INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

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

REJOINDER

SUBMITTED BY

THE UNITED STATES OF AMERICA

May 17, 2021

ANNEXES

VOLUME II

Annexes 279 through 304

ANNEX 279

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

LANDESBANK BADEN-WÜRTTEMBERG ET AL.
Claimants

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/15/45

DECISION ON THE SECOND PROPOSAL TO DISQUALIFY ALL MEMBERS OF THE TRIBUNAL

CHAIR OF THE ICSID ADMINISTRATIVE COUNCIL
Mr. David Malpass

Date: 15 December 2020

argues, the circumstances underlying the Second Proposal are "*beyond any reasonable doubt.*"[21]

40. International Custom. In Spain's view, Articles 14 and 57 of the ICSID Convention cannot be interpreted in isolation from other international conventions or international arbitration practice;[22] and the word "*manifestly*" in Article 57 does not justify a departure from international custom.[23] Such international custom demands the disqualification of an arbitrator when there is "*any reasonable doubt*" about his/her lack of moral character, impartiality or independence.[24] Moreover, Spain adds, misrepresentations are absolutely prohibited in the context of international arbitration, as shown by the doctrine of "*clean hands*" which sanctions parties conduct in that regard.[25] It follows, the Respondent argues, that "*conscious or reckless misrepresentations and misleading statements*" must lead to removal of a tribunal from office.[26]

41. General Principles of Law. Finally, Spain contends that under general principles of international law "*any slight doubt*" about an adjudicator's lack of high moral character, independence or impartiality is ground for disqualification;[27] bias can be inferred, and there is no need for strict evidence.[28] This said, Spain argues, in this case the Tribunal's "*misrepresentations and misleading statements*" are "*blatantly evident*."[29]

[21] Resp. Second Proposal, ¶ 37.
[22] Resp. Second Proposal, ¶ 47.
[23] Resp. Second Proposal, ¶ 50.
[24] Resp. Second Proposal, ¶ 49. *See also, id*., ¶ 53 (referring to "*justifiable and reasonable doubt*"); Resp. Comments III, ¶ 71.
[25] Resp. Second Proposal, ¶ 54. *See also*, Resp. Comments II, ¶ 99.
[26] Resp. Second Proposal, ¶ 56. *See also*, Resp. Comments II, ¶ 104.
[27] Resp. Second Proposal, ¶ 58.
[28] Resp. Second Proposal, ¶ 60.
[29] Resp. Second Proposal, ¶ 60.

ANNEX 280

89/2012 Sb.

ACT

of 3 February 2012

the Civil Code

the Parliament has adopted the following Act of the Czech Republic:

BOOK ONE

GENERAL PROVISIONS

TITLE I

SCOPE OF REGULATION AND ITS BASIC PRINCIPLES

Chapter 1

Private law

Section 1 [Recodification]

(1) The provisions of the legal order governing the mutual rights and duties of persons together constitute private law. The application of private law is independent of the application of public law.

(2) Unless expressly prohibited by a statute, persons can stipulate rights and duties by way of exclusion from a statute; stipulations contrary to good morals, public order or the law concerning the status of persons, including the right to protection of personality rights, are prohibited.

Section 2 [Recodification]

(1) Each provision of private law may be interpreted only in accordance with the Charter of Fundamental Rights and Freedoms and the constitutional order in general, the principles underlying this Act, and considering at all times the values that it protects. Should the interpretation of a provision diverge from this imperative solely on the basis of its wording, the imperative prevails.

(2) Statutory provisions may not be given a meaning other than that which follows from the actual sense of the words in their mutual context and from the evident intention of the legislature; however, no one may invoke the wording of a legal regulation contrary to its sense.

(3) The interpretation and application of a legal regulation must not be contrary to good morals and must not lead to cruelty or inconsiderate behaviour offensive to ordinary human feelings.

