.⁴⁶

(b) *The system of arbitration clauses contained in contracts between States and private individuals*

45. Secondly, there is a type of settlement under which the (respondent) State enters into a direct agreement with the foreign private individual as to the system, method or procedure to be followed for the solution of disputes which have arisen or may arise between them over the interpretation or application of

a contract which they have signed. Of the two alternatives which have been mentioned, the second occurs more frequently and in present circumstances it is the one which most warrants examination. An instance of the first-mentioned practice is to be found in the arbitration agreement of 23 February 1955 signed by the Government of Saudi Arabia and the Arabian-American Oil Company (Aramco). The arbitral tribunal set up under article 1 of this agreement was to decide—and did so in its award of 23 August 1958—questions relating to the rights and obligations of either party under the Aramco Concession Agreement submitted to it by one or the other of the parties.⁴⁷

46. There are several varieties of the second type, some of which are in a sense of little interest within the context of this report. We refer here to those arbitration clauses which provide for arbitration or some other method or procedure for reaching a settlement on a purely internal basis, i.e., they do not place the dispute on a genuinely international level because in fact they do not take it out of the jurisdiction of the State. An example of this type of clause is to be found in the contract of 13 December 1947 between the Government of Haiti and a private citizen of Cuban nationality (Vicente Domínguez) relating to the establishment of a sugar factory and a sugar-growing enterprise:⁴⁸

“Any dispute between the contracting parties relating to the performance of this contract shall be submitted to arbitration, one arbitrator being appointed by the State and one by Mr. Vicente Domínguez. The joint decision of the two arbitrators shall be final and subject to appeal, and the parties undertake faithfully to carry out such decision and to act in accordance therewith. Should the arbitrators be unable to agree, they shall, within thirty days of the date on which they have failed to come to an agreement on the matters in dispute, choose a third arbitrator who shall be neither a Haitian nor a Cuban national. If they are unable to agree on the choice of a third arbitrator, such arbitrator shall be appointed by the *Doyen* of the Civil Court of Port au Prince. The decision of the third arbitrator shall be final.”

47. In some contracts this internal form of arbitration will be found in association with a Calvo Clause, on the lines of the following provision in the contract which gave rise to the *Shufeldt Claim (United States of America v. Guatemala, 1930)*:⁴⁹

“17. It is also agreed upon that in case of any question arising from failure of fulfilment or

⁴⁴ Cf. M. Domke, “American Protection Against Foreign Expropriation in the Light of the Suez Canal Crisis”, *University of Pennsylvania Law Review* (1957), vol. 105, pp. 1036 and 1037. For a more exhaustive study of the matter, see “The Settlement of International Investment Disputes” by the same writer in *The Journal of Business Law* (1957), vol. 12, pp. 262 *et seq.*

⁴⁵ Cf. *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/96, chap. V, sect. 18, p. 197; and *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II, document A/CN.4/111, chap. VIII, p. 62.

⁴⁶ Cf. Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942), *passim*.

⁴⁷ Cf. *Arbitration between Saudi Arabia and the Arabian-American Oil Company (Aramco)*, Ward (*s.l. et a.*), pp. i-iii.

⁴⁸ Cf. *Bulletin des lois et actes* (1947), p. 78. Another case which may be quoted as an example is the telephone concession granted on 23 December 1926 by the Province of Mendoza (Argentina), which provided for settlement through the good offices of arbitrators appointed by the parties.

⁴⁹ Cf. *Reports of International Arbitral Awards*, vol. II, United Nations publication, Sales No.: 49.V.1, p. 1085. Similar provisions are to be found in the contracts in the *Salvador Commercial Co.* and the *Beales, Noble and Garrison* cases mentioned in Eagleton, *The Responsibility of States in International Law* (1928), p. 168.

misinterpretation of any of the clauses of this contract the subject will not be taken by any means to the courts of justice nor shall the case be referred to diplomatic channels but that any question which may arise will be submitted to two arbitrators, appointed one by each party, and in case of disagreement between both arbitrators they will appoint a third arbitrator whose action or finding on the subject will be deemed final or just without appeal.”

48. As will have been noted, particularly in those instruments containing a Calvo Clause, the whole purpose of the undertaking to arbitrate is to keep the settlement of disputes, both as regards the composition of the body which is to deal with it and the law to be applied, within domestic jurisdiction.

49. On the basis of these two criteria, which make it possible to determine the true nature of such arbitration clauses, it is not difficult to perceive the fundamental difference between the methods just referred to and those whereby a dispute is placed on the international level. In the case of some of the instruments now under consideration, the criterion is the nature of the applicable law. It will be recalled that, in the fourth report, reference was made to a number of instruments which were to be governed by international juridical systems or principles; in some of them it was indeed stated that the principles to be applied in resolving any disputes which might arise with regard to their interpretation or application were to be those of international law. Such a provision would enable the courts before which any dispute might eventually be brought to investigate and settle it without reference to the law of the contracting State. Since all these topics were dealt with in detail in that report, further reference to the instruments and decisions in question will be omitted in order to avoid unnecessary repetition.⁵⁰

50. On the other hand, there is one feature or aspect to which attention must be drawn, since it was barely referred to in the previous report, and that is the way in which the body provided for in the arbitration clause is to be established or organized. In this connexion, the relevant provisions of three comparatively recent agreements are of special interest. One of them is contained in the Concession Agreement of 9 September 1953 between the Government of the Republic of Liberia and the International African American Corporation, as completed and amended by the Agreement of 31 March 1955. By the terms of this,

“19. Any dispute existing between the Government and the Corporation... with respect to the terms and conditions of this Agreement shall be submitted to arbitrators for decision. Each party shall appoint an arbitrator, and the two so appointed shall select the third, and they shall give decision within sixty days after the question is submitted to their

deliberation. If they cannot agree as to the designation of a third arbitrator, then the President of the International Chamber of Commerce shall appoint said third arbitrator. Any arbitration shall be final and obligatory, it being understood that the parties renounce all appeals.”

51. In the other two instruments, the manner in which the settlement is to be made and the procedure to be followed are set out and regulated in much greater detail.

52. Let us next examine, therefore, the relevant provisions of a concession granted to an oil company on 19 June 1955 by the Government of the United Kingdom of Libya:⁵¹

Arbitration

(1) Any dispute between the parties arising out of or in connection with this Concession, unless otherwise resolved, shall be settled by arbitration proceedings between the Commission as one party and the Company as the other party and such proceedings shall determine the measures to be taken by the parties including, if appropriate, payment of compensation, to put an end to or remedy the damage caused by any breach of this Concession.

(2) The institution of proceedings shall take place upon the receipt by one party from the other of a written request for arbitration. Each party shall within thirty days of the institution of proceedings appoint an arbitrator. If the arbitrators fail to settle the dispute they shall appoint an umpire within sixty days of the institution of proceedings. If they do not do so either party may request the President, or if the President is a national of Libya or of the country in which the Company was originally registered, the Vice-President of the International Court of Justice, to make the appointment.

(3) If either of the parties within sixty days of the institution of proceedings either fails to appoint its arbitrator or does not advise the other party of the appointment made by it, the other party may request the President or, if the President is a national of Libya or of the country in which the Company was originally registered, the Vice-President of the International Court of Justice to appoint a sole arbitrator who shall hear and settle the dispute alone.

(4) The umpire, however appointed, or the sole arbitrator shall not be either a national of Libya or of the country in which the Company was originally registered; nor shall he be or have been in the employ of any party to this Concession or of the Government of the aforesaid country.

(5) Should the International Court of Justice be replaced by or its functions be substantially transferred to any new international tribunal, the functions of the President or Vice-President (as the case may be) of the International Court of Justice exercisable under this Concession shall be exercisable by the President or Vice-President (as the case may be) of the new international tribunal without further agreement between the parties hereto.

(6) The procedure of arbitration shall be determined by the umpire or the sole arbitrator who shall be guided generally by the relevant rules of procedure established by Articles 32-69 inclusive of the rules of the International Court of Justice of 6th May, 1946. The umpire or sole arbitrator shall likewise fix the place and time of the arbitration.

(7) This concession shall be governed by and interpreted in accordance with the Laws of Libya and such principles and rules of international law as may be relevant, and the umpire or sole arbitrator shall base his award upon those laws, principles and rules.

⁵⁰ See *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), document A/CN.4/119, chap. III, part II, sect. 25.

⁵¹ Cf. clause 28, *The Official Gazette of the United Kingdom of Libya*, 19 June 1955, pp. 72 and 73. The concession granted on 8 April 1957 to the Gulf Oil Co. contains a clause (28) to the same effect.

(8) There shall be no appeal against the award and the parties to this Concession shall faithfully abide thereby.

(9) The expenses of the arbitration shall be borne by the parties in such proportion and manner as may be provided in the award.

It will be noticed in the first place that sub-section (1) of the clause refers in fairly comprehensive terms to the questions concerning which either party may have recourse to arbitration. The arrangements made for the constitution of the arbitral tribunal are also noteworthy; they provide not only that the umpire is to be appointed by an authority unconnected with and independent of the parties, but also that the person appointed by such authority may, if either of the parties has failed to appoint its arbitrator, act as sole arbitrator and settle the dispute. Lastly, the applicable law mentioned in the clause includes "such principles and rules of international law as may be relevant".

53. The third and last instrument to which we shall refer is the Iran-Consortium Agreement of 19-20 September 1954, concluded between the Government of Iran, a corporation organized under the laws of Iran and a number of foreign companies of different nationalities. As an example of the degree to which the system of inserting arbitration clauses in instruments between States and private individuals has developed, we reproduce below the greater part of that Agreement.⁵²

Art. 42. A. If in the opinion of any party to this Agreement any other party is in default in the performance of any obligation hereunder, the first party shall first give the other party written notice specifying the respects in which a default is believed to exist and calling upon such other party to remedy the default. Unless the matter is disposed of by agreement within thirty days after the receipt of such notice or such longer period as may be agreed to by the parties, then the complaint may be referred to a Conciliation Committee under Article 43 of this Agreement. Any complaint which either party does not wish to refer to a Conciliation Committee, or which is not determined by a binding ruling of a Conciliation Committee, may then be submitted by the first party to arbitration under Article 31 or 44 of this Agreement as the case may be.

B. For the purposes of this Article and of the said Articles 43 and 44, a Trading Company shall be represented by the Consortium member which nominated it.