Section 3 [Recodification]

(1) Private law protects the dignity and freedom of an individual and his natural right to pursue his own happiness and the happiness of his family or people close to him in a way that does not unreasonably harm others.

(2) Private law primarily relies on the following principles:

a) everyone has the right to protect his life and health, as well as freedom, honour, dignity and privacy,

b) family, parenthood and marriage enjoy special statutory protection,

c) no one may sustain unjustified harm due to insufficient age, mental capacity or dependency; however, no one may unreasonably benefit from his own inability to the detriment of others,

d) a promise is binding and contracts are to be executed,

e) right of ownership is protected by statutes, and only a statute can prescribe how the right of ownership is created and extinguished, and

f) no one may be denied what he is rightfully entitled to.

(3) Private law also stems from other generally recognised principles of justice and law.

Section 4 [Recodification]

(1) Every person having legal capacity is presumed to have the intellect of an average individual and the ability to use it with ordinary care and caution, and anybody can reasonably expect every such person to act in that way in legal transactions.

(2) Where the legal order makes a specific consequence dependent on one's knowledge, it means knowledge reasonably acquired by a person knowledgeable of the case having considered the circumstances which must have been obvious to him in his capacity. This applies by analogy if the legal order connects a certain consequence with the existence of a doubt.

Section 5 [Recodification]

(1) A person who offers professional performance as a member of an occupation or profession, whether publicly or in dealings with another person, demonstrates his ability to act with the knowledge and care associated with his occupation or profession. If the person fails to act with such professional care, he bears the consequences.

(2) The nature or validity of a juridical act may not be challenged against the will of the person affected only because the person who made the act was not duly authorised or was prohibited to do so.

Section 6 [Recodification]

(1) Everyone is obliged to act fairly in legal transactions.

(2) No one may benefit from acting unfairly or unlawfully. Furthermore, no one may benefit from an unlawful situation which the person caused or over which he has control.

Section 7 [Recodification]

A person who acted in a certain way is presumed to have acted fairly and in good faith.

Section 8 [Recodification]

Evident abuse of a right does not enjoy legal protection.

Chapter 2

Application of the rules of civil law

Section 9 [Recodification]

(1) The Civil Code governs the personal status of persons.

(2) Private rights and duties of a personal and proprietary nature are governed by the Civil Code to the extent that they are not governed by other legal regulations. Usages may be considered where invoked by a statute.

Section 10 [Recodification]

(1) Where a legal case cannot be decided on the basis of an express provision, it is assessed under the provisions concerning the legal case which is, in terms of its content and purpose, the closest possible to the case under consideration.

(2) In the absence of such a provision, the legal case is to be assessed under the principles of fairness and the principles underlying this Act in order to arrive at a good arrangement of rights and duties, having regard to the practice of private life and taking into account the state of legal opinion and established decision-making practice.

Section 11 [Recodification]

General provisions concerning the creation, change and extinction of rights and duties arising from obligations under Book Four of this Act apply, with the necessary modifications, to the creation, change and extinction of other private rights and duties.

Chapter 3

Protection of private rights

Section 12 [Recodification]

Anyone who feels that his rights have been prejudiced may claim the protection of a body executing public authority (hereinafter a "public body"). Unless otherwise provided by a statute, the public body is a court.

Section 13 [Recodification]

Anyone seeking legal protection may reasonably expect that his legal case will be decided similarly to another legal case that has already been decided and that coincides in essential aspects with his legal case; where the legal case has been decided differently, anyone seeking legal protection has the right to a persuasive explanation of the reasons for such a variance.

Section 14 [Recodification]

Self-help

(1) Anyone may, in a reasonable manner, help himself to his rights, if such rights are endangered and it is evident that public authority action would come too late.

(2) Where an unlawful interference with one's right is imminent, anyone so threatened may use effort and resources that a person in his position and under the given circumstances must consider appropriate to avert such encroachment. However, if self-help is only aimed at securing a right that would otherwise be frustrated, the person exercising self-help must, without undue delay, contact the competent public body.