Art. 43. The parties to any complaint arising under Article 42 of this Agreement may agree that the matter shall be referred to a mixed Conciliation Committee composed of four members, two nominated by each party, whose duty shall be to seek a friendly solution of the complaint. The Conciliation Committee, after having heard the representatives of the parties, shall give a ruling within three months from the date on which the complaint was referred to it. The ruling, in order to be binding, must be unanimous.

Art. 44. A. (1) Except as provided in Article 31 of this Agreement, arbitration in accordance with the provisions of this Article shall be the sole method of determining any dispute between the parties to this Agreement arising out of, or relating to, the execution or interpretation of this Agreement, the determination of the rights and obligations of the parties hereunder, or the operation of this Article, and which is neither resolved under Article 42 nor determined under

Article 43.

(2) Arbitration proceedings shall be instituted by a notice in writing given by the complainant to the respondent.

B. (1) If the dispute relates to technical or accounting questions it may by agreement between the parties be referred either to a single expert or to a body of three experts, of whom two shall be appointed by the parties (one by each) and the third shall be appointed by mutual consent. If the parties cannot agree upon the single or the third expert either party may request the Director of the

C. (1) If the parties do not agree that a dispute shall be referred to an expert or experts under Section B of this Article, or if they do so agree but the appointments provided for are not made or a decision is not given within the time limited for the purpose, or if in the circumstances set out in Paragraph (4) of Section B of this Article either of the parties seeks the determination of a question of law, each of the parties shall appoint an arbitrator, and the two arbitrators before proceeding to arbitration shall appoint an umpire who shall be the President of the Arbitration Board. If the two arbitrators cannot within four months of the institution of proceedings agree on the person of the umpire, the latter shall, if the parties do not otherwise agree, be appointed at the request of either party, by the President of the International Court of Justice.

(2) If one of the parties does not appoint its arbitrator or does not advise the other party of the appointment made by it within two months of the institution of proceedings, the other party shall have the right to apply to the President of the International Court of Justice to appoint a sole arbitrator.

(3) If the President of the International Court of Justice is a national of Iran or of any of the nations in which the other parties to this Agreement are incorporated, he shall not make the appointments referred to in Paragraphs (1) and (2) of this Section. If for this or any other reason whatsoever the appointment of a sole arbitrator or an umpire is not made in accordance with Paragraphs (1) and (2) of this Section then, unless the parties shall have otherwise agreed in writing, the said appointment shall be made at the request of either party by the Vice-President of the International Court of Justice (provided that he is not a national of Iran or of any of the nations in which the other parties to this Agreement are incorporated) or, failing him, by the President of the Swiss Federal Tribunal or, failing him, by the President or equivalent judge of the highest court of any of the following nations in the order stated: Denmark, Sweden, Brazil.

(4) The appointment of an umpire or sole arbitrator under Paragraphs (1), (2) or (3) of this Section shall be within the complete discretion of the person authorized to make it, and the exercise of his discretion may not be questioned by either party. The person so appointed should not be closely connected with, nor have been in the public service of, nor be a national of, Iran, the nations in which the other parties to this Agreement are incorporated, any member of the British Commonwealth of Nations, or a Protectorate, Colony or country administered or occupied by any of the above nations.

(5) If the arbitration is referred to an Arbitration Board the award may be given by a majority. The parties shall comply in good faith with the award of a sole arbitrator or of an Arbitration Board.

D. The place and procedure of arbitration shall be determined by the parties. In case of failure to reach agreement, such place and procedure shall be determined by the experts, the third expert, the umpire or the sole arbitrator (as the case may be).

E. The parties shall extend to the expert or experts or the Arbitration Board or the sole arbitrator all facilities (including access to the Area) for obtaining any information required for the proper determination of the dispute. The absence or default of any party to an arbitration shall not be permitted to prevent or hinder the arbitration procedure in any or all of its stages.

F. Pending the issue of a decision or award, the operations or

⁵² The complete text of the Agreement is reproduced in J. C. Hurewitz, *Diplomacy in the Near and Middle East, a Documentary Record*, vol. II, 1914-1956 (1956), pp. 348 *et seq.*

activities which have given rise to the arbitration need not be discontinued. In case the decision or award recognizes that the complaint was justified, provision may be made therein for such reparation as may appropriately be made in favour of the complainant.

G. The costs of an arbitration shall be awarded at the entire discretion of the expert or experts or the Arbitration Board or the sole arbitrator (as the case may be).

H. If for any reason an expert, member of an Arbitration Board or sole arbitrator after having accepted the functions placed upon him is unable or unwilling to enter upon or to complete the determination of a dispute, then, unless the parties otherwise agree, either party may request the President of the International Court of Justice to decide whether the original appointment is to be treated as at an end. If he so decides, he shall request the person or persons who made the original appointment to appoint a substitute within such time as he shall specify, and if within the time so specified no substitute has been appointed, or if the original appointment was made by him, he shall himself appoint a substitute. If the President of the International Court of Justice is a national of Iran or of any of the nations in which the other parties to this Agreement are incorporated, or if for this or any other reason his functions under this Paragraph are not performed by him, they shall devolve on one of the other persons referred to in Paragraph (3) of Section C of this Article in the order therein provided.

I. Should the International Court of Justice be replaced by or its functions substantially devolve upon or be transferred to any new international tribunal of similar type and competence, the functions of the President of the International Court of Justice exercisable under this Article shall be exercisable by the President of the new international tribunal without further agreement between the parties hereto.

J. Wherever appropriate, decisions and awards hereunder shall specify a time for compliance therewith.

K. Either party may, within fifteen days of the date of the communication of the decision or award to the parties, request the expert or experts or the Arbitration Board or the sole arbitrator (as the case may be) who gave the original decision or award, to interpret the same. Such a request shall not affect the validity of the decision or award. Any such interpretation shall be given within one month of the date on which it was requested and the execution of the decision or award shall be suspended until the interpretation is given or the expiry of the said month, whichever first occurs.

Art. 45. A. If any final decision or award given under Article 44 of this Agreement contains no order other than that a defined sum of money specified in the decision or award shall be paid to Iran or NIOC by any other party, and if that sum shall not have been paid within the time limited by such decision or award or, if no time is therein limited, within three months thereof, Iran shall have the right to prohibit all exports of crude oil and petroleum products from Iran by the party in default until such sum is paid.

B. If the party liable to execute a final award given in accordance with Article 44 of this Agreement, fails to comply therewith within the time specified in such award for compliance or, if no time is therein specified, within six months after the communication thereof to the parties, the party in favour of which the award has been given shall be entitled to seek the termination of this Agreement by a decision of an Arbitration Board or sole arbitrator made in accordance with Section C of this Article. Any such decision shall be without prejudice to any accrued or accruing rights and liabilities arising out of the operation of this Agreement prior to its termination hereunder, including such other rights, sums or damages as may have been awarded by the Arbitration Board or sole arbitrator.

C. The power to make the decision provided for by Section B of this Article shall only be exercisable subject to the conditions following, namely:

(1) the decision shall be made only by the Arbitration Board or sole arbitrator who made the final award concerned;

(2) if the Arbitration Board or sole arbitrator who made such award is for any reason unable or unwilling to act, the question of termination for non-compliance with an award shall be referred to arbitration in accordance with Article 44 of this Agreement in the manner provided for determination of disputes;

(3) no decision terminating this Agreement shall be made unless the Arbitration Board or sole arbitrator shall first have prescribed a further period (not being less than 90 days) for compliance with the award and after the expiration of such further period shall have found that the award has not then been complied with.

Art. 46. In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals."

The foregoing provisions are so explicit as to require no comment, which would in any case be substantially the same as that already made on the arbitration clause quoted in the previous paragraph. It should be added, however, that as a whole they represent a system of direct settlement between the State and private contracting parties which embodies the essential elements of an "international" settlement of disputes.

(c) *Proposals relating to such systems of direct settlement*

54. Apart from these practical examples of the two systems of direct settlement between the State and foreign private individuals, it is of interest to refer to some of the numerous proposals which have been put forward with a view to developing both systems, particularly the first, but always in connexion with disputes on patrimonial rights, since the time when the Permanent Court of International Justice was set up. In the period immediately following the end of the First World War, mention should be made of the argument put forward by de Lapradelle in the Advisory Committee of Jurists which drafted the Statute of the Permanent Court of International Justice (1920): that it was necessary to guard the possibility of extending the Court's competence to disputes based on economic relations between a State and an individual unless the dispute was political in character. A few years later André-Prudhomme proposed the establishment of an international court to hear appeals from national courts in disputes arising out of "contracts" between States and private individuals. All the other proposals belonging to that period, to some of which we have already referred in previous reports, envisage direct settlement between States and foreign individuals, but not exclusively in connexion with disputes regarding patrimonial rights.⁵³

55. Another proposal made during the same period, the draft arbitration clause prepared by the League of Nations Committee for the Study of International Loan Contracts, is also worthy of mention. In accordance with

⁵³ For a brief account of these proposals, see L. Sohn, "Proposals for the Establishment of a System of International Tribunals", in *International Trade Arbitration* (brochure *s.l.*), pp. 5 *et seq.*

its terms of reference, the Committee was supposed, *inter alia*, "to prepare model provisions—if necessary with a system of arbitration—which could, if the parties so desired, be inserted in such contracts". In its report, the Committee presented the following model text which the parties could modify to suit their requirements :⁵⁴

"(3) *Draft arbitration clause*

89. (a) Any dispute concerning the rights and obligations arising out of the loan contract shall be submitted to the Arbitration Tribunal constituted as provided hereunder. The Tribunal's decisions shall be final and binding.

(b) The following parties may seize the Tribunal – namely, the debtor Government; any bondholder or bondholders in possession of securities not less than 10 per cent of the amount outstanding; any official representative of the bondholders; any officially recognized authority concerned with the protection of bondholders; the supervisor.

(c) Failing agreement between the parties for the submission of the case, any party may seize the Tribunal directly by means of a unilateral application. The Tribunal may give judgement, by default if necessary, in any dispute so brought before it.

(d) The Tribunal shall decide all questions relating to its competence.

(e) The Tribunal shall consist of three persons nominated at the request of one or more of the parties mentioned above, by the President of the Permanent Court of International Justice, from a standing panel of nine persons chosen by the Court.

The persons chosen for this panel shall remain in office for five years and shall be re-eligible.

(f) The Court shall fix the remuneration for each day's sitting of the persons appointed by it and settle the method of payment. The cost of such remuneration shall be borne by the borrower, but the Tribunal may, if it thinks an action frivolous, order those bringing the action to pay the whole or part of such remuneration.

(g) The Tribunal shall fix where it shall sit in any particular case.

(h) The Tribunal shall decide its own procedure, having regard to any agreement on the subject between the parties: similarly, it shall lay down rules as to the right of intervention.

90. In proposing the appointment of the arbitrators by the Permanent Court of International Justice, the Committee hopes that the latter, in its selection of the members of the Tribunals for the various loans, will have recourse, as far as possible, to the same persons, so as to facilitate the establishment of a uniform jurisprudence.

91. The Committee is unanimously of opinion that the Arbitral Tribunal should try disputes exclusively from a legal point of view, and should in consequence confine itself to declaring what are the rights and obligations of the parties. It is necessary to emphasize this point, because the task of arbitral tribunals has sometimes been, not only to declare the law, but to make arrangements which, in point of fact, constitute modifications of the contract. Arbitration in this sense may take on the character of negotiations under the auspices of a third party, with the object of reaching a compromise acceptable to both sides. In the Committee's view, a clear distinction must be drawn between these two functions – viz., on the one hand, the arbitral award – that is to say, the definition of the rights and obligations of the parties and, on the other, the modification of the contract either by negotiation or by decision of a third party. The role of the Tribunal in the foregoing draft arbitral clause is clearly limited to the first of these two functions – that of judge."

The clause obviously envisages the establishment of a truly international arbitral authority, not only in the membership of the tribunal but also in the final and the binding character of its decisions. Moreover, it shows certain special features, such as the requirements as to the status of the parties, which are in keeping with the highly specialized nature of the type of dispute to which the clause refers.

56. The other proposals referred to hereunder do not envisage the insertion of such clauses in contracts between States and private individuals, but rather the creation by the States of some arbitration machinery which could settle disputes of that kind. That is the system suggested in the draft "International Code of Fair Treatment for Foreign Investments", approved by the International Chamber of Commerce at its Quebec Congress (1919). The draft provides for the establishment of an "International Court of Arbitration" (articles 13 and 14), to which representatives of bondholders in an international loan could apply if national courts failed to act within a reasonable period or in the case of unfair treatment not amenable to the jurisdiction of a court (article 10). But the draft contains no provision on the constitution and operation of the arbitral tribunal.⁵⁵

57. The idea of establishing an "international court of arbitration" is more fully developed in the response submitted by the American Branch of the International Law Association at the New York session (September 1958). That court, to which holders of property or contractual rights would have equal access with States, would be designed to resolve disputes between States and aliens and would be constituted along the lines of the Permanent Court of Arbitration at The Hague. It should be animated by those general principles of law recognized by civilized nations, and would supply the advantages of arbitration to the many alien investors whose interests are not contractual or whose contracts do not provide for *ad hoc* arbitration.⁵⁶

58. Substantially the same idea was taken up in the draft convention on foreign investments, prepared by a group of German, Netherlands and British international lawyers and submitted by the Government of the Federal Republic of Germany to a committee of the Organization for European Economic Co-operation (OEEC). Article VII provides for the establishment of an "Arbitral Tribunal" competent to hear any dispute which may arise between the States parties concerning the interpretation or application of the convention, and also authorizes the nationals of any of the parties who have suffered damage through measures alleged to be infringements of the convention to bring a claim against the party responsible, always provided that that party has declared its acceptance of the Tribunal's jurisdiction in respect of such claims. The provisions relating to the organization of the Tribunal

⁵⁴ League of Nations, *Report of the Committee for the Study of International Loan Contracts*, document C.145.M.93.1939, pp. 26 and 27.

⁵⁵ Cf. International Chamber of Commerce, Brochure 129 (Paris, August 1949), pp. 16 and 17.

⁵⁶ *Proceedings and Committee Reports of the American Branch of the International Law Association, 1957-1958*, p. 74.

and the procedure to be followed are set forth in an annex to the convention.⁵⁷

59. The establishment of an Arbitral Tribunal to settle disputes on patrimonial rights is again envisaged in a draft convention prepared by the Committee on a World Investments Code of the Parliamentary Group for World Government. This draft would also allow access to the Tribunal to individuals and companies, on the grounds that only a large undertaking can induce the State of its nationality to provide diplomatic protection. The members of the Tribunal could be appointed by the International Court of Justice.⁵⁸

60. Finally, reference should be made to the draft recommendation submitted to the Consultative Assembly of the Council of Europe by its Economic Committee, relating to the adoption of an investment Statute. Although no proposal concerning the organization and procedure of a tribunal was submitted, there is a declaration to the effect that in the context of "economic co-operation between European and African countries", compulsory arbitration would appear to be the best solution. And it is added that recourse to arbitration for the settlement of disputes should be open both to the contracting parties and to their nationals.⁵⁹

41. SOME OBSERVATIONS CONCERNING THESE SYSTEMS OF SETTLEMENT

61. In analysing the various systems for the settlement of disputes relating to patrimonial rights, it is perhaps inappropriate to raise the question of which of them is the most suitable. In fact, even disputes having a common denominator with regard to the question at issue do not all possess the same characteristics or arise in the same circumstances. In each specific case both factors will have to be taken into account in estimating the advantages or disadvantages of following one or the other system. This comment, however, does not alter the fact that, in principle, it is desirable to follow the system of direct settlement between the respondent State and the alien affected. And although the third report pointed out the advantages of that system in connexion with all disputes arising on the grounds of injury to the persons or property of aliens, there are special reasons for considering it the most suitable method of settling disputes over patrimonial rights. In the last (fourth) report, in defining the scope of international protection for acquired rights, it was shown that such protection was "relative" by comparison with that available for other rights enjoyed by aliens (A/CN.4/119, chap. I, sect. 4). This comment is only introduced with the purpose of emphasizing the fact that in the matter of

patrimonial rights, the grounds for the exercise of diplomatic protection are reduced to a minimum; not to mention the possibility that such rights have been acquired under a contract or concession containing a Calvo Clause.

62. In these circumstances, as has already been pointed out, the question at issue should be the right and obligation of the alien to pursue through international channels a claim already instituted and exhausted within the municipal system. As the claim is one and the same, if the consequences of the act or omission do not go beyond the private injury suffered by the alien, on what grounds or by what title could the State of nationality really object to the private individual himself exercising that right? It should not be forgotten that the entire doctrine of diplomatic protection was based on the premise that, at the international level, private individuals could take no action whatsoever and that as soon as domestic remedies had been exhausted, they were completely without protection against denial of justice by the State from which they were claiming reparation. In such circumstances, protection by the State of nationality was, whether good or bad, the only possible solution. But at the present time, when States themselves have even voluntarily agreed to allow their nationals to bring direct claims before international tribunals, what objection could there be to those nationals agreeing with the respondent State that, with regard to matters and subjects of concern to those persons alone, the dispute should be referred for settlement to an international body? (See third report, A/CN.4/111, chap. VII, sect. 9.)

63. Advocates of the establishment of an international court of arbitration to which private individuals would have access have sometimes raised the question of the exhaustion of local remedies. Thus, for instance, in the report of the American Branch of the International Law Association, to which reference has already been made, it was suggested that the rule should be modernized, in the sense that in situations such as maladministration of the judicial process, or where there has been some enactment of legislation or decree altering the municipal law and preventing the municipal courts from providing a remedy, aliens should have recourse to an alternative forum of the first instance, namely, the international court. Thus, the report added, the alien would be required either to exhaust municipal remedies or the remedies of the international court of arbitration before the diplomatic intervention of his State would be permissible.⁶⁰

64. The question of the exhaustion of municipal remedies could in fact be raised again in connexion with the establishment of a tribunal of the kind indicated, but not in precisely the same terms. The rule has a very clearly defined and precise function in relation to the

⁵⁷ As is stated in the commentary appearing in the pamphlet (published in April 1959, but without a reference symbol) the structure of the Tribunal is not substantially different from that of the Arbitral Tribunal provided for in Loan Regulations 3 and 4 of the International Bank for Reconstruction and Development.

⁵⁸ Cf. Parliamentary Group for World Government, 590715.196, July 1959.

⁵⁹ Cf. Council of Europe, Consultative Assembly, 8 September 1959, document 1027, p. 19.

⁶⁰ *Op. cit.*, p. 75. See also K. S. Carlston, "Concession Agreements and Nationalization", *American Journal of International Law* (1958), vol. 52, p. 275.

exercise of diplomatic protection, and there is no reason to change that function in the case of international claims in which the only parties are the respondent State and the alien individual. When, however, the problem does not arise in connexion with the exercise of diplomatic protection, but in connexion with the recognized right of a private individual to bring a claim before an international tribunal, the situation is different, or may be different if, under the instrument setting up the tribunal, the private individual is authorized to institute proceedings before he has exhausted municipal remedies. In that respect, the situation would be the same as with contracts or concessions where the State and the alien stipulate that there should be recourse to international arbitration to settle any dispute which may arise between them in connexion with the interpretation or application of the instrument. For instance, under any of the instruments whose provisions are quoted in sub-section (b) or the proposals to which reference is made in sub-section (c), the recourse to international jurisdiction as envisaged is not subject to the requirement that local remedies must be exhausted, although there is actually no reference in them to that point. When, in another connexion, we dealt with the possibility of States expressly consenting to the local remedies rule being dispensed with, we observed that, given the nature of the rule, exceptions to its application could not be presumed (third report, A/CN.4/111 para. 24). But in the hypothesis now under consideration no exception would be introduced, for the said instruments would be deemed to contain a tacit waiver, by the State making the contract with the alien, of the right to require the exhaustion of local remedies. Furthermore, if the essential purpose of the arbitration clause in those instruments is precisely to empower the parties to present a claim before an international tribunal whenever a dispute arises, what would be the sense of requiring recourse to municipal jurisdiction? And, in strict accuracy, is it not also the essential design of such instruments that all disputes concerning their interpretation and application should be removed from local jurisdiction?

65. In another context, related to some extent to the foregoing, these arbitration clauses also contain an implicit waiver of the right of private individuals to seek diplomatic protection from the State of their nationality. This aspect of the question, however, has already been dealt with and there is no need to return to it (third report, A/CN.4/111, chap. VII, sect. 10).