TITLE II

PERSONS

Chapter 1

General provisions

Section 15 [Recodification]

(1) Legal personality is the capacity to have rights and duties within the legal order.

(2) Legal capacity is the capacity to acquire rights and assume duties for oneself by making juridical acts (to make juridical acts).

Section 16 [Recodification]

No one may surrender his legal personality and legal capacity, neither in full, nor in part; doing so is disregarded.

Section 17

(1) Only persons may have and exercise their rights. Duties may only be imposed upon and their performance enforced in relation to persons.

(2) If anyone creates a right or imposes a duty upon something other than a person, such a right or duty is attributed to the person to whom it belongs according to the legal nature of the case.

Section 18

There are either natural, or legal persons.

Section 19 [Recodification]

(1) Every individual has innate natural rights knowable by the very reason and feelings, and therefore is considered to be a person. A statute only provides for the limits of application and the manner of protection of the natural rights of an individual.

(2) Natural rights associated with the personality of an individual may not be alienated and may not be waived; should this occur, it is disregarded. The limitation of these rights to the extent contrary to a statute, good morals or public order is also disregarded.

Section 20 [Recodification]

(1) A legal person is an organised body whose legal personality is provided or recognised by a statute. A legal person may, without regard to its objects of activities, have rights and duties consistent with its legal nature.

(2) Legal persons governed by public law are subject to statutes under which they have been established; the provisions of this Act only apply if they are consistent with the legal nature of these persons.

Section 21 [Recodification]

Within private law, the State is considered to be a legal person. Another legal regulation provides for the manner in which the State makes juridical acts.

Section 22 [Recodification]

(1) A close person is a relative in the direct line, sibling and spouse or a partner under another statute governing registered partnership (hereinafter a "partner"); other persons in a familial or similar relationship shall, with regard to each other, be considered to be close persons if the harm suffered by one of them is perceived as his own harm by the other. Persons related by affinity and persons permanently living together are also presumed to be close persons.

(2) If a statute provides specific conditions or limitations for the protection of third persons regarding the transfer or encumbrance of property or the relinquishment of property to another for his use between close persons, these conditions and limitations shall also apply to similar juridical acts between a legal person and a member of its governing body or a person exercising substantial influence over the legal person as its member or based on an agreement or another fact.

Chapter 2

Natural persons

Division 1

General provisions

Section 23

An individual has legal personality from birth to death.

Section 24

Every individual is responsible for his own actions, if he is able to assess and control them. A person who induces upon himself a self-inflicted condition which would otherwise preclude the responsibility for his actions is responsible for the actions taken under this condition.

Section 25

A conceived child is considered to be already born if it suits the child's interests. A child is presumed to have been born alive. However, if the child is not born alive, he is considered never to have existed.

Section 26

Proof of death

(1) The death of an individual is proved by a public instrument issued after examining the dead body in a manner prescribed.

(2) Where a dead body cannot be examined in the manner prescribed, a court shall, even of its own motion, declare the individual dead if the individual was involved in such an event that his death, given the circumstances, seems certain. In its decision, the court shall specify the date established as the date of death.

Section 27

If a legal consequence is dependent on an individual surviving another individual, and it is not certain which of them died first, they are all presumed to have died at the same time.

Section 28

(1) If it is not known where an individual died, he is presumed to have died where his body was found.

(2) The place where an individual declared dead last dwelled when he was alive is conclusively presumed to be the place where he died.

Section 29 [Recodification]

Sex change

(1) Sex change of an individual takes place by surgery while simultaneously disabling the reproductive function and transforming the genitalia. The date of the sex change is presumed to be the date indicated in the certificate issued by the health care provider.