B. CONSTITUENT ELEMENTS OF INTERNATIONAL RESPONSIBILITY

I. How international responsibility arises

66. The breach or non-observance of a rule of international law is the first constituent element of the institution of responsibility. This may take the form of either an "act" or an "omission", according to the type of conduct covered by the rule in question. Two problems arise in connexion with this requirement. One is to ascertain whether the act or omission must involve

the non-performance of a well-defined and specific international "obligation" or whether it is sufficient that there has been an "abuse of rights". The second problem is to decide whether responsibility is dependent on a wilful attitude (*culpa* or *dolus*) or on the mere occurrence of an act objectively contrary to international law. We shall begin by considering the first of these problems, namely, how international responsibility arises.

1. THE PREVAILING VIEW: RESPONSIBILITY ARISES OUT OF THE NON-PERFORMANCE OF AN INTERNATIONAL "OBLIGATION"

67. According to the prevailing view, which is set forth in earlier reports and embodied in article 1 of the draft submitted to the Commission (see A/CN.4/111, annex), responsibility arises out of the non-performance of an international "obligation". The term is placed in inverted commas to stress the true meaning or scope given to it in practice and by the authorities, namely, that of an international obligation which, whatever the source wherefrom it stems, has a clearly defined and specific content. This does not mean, of course, that obligations recognized as being of this type are necessarily always so, but that is another aspect of the question which will be dealt with below.

68. This concept is repeatedly reflected in codification drafts and in international jurisprudence. In its 1927 draft, the Institute of International Law states that "the State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations..."⁶¹ The texts adopted in first reading by the Third Committee of the Hague Conference (1930) are based on the same concept. One of these contains the statement that "the international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation".⁶² Innumerable statements to the same effect are to be found in international jurisprudence. In the decisions of claims commissions reference may be made, by way of illustration, to the statement in the *Dickson Car Wheel Company* case (1931): "Under International Law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard."⁶³ With regard to the jurisprudence of the Permanent Court of International Justice and the present Court, we have already seen, when examining the juridical nature of international responsibility on another occasion, that "the duty to make reparation" was deemed to arise out of the

⁶¹ See *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/96, annex 8, article I.

⁶² *Ibid.*, annex 3, article 3. See also Bases of discussion Nos. 2, 7, 12, 13, 16 and 5, *ibid.*, annex 2.

⁶³ Cf. General Claims Commission (United States-Mexico), *Opinions of Commissioners* (1931), p. 187.

State's "breach of an engagement", that is, of an international obligation.⁶⁴ This rigid—or at least apparently rigid—concept of responsibility has not prevented other more flexible interpretations from also being accepted in international jurisprudence, as will be seen further on, but the vast majority of international decisions has clearly endorsed it. The same trend is evident in doctrine, where the existence of responsibility is generally contingent upon the non-performance of an international obligation.⁶⁵

69. Even if the other features or constituent elements of international responsibility are present, it is not always possible to impute to the State the non-performance of an "obligation" which is both clearly defined and specific. The question therefore arises whether, from a strictly legal point of view, when injury has been caused as the result of an unjustified act or omission on the part of the State, responsibility can be deemed to have been incurred although there are no grounds for imputing the violation or non-observance of a rule of international law establishing a sufficiently precise and unequivocal prohibition concerning the act or omission in question. In the theory and practice of international law situations of this type may, in fact, be quite frequent, on account of the lacunae and uncertainties which are still to be found within its complex of rules, including the sphere of conventional or written law. Even in municipal law, in spite of its considerably greater normative development, gaps and uncertainties are far from being entirely overcome. In order to meet the various situations arising as a result, recourse is had, particularly in a municipal juridical system, to general principles of law, to analogy, to interpretation of the applicable standard, to equity, etc. But in the matter of responsibility, in which the first requirement is to determine whether or not the act or omission which has occasioned the injury is contrary to a juridical precept, recourse is mainly had to the principle which forbids the "abuse of rights". This is easily explained if account is taken of the reasons underlying this prohibition and the central part it plays with regard to the exercise of subjective rights.

2. THE DOCTRINE OF "ABUSE OF RIGHTS": OPINIONS OF AUTHORS

70. Relatively few authors have troubled to study the applicability of the doctrine of "abuse of rights" in international relations. The majority of those who have done so, however, have not only reached the conclusion that the doctrine can and should be applied in order to solve particular problems, but also contend that its applicability has already been adequately

demonstrated in practice. The question was first raised officially in the proceedings of the Advisory Committee of Jurists which drafted the Statute of the former Permanent Court. In discussing the provisions concerning sources (art. 38), the Italian member, Ricci-Busatti, referred to the principle "which forbids the abuse of rights" as one of the "general principles of law recognized by civilized nations" which the Court would apply when deciding, in accordance with international law, disputes submitted to it. By way of illustration, he mentioned the disputes which might arise concerning the exercise of the right of the coastal State to fix the breadth of its territorial sea. Assuming that there was no rule of international law in existence which defined the outer limit of this sea area, he suggested that the Court should admit the rulings of each country in this regard, as "equally legitimate in so far as they do not encroach on other principles, such as for instance, that of the freedom of the seas".⁶⁶

71. Since then, a number of authors have emphasized the extent to which the doctrine of abuse of rights has been recognized in international practice, particularly in the jurisprudence of international tribunals and claims commissions, and advocated its progressive application as one of the "general principles of law" referred to in paragraph 1 (c) of article 38 of the Statute of the International Court of Justice. As a source of international law of this kind, Politis considered it of particular importance for the development of the law of nations, especially in regard to the principles governing State responsibility.⁶⁷ Some years later Lauterpacht also remarked that in international law—where, in contrast to municipal law, the process of express or judicial law-making is still in a rudimentary stage—the law of torts is confined to very general principles, and the part which the doctrine of abuse of rights is called upon to play is therefore particularly important. It is one of the basic elements of the international law of torts.⁶⁸ In a more recent monograph, Kiss expresses the view that the prohibition of the abuse of rights is rather a general principle of international law, deriving from the very structure of this legal system, and promoting its development in three distinct ways: by creating a new rule of customary law, by its impact on systems of municipal law, and by contributing to the creation of conventional rules, or rather by originating a new principle.⁶⁹ Cheng considers the doctrine of abuse of rights to be merely an application of the principle of good faith to the exercise of rights. Any violation of the requirements of this principle (that is, when a right is exercised for the purpose of causing injury, in order to evade obligations, in a manner incompatible with the principles of the

⁶⁴ Cf. *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publications, Sales No.: 56.V.3, Vol. II), document A/CN.4/96, chap. III, sect. 6. This concept is so firmly established in the jurisprudence of the Hague Court that it may be said to regard an "international illegal act" and a "breach of international obligations" as synonymous terms. Cf. Schwarzenberger, *International Law*, vol. I (3rd ed., 1957), p. 571.

⁶⁵ See Bustamante and authors cited by him, *Derecho Internacional Público* (1936), vol. III, pp. 474, 481.

⁶⁶ *Proceedings of the Advisory Committee of Jurists (June 16th–July 24th 1920)*, pp. 315 and 316.

⁶⁷ "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des cours de l'Académie de droit international* (1925–I), vol. 6, p. 108.

⁶⁸ *The Function of Law in the International Community* (1933), p. 298.

⁶⁹ *L'abus de droit en droit international* (1953), pp. 193–196.

legal order, or against the interests of others etc.), constitutes an abuse of rights, prohibited by law.⁷⁰

72. The authors who dispute the applicability of the doctrine of abuse of rights in international relations do not always do so on the same grounds. Scerni, for instance, contends that the only theoretical basis on which the doctrine could be founded would be the social and solidaristic conception of subjective rights, a conception which is out of the question on account of the highly individualistic character of international law.⁷¹ In another elaborate study, of more recent publication, J. D. Roulet considers that the doctrine is useless; he points out the primitive and often imprecise nature of the rules of international law and argues that to seek to remedy the situation by means of a doctrine which is similarly characterized by a marked flexibility and lack of precision can produce no positive results.⁷² Viewing the question from another angle, Schwarzenberger maintains that in the cases and situations usually mentioned in support of the recognition and applicability of the doctrine in international law, there have been no real "abuses of rights" but breaches of a prohibitory rule of international law.⁷³

3. RECOGNITION AND APPLICATION OF THE DOCTRINE IN PRACTICE

73. A survey of international practice, particularly in the jurisprudence of the courts and claims commissions, clearly shows that at least the basic principle of the prohibition of abuse of rights is applicable in international relations. This is apparent from the decisions of the Hague Court itself. In the case concerning *Certain German Interests in Polish Upper Silesia* (1926), the former Permanent Court admitted that, in contractual matters, the misuse of a right or the violation of the principle of good faith have the character of a breach of the treaty. The Court further stated that the misuse of the right could not be presumed, and that it rested with the party who stated that there had been such misuse to prove his allegation.⁷⁴ In a later decision, the Court pointed out that a State is guilty of an abuse of rights when it seeks to evade its contractual obligations by resorting to measures which have the same effects as acts specifically prohibited by

an agreement.⁷⁵ Likewise the new International Court of Justice, dealing with the right to draw straight baselines for the purpose of delimiting the territorial sea, mentioned the "case of manifest abuse" of this right by the coastal State.⁷⁶

74. Commenting on the arbitral decision in the *Boffolo* case and similar cases, Judge Lauterpacht observes: "The conspicuous feature of these awards is the view that the undoubted right of expulsion degenerates into an abuse of rights whenever an alien who has been allowed to take up residence in the country, to establish his business and set up a home, is expelled without just reason, and that such an abuse of rights constitutes a wrong involving the duty of reparation."⁷⁷ The doctrine of the abuse of rights has been applied in various other matters. For example, in a well-known case, the General Claims Commission (United States-Mexico) referred to "world-wide abuses either of the right of national protection or of the right of national jurisdiction", stating in that connexion that "no international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible with the general rules and principles of international law".⁷⁸ The problem was also raised in the *Trail Smelter* arbitration (1938-1941) between the United States and Canada, although no explicit reference was made to the prohibition of the abuse of rights: "... under the principles of international law", the Court stated, "... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".⁷⁹

75. The basic concept of the "abuse of rights" also appears in certain international treaties and conventions. For example, in the Inter-American Convention on Rights and Duties of States (Montevideo, 1933), it is stipulated that "the exercise of these rights has no other limitation than the exercise of the rights of other States according to international law." Although expressed differently, the same idea was embodied in the Convention on the High Seas, adopted by the Geneva Conference of 1958. Under its article 2, "... Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law" and similarly, "these freedoms [of navigation, of fishing, etc.], ... shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas". The text of these provisions and their legislative history clearly show the purpose they serve, namely,

⁷⁰ *General Principles of Law as applied by International Courts and Tribunals* (1953), pp. 121 and 136.

⁷¹ *L'Abuso di Diritto nei Rapporti Internazionali* (1930), p. 80. See in the same sense Cavaglieri, *Corso di Diritto Internazionale* (3rd ed., 1934), p. 508.

⁷² *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (1958), p. 150.

⁷³ "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international* (1955-1), vol. 87, pp. 309 *et seq.* In a later publication Professor Schwarzenberger seems to have altered his position concerning the "arbitrary or unreasonable exercise of absolute rights", that is, of "rights or discretion within the exclusive jurisdiction of States". Cf. "Uses and Abuses of the 'Abuse of Rights' in International Law", *Transactions of the Grotius Society of International Law* (1956), vol. 42, p. 167.

⁷⁴ Publications of the Permanent Court of International Justice, *Series A*, No. 7, pp. 30-37.

⁷⁵ *Case of the Free Zones of Upper Savoy and the District of Gex* (1932), *Ibid.*, *Series A/B*, No. 46, p. 167.

⁷⁶ *Fisheries case, Judgment of December 18th, 1951: I. C. J. Reports 1951*, p. 142.

⁷⁷ Lauterpacht, *Op. cit.*, p. 289.

⁷⁸ Cf. General Claims Commission (United States-Mexico), *Opinions of Commissioners* (1927), p. 23.

⁷⁹ *Reports of International Arbitral Awards* (United Nations publication, Sales No.: 49.V.2), vol. III, p. 1965.

that of limiting the exercise of rights which are not always well-defined and precise rules in general international law or in the particular instruments which recognize them.

4. WHEN "ABUSE OF RIGHTS" GIVES RISE TO INTERNATIONAL RESPONSIBILITY

76. In international law, as in municipal law, it is necessary to determine what, exactly, constitutes an "abusive" exercise of a right.⁸⁰ But apart from the considerable difficulties that would be encountered if we attempted an exhaustive and systematic classification of the various and varied instances of "abuse of rights", especially if such a classification were to be based on cases encountered in practice, for the purposes of the present report we are mainly concerned with the fact that the principle *per se* has been recognized as a principle applicable to international relations, either as a "general principle of law", or as a general principle of international law.⁸¹ Clearly, it is not always easy to determine whether the case is one of abuse of rights or of a breach of an international obligation *stricto sensu*. This, however, is in turn very different from saying that it is always possible to detect a breach of an international obligation stemming from a clear and specific injunction to do or abstain from doing a given act. There is no denying that as a complex of rules international law suffers, to a far greater extent than municipal law, from gaps and lack of precision, that this occurs in customary law as well as in conventional and written law and that these gaps and this lack of precision are to be found in practically all matters which the law of nations embraces.

77. In view of the foregoing, it is necessarily true that the doctrine of the abuse of rights finds its widest application in the context of "unregulated matters", that is, matters which "are essentially within the domestic jurisdiction" of States. In fact, as has been pointed out, even the most forceful opponents of the doctrine admit the possibility of the abusive exercise of this category of State rights. And in any field in which States necessarily enjoy wide discretionary powers the applicable principles are precisely those "principles of international law which govern the responsibility of the State" for injuries caused in its territory to the person or property of aliens. The example usually given is the right of the State to expel aliens, though this, of course, is not the only or the most frequent example. Whatever the aspect of the "treatment" to which aliens are entitled under those principles governing international responsibility, it is recognized, as can be seen from chapter III of the second report (A/CN.4/106), that the State possesses the right to take measures restricting human rights and fundamental freedoms for

⁸⁰ For the different criteria used in defining the institution in municipal law, see L. Josseland, *De l'esprit des droits et de leur relativité, théorie dite de l'abus des droits* (1927), *passim*.

⁸¹ For the criteria put forward in this field with a view to defining the "abuse of rights" see Roulet, *op. cit.*, pp. 67 *et seq.* See also Cheng, *op. cit.*, for a classification of the different forms the institution takes in international jurisprudence.

reasons of internal security, the economic well-being of the nation, to ensure order, to protect health and morals, etc. Consequently, where this right is not governed by explicit and exact rules, the international responsibility which may be incurred by the State through a violation of human rights and fundamental freedoms in such cases will only be imputable on the grounds of an unjustified and arbitrary, i.e. "abusive", exercise of the discretionary power.

78. In the fourth report, in examining the international responsibility which may be incurred by the State through measures which affect acquired rights, a distinction was made between measures which involve "unlawful" acts and those which, by contrast, can only be reflected in "arbitrary" acts. This, as has been demonstrated in practice and recognized by some authors, is another context in which the doctrine of the abuse of rights can be applied. In view of the impossibility, at least for the present, of devising a detailed and precise set of rules governing the right of expropriation, the notion of "arbitrariness" is all that can be relied upon in any attempt to ascertain whether international responsibility exists and is imputable. The mere act of expropriation, whatever form it takes and whatever the nature of the property, constitutes the exercise of a right of the State. Consequently, except in the specific cases referred to in the fourth report (existence of treaties or a certain type of contract or concession), it would not be possible to speak of non-performance of an international obligation. The factor giving rise to responsibility, when it exists, must necessarily be something different: the absence of a reason or purpose to justify the measure, some irregularity in the procedure, the measure's discriminatory nature or, according to the circumstances, the amount, the degree of promptness or form of the compensation.

II. The basis of international responsibility

79. Consideration must now be given to the second problem arising in connexion with the circumstances which must be present before an act or omission can be described as contrary to international law. As was pointed out in paragraph 66 above, the problem is to ascertain whether international responsibility can only be incurred, and consequently imputed, if, in addition to the unlawful and harmful act, there has been some wilful act (*culpa* or *dolus*) on the part of the subject of imputation. The first step must be to consider the opinions of the authorities on the question, with a special view to assessing the two basic theories which have been propounded.

5. Opinions of authors on this question

80. The theory of "fault" was introduced into international law by Hugo Grotius. He held that "... if anyone be bound to make reparation for what his minister or servant does without his fault, it is not according to the Law of Nations, ... but according to the Civil Law, and even that rule of the Civil Law is not general...". Grotius extended this principle to cover cases of responsibility for acts by private individuals

through the notions of *patientia* and *receptus*: "A civil community [a State], like any other community, is not bound by the act of an individual member thereof, without some act of her own, or some omission."⁸² As has been pointed out, the theory was intended to replace the Germanic doctrine of reprisals, which was based on the notion of "collective" responsibility for injuries caused to a State or its subjects by a third State or its subjects.⁸³ Subsequently, and up to the end of the nineteenth century, authors accepted the theory virtually without questioning it. For a further quarter of a century, the theory continued to be prevalent among students of international law, and even today it has a considerable number of adherents—particularly in its modern version according to which responsibility derives not from the fault or *culpa* of the State itself, but from that which may be imputed to the agency or official responsible for the act or omission which places an obligation upon the State.⁸⁴

81. Neither of these versions of the theory of "fault" should be confused with the concept of the "principle of fault" advanced by B. Cheng. On the basis of certain arbitral decisions which shall be examined further on, this author maintains that fault is synonymous with "unlawful act (or omission)", because it implies the violation of an obligation giving rise to international responsibility. In his view, contrary to the opinion of most writers, fault in modern jurisprudence is no longer identified exclusively with negligence or malice. However, the fact that it means any act or omission, which violates an obligation, does not imply that in order to be internationally unlawful such an act or omission must needs be committed "wilfully and maliciously or with culpable negligence". Certain acts are not internationally unlawful unless committed with malice or culpable negligence. But the latter is only one category of fault, namely, default in those obligations which prescribe the observance of a given degree of diligence for the protection of another person. In short, Cheng holds that the only genuine cases of "objective responsibility" are those in which "the obligation to make reparation is conditional on the happening of certain events independent of any fault or unlawful act imputable to the obligated party". In such cases, however, he does not consider that there is responsibility *stricto sensu*, but simply a legal obligation modelled on the notion of "assumed responsibility".⁸⁵

82. The other main school of thought consists of the authors who favour the theory of "risk". Although Triepel was the first to attack the theory of "culpability" (fault), he really only rejected it so far as political and moral satisfaction was concerned, and acknowledged the need for retaining the element of *culpa* or fault with regard to the duty of material re-

paration.⁸⁶ Anzilotti was the first to reject the theory entirely, postulating in its place the principle of objective responsibility. In his view, the State is responsible not because of the direct or indirect connexion which exists between its will and the action of the individual (agency or official), nor because of a possible culpable or malicious intention, but because it has not fulfilled the obligation imposed upon it by international law. It is not fault (*culpa* or *dolus*) but a fact contrary to international law which makes the State responsible; for it is the mere lack or want of diligence (in the prevention of the act of the individual or in its punishment), and not the "culpable" fault, which constitutes the violation of international law.⁸⁷

83. A number of more recent writers have adhered to the theory of "risk" or of objective responsibility. At the session of the Institut de droit international, to which reference was made earlier, Bourquin maintained that, even in cases in which international responsibility arises out of "lack of diligence", the basis of the responsibility need be sought no further. And, in the final analysis, as the intention or *culpa* is obscured by the violation of the international obligation, the idea of fault, as an independent and necessary condition for State responsibility, becomes superfluous.⁸⁸ Guggenheim also has stated that the "objectivation" of the notion of negligence imposes upon the community a duty of vigilance and diligence.⁸⁹ Sometimes the theory has been explained from the point of view of the problem of "imputability", and in this connexion, it has been submitted that if the breach of an international obligation is positively determined, this conduct (act or omission) will be imputed provided that the State agency or official concerned had the requisite competence and the action took place in such circumstances that international law would make the imputation.⁹⁰ The members of the Vienna School explain the theory merely on the grounds of the "collective" character of the institution of international responsibility.⁹¹

84. Some writers have attempted to solve the problem by adopting an eclectic approach. This was the course first followed by Shoen, who admits that *culpa* is required in all cases of responsibility for acts of private persons, where lack of diligence on the part of the State organs or officials must be established, but

⁸⁶ Cited by Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 142, footnote 5.