(2) Sex change does not affect the personal status of an individual or his personal and property situation; however, marriage or registered partnership terminate. The rights and duties of a man and woman whose marriage terminated to their common child and their property rights and duties at the period following the termination of marriage are governed, by analogy, by the provisions on the rights and duties of divorced spouses to their common child and on their property rights and duties at the period following the divorce; a court shall decide, even of its own motion, on the care each of the parents will take of their common child thereafter.

Section 30 [Recodification]

Age of majority

(1) An individual acquires full legal capacity upon reaching the age of majority. The age of majority is reached upon reaching eighteen years of age.

(2) Before reaching the age of majority, full legal capacity is acquired by being granted legal capacity or by entering into marriage. Legal capacity acquired by entering into marriage is not terminated upon termination or invalidation of marriage.

Minors

Section 31 [Recodification]

Any minor who has not yet acquired full legal capacity is presumed to be capable of making juridical acts which are, as to their nature, appropriate to the intellectual and volitional maturity of the minors of his age.

Section 32 [Recodification]

(1) Where, in accordance with the usages of private life, a legal representative has granted a minor who has not yet acquired full legal capacity his consent to make a particular juridical act or achieve a specific purpose, the minor is capable of making juridical acts within the consent so granted, unless specifically prohibited by a statute; the consent may be subsequently limited or withdrawn.

(2) Where there are multiple legal representatives, it is sufficient if at least one of them expresses his will towards a third person. However, if there are multiple representatives performing acts towards another person together and these acts are contradictory, their expressions of will are disregarded.

Section 33 [Recodification]

(1) If the legal representative of a minor who has not yet acquired full legal capacity grants his consent to the independent operation of a business enterprise or another similar gainful activity, the minor becomes capable of making acts related to this activity. The validity of the consent is subject to the leave of a court.

(2) The leave of a court substitutes the condition of a certain age, if required to perform a gainful activity by another legal regulation.

(3) The legal representative may withdraw his consent only with the leave of a court.

Section 34

Dependent work of minors under the age of fifteen years or minors who have not completed compulsory education is prohibited. These minors may perform only artistic, cultural, advertising or sporting activities under the conditions laid down in another legal regulation.

Section 35 [Recodification]

(1) A minor who has reached the age of fifteen years and completed compulsory education may undertake to perform dependent work under another legal regulation.

(2) The legal representative of a minor who has not reached the age of sixteen years may terminate the minor's employment or a job contract creating a similar obligation between an employee and the employer if it is necessary in the interests of upbringing, development or health of the minor, in the manner provided by another legal regulation.

Section 36

Notwithstanding the content of other provisions, a minor who has not acquired full legal capacity shall in no case have the capacity to act independently in the matters in which his legal representative would need the leave of a court.

Section 37 [Recodification]

Granting legal capacity

(1) If a minor without full legal capacity applies to a court to be awarded legal capacity, the court shall grant the application if the minor has reached the age of sixteen years, if his ability to provide for his maintenance and take care of his matters has been proved, and if the legal representative of the minor consents to such an application. In other cases the court shall grant the application if it is in the interest of the minor for serious reasons.

(2) Under the conditions set out in Subsection (1), the court shall also grant legal capacity to a minor on the application of his legal representative if the minor consents to the application.

Division 2

Subsidiary measures in the case of disrupted capacity of an adult to make juridical acts

Declaration in anticipation of incapacity

Section 38 [Recodification]

In anticipation of one's own lack of capacity to make juridical acts, an individual may express the will to have his matters managed in a certain way or by a certain person, or to have a specific person become his guardian.

Section 39 [Recodification]

(1) Unless the declaration has the form of a public instrument, it must be made by a private instrument dated and acknowledged by two witnesses; in the acknowledgement, the witness shall provide his personal information which allows the witness to be identified.

(2) Only persons without any interest in the declaration and its contents who are not blind, deaf, mute or ignorant of the language in which the declaration is made may become witnesses. Witnesses must sign the declaration and be able to confirm the ability of the declarant to perform acts and the content of his declaration.