⁸⁷ *La Teoria Generale della Responsabilita dello Stato nel Diritto Internazionale* (1902), pp. 172-173.

⁸⁸ Cf. *Annuaire de l'Institut de droit international* (1927), vol. I, pp. 504-505.

⁸⁹ Guggenheim, *op. cit.*, p. 54.

⁹⁰ Cf. Starke, "Imputability in International Delinquencies", *British Year Book of International Law* (1938), p. 114. The same position will be found in Diena, *Diritto Internazionale Pubblico* (4th ed., Milan, 1939).

⁹¹ See Kunz "Teoria General del Derecho Internacional", *Cursos de la Academia Interamericana de Derecho Comparado e Internacional* (Havana, 1952), vol. II, p. 431. Kelsen, however, making a distinction between the obligated party and the party against whom the sanctions are directed, concedes that the responsibility of the latter may be based on the fault of the delinquent. Cf. *Principles of International Law* (1952), p. 122.

⁸² *De Jure Belli ac Pacis*, L.ii.c.17,s.20 and c.21,5.2.

⁸³ On this point, see Nys, *Les origines du droit international* (1894), pp. 62 *et seq.*

⁸⁴ For these two versions of the theory, see Guggenheim, *Traité de droit international public* (1954), vol. II, pp. 50-52.

⁸⁵ Cf. *General Principles of Law*, etc., chap. 8.

not with respect to the other cases, in which responsibility is incurred simply by the violation of international law.⁹² Strupp, following a similar line of thought, would extend the application of fault to all cases of omissions (*délits d'omission*), where responsibility is engaged because of lack of diligence, but in all cases of positive acts (*delicta commissiva*) would hold the State responsible merely on account of the illegality of the act.⁹³ Authors seeking to find compromise formulae have sometimes followed other lines of reasoning. Anzilotti himself, in a later reconsideration of his original position, admitted that: "Whenever there is a rule providing for the international responsibility of the State for certain acts, it is necessary to ascertain whether such rule, tacitly or expressly, makes its imputation dependent on the fault or *dolus* on the part of the organ, or, on the contrary, points only to the existence of a fact objectively contrary to international law." It is his view that in most cases the question cannot be resolved on the basis of a specific rule; recourse must therefore be had to general principles of law, according to which, in normal circumstances, the *animus* of the individual or organ of the State is not the reason for or a condition of responsibility in international law.⁹⁴ Still other authors, though advocating the fault theory, have also made concessions by admitting that "if necessities of international life lead us to the adoption, in certain instances, of the principle of absolute liability, such cases will nevertheless, as they do in private law, constitute an exception to the generally recognized principle of responsibility based on fault".⁹⁵

6. THE POSITION IN INTERNATIONAL JURISPRUDENCE

85. This divergence of opinion among the authorities is principally due to the uncertainty and lack of a settled approach in international practice. To begin with, the decisions of international courts and claims commissions are not always consistent in the terminology they use in this connexion. Thus, in some cases, which often are cited to demonstrate the explicit acceptance of the classic theory, the word "fault" is not employed in the sense of *culpa* or of any other subjective element, but in the sense of an act or an omission constituting by itself the violation of the international obligation involved. For example, in the *Jamaica* case (1798) the term is used as synonymous with "omission of duty".⁹⁶ Likewise, in the *Russian Indemnity* case (1912), decided by the Permanent Court of Ar-

bitration, "fault" means every act or omission involving the duty to make reparation; that is to say, it is identified with the concept of an "unlawful act or omission".⁹⁷

86. Undoubtedly there are cases where the subjective element (fault, *culpa* or even *dolus*) is not only expressly mentioned, but also taken as the basis of responsibility and the foundation for the imputation of the act or omission involving a breach of international law. In the *Chattin* case (1927), the Mexican-United States General Claims Commission admitted that in a case of injustice committed by a judicial organ it is necessary to inquire whether the treatment of an alien amounts to an outrage, bad faith, wilful neglect of duty or an insufficiency of governmental action recognizable by every unbiased man.⁹⁸ And in the *Fur Seal Arbitration* (1892), the President of the Tribunal referred to an injury done "maliciously".⁹⁹ In other cases, however, the unlawful character of the act or omission was not made dependent on the *animus* behind the conduct of the State organ or official. For example, in the *Caire* case (1929), the Commission declared that "to be able to admit this so-called objective responsibility of the State for the acts committed by its officers or organs outside the limit of their competency, it is necessary that they should have acted at least apparently as competent officials or organs, or that, in acting, they had used the powers or means belonging to their official capacity."¹⁰⁰ Again, in the *Jessie* case (1921), decided by the British-United States Claims Arbitral Tribunal, it was admitted that "any Government is responsible to other Governments for errors in judgement of its officials purporting to act within the scope of their duties and vested with power to enforce their demands."¹⁰¹

87. With regard to the decisions of the former Permanent Court of International Justice, according to a widely-held view, "Until the Judgement in the *Corfu Channel (Merits)* case (1949), the practice of the World Court had been unambiguous. It was based on the assumption that any imputable and voluntary breach of an international obligation constituted an international tort. Not in a single judgement or advisory opinion did the Court pay any attention to guilty

⁹⁷ Scott, J. B. (ed.), *The Hague Court Reports* (1916), p. 543.

⁹⁸ Cf. General Claims Commission (United States-Mexico), *Opinions of Commissioners* (1927), p. 429.

⁹⁹ Moore, J. B., *History and Digest of the International Arbitrations, etc.* (1898), vol. I, p. 890.

¹⁰⁰ English text quoted from Cheng, *op. cit.*, p. 205. Cf. *Jurisprudence de la Commission franco-mexicaine des réclamations, 1924-1932* (Paris, 1933), p. 221.

¹⁰¹ *Reports of International Arbitral Awards* (United Nations publication, Sales No.: 55.V.3), vol. VI, p. 59. It has recently been said that cases of responsibility for the *ultra vires* acts of organs or officials "seem to suggest that not only is an element of malice not essential to the establishment of responsibility, but even a total absence of fault will not be fatal to the claim". Cf. T. Meron, "International Responsibility of States for Unauthorized Acts of their Officials", *British Year Book of International Law* (1957), p. 96. See other awards which seem to accept "objective responsibility" in Basdevant, "Règles Générales du Droit de la Paix", *Recueil des cours de l'Académie de droit international* (1936-IV), vol. 58, pp. 670 et seq.

⁹² Quoted in Eagleton, *The Responsibility of States in International Law* (1928), p. 212. This view was shared by de Visscher, "La Responsabilité des Etats", *Bibliotheca Visseriana* (1924), pp. 86 et seq.

⁹³ *Éléments du droit international public universel, européen et américain* (2nd ed., 1930), vol. I, p. 330.

⁹⁴ *Corso di Diritto Internazionale* (3rd ed., 1928), pp. 443-444. The idea of deciding on the basis of the relevant rule whether or not responsibility depends on the presence of any subjective element was adhered to subsequently by Starke, *loc. cit.*, p. 116, and by Ross, *A Text Book of International Law* (1947), pp. 257-258.

⁹⁵ Lauterpacht, *op. cit.*, p. 143.

⁹⁶ Cf. J. B. Moore, *International Adjudications, etc., Modern Series* (1929-1933), vol. IV, p. 499.

intent or negligence as a constituent element of international torts.”¹⁰² Though it may be claimed that in the *Corfu Channel* case the International Court of Justice held Albania responsible on the basis of the fault (*culpa*) theory, there is no passage in the judgement where an unequivocal statement to that effect can be found. It is true that the Court admitted that “it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.” But the Court, when determining the “other circumstances” needed to impute responsibility, proceeded to examine only “...whether it has been established by means of indirect evidence that Albania has knowledge of minelaying in her territorial waters independently of any connivance on her part in this operation”. In a further passage the Court included, among the international obligations relevant to the case, “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.¹⁰³ When the judgement is read as a whole, the question whether this element or circumstance of actual “knowledge” should be deemed identical with or, at least, analogous to that of *culpa*, is a matter for interpretation. The views expressed with regard to this aspect of the judgement by the judges who did not concur in it seem to lend further support to this point of view.¹⁰⁴

7. CONSIDERATION OF THE PROBLEM FROM THE STANDPOINT OF CODIFICATION

88. Obviously neither doctrine nor case-law has yet adopted a conclusive position as to the basis of international responsibility. Some general submissions can be made, however, in the light of a study of the latter. For instance, in the case of omissions related to acts of private persons, the subjective element (*culpa* or *dolus*) is so closely linked to the conduct of the organ or official as to be practically identified therewith, thus constituting, in the final analysis, the actual object of imputation. In other words, in cases of responsibility arising out of the negligence (or any other form of exercise of the will) of the organ or official, it is the negligence or volition which constitutes the conduct contrary to international law. As the Special Rapporteur indicated in his second report (A/CN.4/106, chap. V, sect. 15), if there is any category of cases in which it cannot be said that responsibility arises through the simple existence of a wrong it is surely the category in which there has been failure to exercise “due dili-

gence”. On the other hand, in the case of positive acts and even of some omissions which give rise to the direct responsibility of the State, the *animus* attributable to the organ or official, if it plays any role at all, does not appear to have any serious bearing on the imputation of responsibility, which depends fundamentally on the existence of an injury and on the equally objective fact that the injury was caused through the non-performance of an international obligation (or an abuse of right, as the case may be). This second submission is made without prejudice to the fact that the rule in question may make the imputation of responsibility conditional on *culpa* or on any other subjective element or that the international court may infer such a condition from the nature or purpose of the rule. Further submissions, unless made in the same general terms as the foregoing, could fail to reflect practical realities.

89. How should this problem of the basis of international responsibility be approached from the technical standpoint of codification? Except for the draft prepared by the Institute of International Law in 1927 and that adopted by the Third Congreso Hispano-Luso-Americano de Derecho Internacional, apparently none of the official or private codifications mentioned in the Special Rapporteur’s reports has attempted to solve the problem.¹⁰⁵ The text adopted by the Institute also does not take a definite, clear-cut stand. Members were divided not only on the question of substance, but even as to the advisability of introducing into the draft a provision defining the basis of international responsibility. The majority was in favour of the “fault” theory, which the Rapporteur, Professor Strisower, had adopted in his report as applicable to all cases of responsibility.¹⁰⁶ The text finally approved, however, seems to reflect the purpose of reconciling the two schools of thought, though admitting objective responsibility rather as an exception to the general rule:

“This responsibility of the State does not exist

¹⁰⁵ It has been said that article 1 of the text approved by the Third Committee of the Hague Conference recognized the “objective responsibility” of the State for the actions of its organs and that it completed the development of this concept. Cf. Guggenheim, *op. cit.*, p. 53. It will be recalled that, according to this article, “International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.” Apart from the fact that the text only follows the usual drafting of contemporary codifications, there is nothing in the records of the Third Committee showing that either the French delegation had in mind the problem of the basis of international responsibility. Cf. League of Nations Publications (document C.351(c) M.145(c)1930.V.), pp. 26–31, 236.