(3) Where the content of the declaration made by a public instrument determines who is to become the guardian, the person who wrote the public instrument shall record information about the identity of the person who made the declaration, the person who is selected to act as the guardian and the person who wrote the public instrument in a non-public list maintained under another statute.

Section 40 [Recodification]

(1) Where the declaration is made by a blind person or a person who cannot or is not able to read or write, the declaration must be read aloud to the person by a witness who did not write the declaration. A blind person or a person who cannot or is not able to read or write shall confirm before witnesses that the instrument contains his true will.

(2) Where a declaration is made by a person with a sensory disability who cannot read or write, the contents of the instrument must be interpreted to the person in the way of communication of his choosing and by a witness who did not write the declaration; all witnesses must have command of the way of communication which is used to interpret the content of the instrument. The declarant shall acknowledge before witnesses in the way of communication of his choosing that the instrument contains his true will.

Section 41 [Recodification]

(1) Express withdrawal of the declaration requires the expression of will made in the form prescribed in Section 39(1).

(2) If the instrument containing the declaration is destroyed by the declarant, it has the effect of revocation.

Section 42 [Recodification]

Where the declaration concerns matters other than selecting a person to act as a guardian and its effectiveness is conditional, the fulfilment of the condition is decided by a court.

Section 43 [Recodification]

If the circumstances evidently change in such a substantial way that, under such circumstances, the declarant would not have made the declaration or would have made a declaration with different contents, a court shall amend or cancel the declaration if the declarant were otherwise under a threat of serious harm. Before making any decision, the court shall make the necessary effort to obtain the opinion of the individual whose declaration is subject to the court's decision, also using the way of communication of the individual's choosing.

Section 44 [Recodification]

If the declaration or its revocation is invalid, the court shall take it into account, unless there is cause to doubt the will of the declarant.

Assistance in decision-making

Section 45 [Recodification]

If an individual needs assistance in decision-making due to complications resulting from his mental disorder, even where his legal capacity has not been limited, he and the assisting person may agree on the provision of assistance; there may be multiple assisting persons.

Section 46 [Recodification]

(1) By concluding a contract for assistance, the assisting person undertakes, subject to the consent of the person receiving assistance, to be present at his legal proceedings, provide him with the necessary information and communications and assist him by giving advice.

(2) The contract becomes effective on the date on which it is approved by a court. Unless the contract has been executed in writing, the parties are required to express their will to execute the contract before a court. If the interests of the assisting person are contrary to the interests of the person receiving assistance, the court shall not approve the contract.

Section 47 [Recodification]

(1) The assisting person must not jeopardise the interests of the person receiving assistance by exerting improper influence or unjustly enrich himself at the expense of the person receiving assistance.

(2) In carrying out his duties, the assisting person shall proceed in accordance with the decisions of the person receiving assistance. If the person receiving assistance makes a juridical act in writing, the assisting person may affix his signature, indicating his position and, where applicable, the support provided to the person receiving assistance; the assisting person may also invoke the invalidity of the juridical act made by the person receiving assistance.

Section 48 [Recodification]

ANNEX 281

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-17-088938-157

DATE : Le 22 octobre 2019

SOUS LA PRÉSIDENCE DE L'HONORABLE LUKASZ GRANOSIK, j.c.s.

NOËL-ALEXANDRE BERTOUT
et
NOËL-ALEXANDRE BERTOUT PHARMACIEN INC.
Demandeurs
c.
IRVING SAFFRAN
Défendeur

JUGEMENT
(responsabilité contractuelle)

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[1] Des pratiques commerciales douteuses, voire illégales, sont à la source de ce litige qui oppose l'acheteur et le vendeur d'une pharmacie. Ce dernier vendait à une partie importante de sa clientèle, qui payait comptant, des médicaments à rabais et l'abandon de cette pratique par l'acheteur a eu pour effet de plomber les ventes au point de rendre l'exploitation de la pharmacie impraticable.