¹⁰⁶ The Rapporteur’s original text read as follows: “The State shall not be held responsible unless the non-performance of the international obligation is a consequence of the malice (*dol*) or negligence of its organs.” At a later stage of the discussion the Third Committee of the Institute introduced a new text leaving a door open for cases in which fault might not be required: “The State shall not be held responsible unless the non-observance of the international obligation is the consequence of a fault of its organs. The question of the cases in which the State may be held bound to make reparation for an injury when there has been no fault on the part of its organs shall remain open.” Cf. *loc. cit.*, pp. 471 and 557 and 558, respectively.

¹⁰² Schwarzenberger, *International Law*, vol. I, *International Law as Applied by International Courts and Tribunals* (3rd ed., 1957), p. 632. See a similar comment in Guggenheim, *op. cit.*, p. 52.

¹⁰³ *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, pp. 18 and 22.

¹⁰⁴ See Dissenting Opinions by Judges Badawi Pasha, Krylov and Azevedo, *ibid.*, pp. 65, 71 and 85, respectively.

if the lack of observance of the obligation is not a consequence of a fault of its organs, unless in the particular case a conventional or customary rule, special to the matter, admits of responsibility without fault."¹⁰⁷

On the other hand, the second of the drafts we have mentioned adopts the "fault" theory in absolute form: "That such unlawful act be legally imputable to the State on account of duly substantiated *dolus* or *culpa* on its part."¹⁰⁸

90. It is not difficult to see that neither of the two texts reflects the traditional practice. The latter states as an absolute principle a concept that has been gradually abandoned since the end of the last century. The Institute's proposal, in turn, besides suffering from substantially the same defect, fails to provide for cases of "reponsibility without fault", as they are most frequently encountered, so far as form and scope are concerned, in practice. In connexion with these draft codifications it is interesting to note that during the Institute's discussions one of its members, Le Fur, expressed the opinion that it was possible to devise a theory of responsibility without reference to the concepts of fault or risk, since the conflict between these two concepts was exaggerated and of a purely technical interest. On the same occasion de Visscher, after pointing out the shortcomings inherent in each concept, favoured a theory of responsibility based on a *système des preuves*, establishing the cases in which the State is *prima facie* responsible and in which it can exonerate itself by invoking certain circumstances.¹⁰⁹

8. SPECIAL SITUATION CREATED BY TECHNICAL DEVELOPMENTS

91. The material referred to hitherto relates exclusively, or at least primarily, to the most commonly encountered cases of responsibility. Hence the survey would be incomplete without a reference to the special situation created by the progressive application of modern technology to industrial and other activities. These developments can logically be expected to have repercussions on the law of nations similar to those already observed in the municipal law of many countries; new categories of objective responsibility will have to be created to provide for the growing number of risks entailed by the use of the new technology. Among the precedents offered by international practice, mention need be made only of the *Trail Smelter* case which, although it was cited above in connexion with "abuse of rights", may also be adduced as proof that the State is responsible for injuries caused by specific industrial activities, without reference to any question of *animus* attributable to the organ or official whose duty it is to prevent the occurrence of the accidental damage.

92. This problem has gained attention in the theoretical field because of the nuclear tests carried out in

some areas of the high seas. In defending the right of the United States to conduct these tests, McDougal and Schlei maintain that such tests can be undertaken as "preparatory measures for self-defense" within the concept of the State's "reasonable competence" beyond its territorial seas, provided that they involve only a temporary and limited interference with navigation and fishing on the high seas.¹¹⁰ Other authors, however, have expressed opposition to these tests and have pointed out the international responsibility which the State conducting them may incur. Professor Gidel, in particular, has emphasized that, from the legal point of view, nuclear tests affecting the high seas undoubtedly constitute internationally unlawful acts giving rise to a duty to make reparation for the injuries caused, regardless of the precautionary measures which may have been taken to avert such injuries.¹¹¹

93. Much the same situation arises in connexion with nuclear tests conducted within a State's territory, the use of the high seas as a receptacle for radioactive waste materials, the use of space for launching intercontinental missiles and artificial satellites, etc., all of which involve new dangers, often unforeseeable and uncontrollable, to human safety, property and the use and exploitation of the high seas and of the suprajacent space. The consideration and solution of the problem are made more difficult by the fact that in all these cases it must first be decided whether a State has the right to use the high seas and the suprajacent space—and even its own territory—to conduct tests of this type. President Eisenhower, disagreeing with the protests evoked by the Soviet Union's announced plans to test a powerful new missile in an area of the central Pacific, recently declared that the United States had always claimed the right in the high seas to use areas thereof for valid scientific experiment and had, in doing so, notified everybody concerned, and then taken the proper measures to warn away from the areas involved anyone that might be damaged; he added that the United States had assumed that that was within the meaning and spirit of international law and that it would be very unusual for the United States to protest against the Soviet Union's plans to do the same thing.¹¹² Nevertheless, the first United Nations Conference on the Law of the Sea (Geneva, 1958) recognized, in connexion with article 2 of the Convention on the High Seas cited above, that "there is a serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement of the freedom of the seas."¹¹³ Later, at its fourteenth session, the General Assembly requested France to refrain

¹¹⁰ "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security", *The Yale Law Journal* (April 1955), vol. 64, pp. 684-687.

¹¹¹ "Explosions nucléaires expérimentales et liberté de la haute mer", in *Problèmes fondamentaux du droit international, Festschrift für Jean Spiropoulos* (1957), pp. 198, 201-202, 205. For a similar view, see E. Margolis, "The Hydrogen Bomb Experiments and International Law", *The Yale Law Journal* (1955), vol. 64, pp. 635, 641, 647.

¹¹² UPI dispatch from Washington, dated 13 January 1960.

¹⁰⁷ *Loc. cit.*, vol. III, pp. 330 and 331.

¹⁰⁸ Cf. *III Congreso Hispano-Luso-Americano de Derecho Internacional, Boletín de Información No. 15, Resolución V.—La Responsabilidad del Estado por Daños Causados a los Extranjeros*.

¹⁰⁹ *Loc. cit.*, vol. III, p. 106

from undertaking nuclear tests in the Sahara, "conscious of the great concern throughout the world repeatedly expressed in the United Nations over the prospect of further nuclear tests and their effects upon mankind" (General Assembly resolution 1379 (XIV));¹¹³ some States had also suggested that the attention of France should be drawn to the fact that, in creating conditions of danger in Africa, it could not assume the responsibility for the protection of the threatened sovereign States.

94. Obviously, in view of these resolutions, it cannot be asserted that there is, *stricto sensu*, an international obligation prohibiting nuclear tests or, for that matter, the other tests which have been mentioned. Nevertheless, if States invoke the freedom to use the high seas or the suprajacent space, or even their own territory, the question arises whether the exercise of that freedom would be lawful if it involved activities potentially harmful to such important interests as the safety of human beings. From the viewpoint of international responsibility, the problem is not to determine whether or not there is a well-defined, precise prohibition against conducting a particular test under certain conditions; it is enough to know that the activities concerned imply, by their very nature and by their harmful consequences, the abusive and unlawful exercise of a right. The expression "a right" is used because scientific tests that are incapable of causing injury are entirely compatible with freedom of use of the high seas and space. But according to article 2 of the Geneva Convention which has been cited repeatedly, this freedom, whatever its manifestations, "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

95. In short, the special problem created by nuclear tests and by the other activities mentioned in this section does not, for the moment, seem to be capable of solution except by recourse to the "doctrine of abuse of rights". That doctrine clearly appears to offer the only possible chance of solving any such cases as may arise until the subject is regulated and the conditions to which the imputation of international responsibility should be subordinated are determined and fixed. In these circumstances, the question of the basis of responsibility loses some of its importance. For, in any case, since the decisive factor is the injurious act resulting from a manifest abuse of right, it would be senseless to require, as a basis for the imputation of responsibility, the proof of *culpa* on the part of the author of the injury. At the most, it may be said that the degree of diligence and the efforts made by the

State to avert all risk have, up to a certain point, the effect of an extenuating circumstance; but they can never exonerate the State from responsibility or relieve it from the duty to make reparation for the damage and injury caused.

96. As the Commission knows, the International Atomic Energy Agency has entrusted a panel of experts with the task of investigating non-military nuclear hazards and recommending any action that might seem necessary to assure maximum legal protection to the public. Part of the discussions which have taken place so far have referred to the problem of international responsibility of States for injuries caused to persons or property as a result of nuclear tests. The purpose of these deliberations has been to prepare a draft convention on the subject. One of the questions raised has been whether, in such cases, fault or negligence should be regarded as a prerequisite of the imputation of international responsibility to the State.

C. AMENDMENTS AND ADDITIONS TO THE DRAFT

97. The Special Rapporteur wishes to incorporate certain conclusions reached in this and the preceding report in the appropriate provisions of the draft he has presented to the Commission. Reference must be made first to the provisions relating to the constituent elements of the institution of international responsibility and then to those dealing with measures affecting acquired rights.

1. CONSTITUENT ELEMENTS OF INTERNATIONAL RESPONSIBILITY (ARTICLE 1 OF THE DRAFT)

98. As has been shown in part B of this report, the conditions or requirements which an act or omission must meet in order to give rise to the international responsibility of the State raises two problems: first, it has to be determined whether the act or omission must involve the non-performance of an exactly defined and specific international "obligation" or whether the fact that there has been an "abuse of rights" will suffice; and second, it must be decided whether responsibility can only be incurred if, in addition to the unlawful and injurious act, there has been a wilfully adopted attitude (*culpa* or *dolus*) on the part of the subject of the imputation. Both problems arise mainly in connexion with article 1 of the draft.

(a) *Nature of the acts and omissions giving rise to international responsibility*

99. With respect to the first of the two problems mentioned above, part B (I) (4) indicated in a general way when an "abuse of rights" gives rise to the international responsibility of the State. Here, the question will be approached from the standpoint of the technique of codification. It cannot be denied that, because of the lack of precision in the body of rules composing international law, the distinction between cases of non-

¹¹³ United Nations Conference on the Law of the Sea, *Official Records, Volume II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.56, resolution I: Nuclear tests on the high seas.

¹¹⁴ In two other resolutions (1402 A and B (XIV)) on the "Suspension of nuclear and thermo-nuclear tests", the Assembly referred to the negotiations which began at Geneva on 31 October 1958 on such suspension, "Considering that an agreement on the cessation of nuclear and thermo-nuclear tests with effective international control is urgent".

performance of concrete, exactly defined and specific international obligations and cases of "abuse of rights" is at times very slight and often difficult to establish. For this reason and, in particular, in order to overcome the difficulties that would be raised by any attempt to distinguish the diverse and different cases of "abuse of rights", a paragraph might be added to draft article 1, in the following terms:

"2 *bis*. The expression 'international obligation of the State' shall also include the prohibition of 'abuse of rights', which shall be construed to mean any act or omission contrary to the conventional or general rules of international law governing the exercise of the rights of the State."

Drafted in this way, the paragraph covers any case of "abuse of rights", on the understanding that an act or omission of this kind can only engage the responsibility of the State if such act or omission involves a breach of a rule established by treaty or of a rule of general international law stipulating the limitations to which the (legitimate) exercise of the right in question is subject.

100. If the Commission should, nevertheless, prefer not to include the suggested paragraph but rather to confine itself to the formula generally used in previous draft codifications, it would be advisable to place a broad interpretation on the expression "international obligations of the State" and to regard the prohibition of "abuse of rights" as inherent therein either as a "general principle of law recognized by civilized nations" or as a principle of international law. In commenting on the meaning and scope of that expression in the second report (A/CN.4/106, chap. I, sect. 4), the Special Rapporteur, after pointing out the fact that every work of codification is apt to contain "gaps", suggested a means of filling any such gaps as might be found in the draft. On that occasion it was stated that "the article [1] defines 'international obligations' as those resulting from 'any of the sources of international law'." And the report went on to say: "consequently, while the draft endeavours to provide for every contingency, any situation not expressly foreseen in the text only necessitates reference to such sources and a search for an applicable principle or rule which is not incompatible with the provisions of the instrument. Hence, the expression 'obligations resulting from any of the sources of international law' allows for the application, as a subsidiary expedient, of principles or rules not expressly set forth in the draft prepared by the Commission". The interpretation suggested would thus be not only legally feasible, but also consistent with these remarks. Nevertheless, the addition of the paragraph proposed by the Special Rapporteur would have the advantage of defining the essential idea underlying cases of "abuse of rights" in the draft itself.

101. The foregoing naturally relates, for the most part, to the formal aspect of the problem, for the substantive question is whether or not "abuse of rights" should be accepted as a constituent element of the in-

ternational responsibility of the State and expressly mentioned in article 1. In this connexion, the Special Rapporteur would like to explain why in this report he advocates the admission of the doctrine of abuse of rights despite the fact that in his second report he asked: "would it not be most dangerous to depart from the traditional formula and to include in such draft as the Commission may prepare a clause providing for responsibility in the absence of any violation or non-observance of specific international obligations?" In that same context, it was observed that "as long as the draft does not in any way exclude such responsibility [the atomic explosion on the Bikini atoll and the *Trail Smelter* arbitration] whenever the circumstances genuinely justify a claim against the State for negligence in the discharge of its essential functions, any clause of this nature would be completely redundant". (A/CN.4/106, chap. I, sect. 3.) The more thorough study of the question which the Special Rapporteur made subsequently,¹¹⁵ particularly of the necessary applications of the doctrine with regard to measures affecting acquired rights,¹¹⁶ convinced him of the need to propose its incorporation in any such draft as the Commission may prepare. He believes that the disadvantages which it may undoubtedly entail in specific cases will be fully offset by the evident advantages inherent in the assurance of greater legal protection for interests that may be affected by the abusive exercise of a right.

(b) *The basis of imputation*

102. In part B (II) (7) of this report, the Special Rapporteur formulated some general conclusions on the position taken by international case-law regarding the problem of the basis of imputation of responsibility and the approach to this problem from the technical standpoint of codification. In order to complete and round off those conclusions, it need only be added that it is unnecessary to introduce any amendments or additions on this subject to the text of article 1 of the draft. International responsibility is in principle objective, for the decisive factor is the existence of an injury which is the result of the unjustified non-performance of an international obligation of the State or, in certain cases, of an unjustifiable abuse of a right. The new text of article 1 covers all these general constituent elements of responsibility. In cases when the existence or imputability of responsibility depend on *culpa* or on some other subjective element, or when such element constitutes the very basis on which responsibility and imputability rest, express provision therefore has to be made. And the draft duly makes such provision, for example, with respect to cases in which the State may incur responsibility as a result of the acts of individuals and internal disturbances.

¹¹⁵ Cf. García Amador, "State Responsibility—Some New Problems", *Recueil des cours de l'Académie de droit international* (1958-II), vol. 94, pp. 376 *et seq.*

¹¹⁶ See *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), document A/CN.4/119, particularly section 5.

2. MEASURES AFFECTING ACQUIRED RIGHTS (CHAPTER IV OF THE DRAFT)

103. The next point to consider is the amendments and additions that should be made to chapter IV of the draft, which is entitled, in the original text, "Non-performance of contractual obligations and acts of expropriation". These changes are based on the conclusions expressed in the fourth report and in this report.

(a) *Measures giving rise to international responsibility*

104. As was explained in the introduction to the fourth report (A/CN.4/119), the fourth report was not merely an expansion of chapter IV of the second report, for there was also a difference in the method of study adopted in each of them. The fourth report, besides giving more exhaustive treatment to the traditional doctrine and practice in the matter, dwelt on the new trends which had made their appearance, mostly since the last World War; although they do not jointly constitute a uniform movement, and some are even contradictory, there is no doubt that they have made a deep impact on the traditional notions and ideas. In this connexion, the Special Rapporteur then added that this fact was so certain that it would be wholly unrealistic to disregard it and to deny that the new tendencies could make a valuable contribution to the development and codification of the relevant rules on international responsibility. The revised text of chapter IV of the draft reads as follows:

CHAPTER IV

MEASURES AFFECTING ACQUIRED RIGHTS

Article 7. Expropriation and nationalization measures

1. The State is responsible for the expropriation of the property of an alien if the measure in question does not conform to the provisions of the domestic law in force at the time when such property was acquired by the affected holder thereof.

2. In the case of nationalization or expropriation measures of a general and impersonal character, the State is responsible if the measures are not taken for a public purpose or in the public interest, if there is discrimination between nationals and aliens to the detriment of the latter with respect to compensation for expropriated property, or if unjustified irregularities injurious to such property are committed in the interpretation or application of such measures.

Article 8. Non-performance of contractual obligations in general

1. The State is responsible for the non-performance of obligations stipulated in a contract entered into with an alien or in a concession granted to him, if the measure in question is not justified on grounds of public interest or of the economic necessity of the State or if it involves a "denial of justice" within the meaning of article 4 of this draft.

2. The foregoing provision is not applicable if the contract or concession contains a clause of the nature described in article 16, paragraph 2.

3. When the contract or concession is governed by international law or by legal principles of an international character, the State is responsible for the mere non-performance of the obligations stipulated in said contract or concession.

Article 9. Public debts

The State is responsible for the repudiation or the cancellation of its public debts, if the measure in question is not justified on grounds of public interest or if it discriminates between nationals and aliens to the detriment of the latter.

105. The reasons for the revision of chapter IV and the scope of the new provisions were discussed in the fourth report (see A/CN.4/119, in particular sections 14, 15, 21 and 29) and need not be restated here. The fundamental amendments and additions should, however, be pointed out: article 7 now draws a distinction between the common type of expropriation and nationalization measures, a distinction which affects in particular the *quantum* of compensation and the form and promptness of payment; and article 8 now contains the new provision on contracts or concessions governed by international law or by legal principles of an international character.

(b) *Extraterritorial effect of such measures*

106. In view of the fact that the sole purpose of the draft is to describe the conditions or circumstances in which the State incurs international responsibility for injuries caused in its territory to the person or property of aliens, it is, strictly speaking, inappropriate to add to it provisions on the extraterritorial effect of measures affecting acquired rights. Nevertheless, if the Commission considers it opportune or convenient to include such provisions in the draft it is preparing, the Special Rapporteur suggests that the following text, which assembles the fundamental considerations and conclusions expressed in section 38 of this report, be taken as a basis for discussion:

"Measures affecting acquired rights shall have extraterritorial effect and shall be recognized and executed in any State, save in so far as they are contrary to the principles of (public) international law governing the exercise of the right of the State to take measures of this category."

The principles of (public) international law mentioned in the foregoing text would be those set forth in chapter IV of the draft.

(c) *Systems for the settlement of disputes*

107. From the survey contained in this report of the various methods of settlement applicable to disputes concerning acquired rights, the Special Rapporteur concluded that the advantages or disadvantages of each system depended primarily on the circumstances in which each dispute arose. Accordingly there seems to be no need to introduce any amendment or addition to chapter VII of the draft, which covers all the systems and indicates which is to be followed in each given case. However, the Special Rapporteur feels bound to reaffirm his opinion that, given the nature of these controversies, the most appropriate system, for reasons already stated, would seem to be direct settlement between the respondent State and the alien concerned. Moreover, it may perhaps be advisable to add to the

draft a provision designed to cover the special situation created by contracts or concessions which provide for international jurisdiction without reference to the exhaustion of local remedies. Here again the reasons have been fully explained and a paragraph could accordingly be inserted in article 19 of the draft, in the following terms :

“(4 *bis*) Where there is an agreement between the respondent State and the alien, it shall not be necessary to exhaust the local remedies unless the

agreement expressly so requires as a condition for the submission of a claim to the international body specified in the agreement.”

As was indicated in the relevant part of the report, the aim here is not to introduce an exception to the local remedies rule, but rather to ensure consistency with the essential purpose behind the arbitration clauses which such instruments contain, namely, the removal from local jurisdiction of disputes concerning their interpretation, application or execution.