[2] Tous reconnaissent que vendre des médicaments en deçà du prix fixé et uniquement pour de l'argent comptant constitue de la fraude, une infraction à la réglementation applicable ou les deux à la fois. Tous concèdent également qu'en dépit de ce constat, cette pratique n'est pas exceptionnelle dans l'industrie et qu'elle a un impact sur le chiffre d'affaires d'une pharmacie puisque la clientèle, faut-il s'en étonner, recherche toujours le meilleur prix. Or, en l'instance, l'acheteur qui a cessé cette façon de faire connaît une baisse considérable du chiffre d'affaires du commerce dont il s'est porté acquéreur et en tient responsable le vendeur, qui lui aurait caché ses pratiques.

[3] Bref, alors que l'acheteur insiste sur l'obligation de renseignement à laquelle serait tenu le vendeur, ce dernier réplique que c'est plutôt l'acheteur qui avait le devoir de se renseigner adéquatement quant à l'étendue de la pratique en cause, car il en connaissait l'existence.

CONTEXTE

[4] Noël-Alexandre Bertout est pharmacien. Après avoir travaillé quelques années au sein de l'industrie du médicament, il souhaite se lancer en affaires et devenir propriétaire d'une pharmacie. En 2013, il en achète une située sur le boulevard Décarie à Montréal, sous la bannière Uniprix. Il se présente immédiatement à ses voisins pharmaciens, dont Irving Saffran, qui exploite depuis 1964 la pharmacie fondée par son père dans les années 40 sur la rue Sherbrooke.

[5] Après avoir acheté sa première entreprise, Bertout[1] cherche à en acquérir une seconde. En faisant de la prospection commerciale, il est aiguillé vers Saffran, qu'il connaît déjà à la faveur de la visite de courtoisie rendue quelques semaines auparavant. Ce dernier ne veut pas nécessairement vendre son entreprise mais il est âgé de 73 ans et son épouse, Esther, verrait d'un bon œil qu'il prenne sa retraite.

[6] Bien que n'occupant qu'un tout petit local, la pharmacie de Saffran a un chiffre d'affaires enviable car elle prépare, à l'époque, environ 80 000 prescriptions par an. Sa clientèle est constituée pour moitié de patients en résidences pour personnes âgées et dans une proportion importante, par des patients issus de la communauté d'immigrants russes et de la communauté autochtone de Kahnawake. Peu de clients habitent le

[1] L'utilisation des seuls noms de famille dans le présent jugement a pour but d'alléger le texte et il ne faut pas y voir un manque de courtoisie à l'égard des personnes concernées.

quartier et, au plus fort de ses activités, Saffran emploie jusqu'à quatre livreurs à temps partiel.

[7] Saffran doit son succès auprès des résidences pour personnes âgées à l'utilisation des piluliers, alors qu'il aurait été parmi les premiers pharmaciens à offrir ce système de distribution des médicaments dans les années 90. Lorsque ce procédé est devenu courant dans l'industrie, Saffran a su garder cette clientèle en s'associant étroitement avec des médecins qu'il a présentés à ces clients et qui ont commencé à la desservir, faisant donc le pont avec la pharmacie de Saffran.

[8] Cependant, Saffran pratique la vente à rabais au comptant en faveur de certains clients dont le nombre se situe entre 20 et 25 % des prescriptions préparées. Il encaisse ainsi des montants inférieurs à ceux qui sont facturés officiellement. Ces rabais sont octroyés à la caisse par l'employée de Saffran, selon les instructions de ce dernier.

[9] Ce procédé est illégal[2]. La preuve indique qu'au Québec, le prix des médicaments est fixe et que les pharmaciens ne peuvent le modifier à la baisse. Ces derniers sont rémunérés uniquement par les honoraires professionnels qui sont ajoutés au prix du médicament. Lorsqu'il s'agit de médicaments couverts par l'assurance maladie étatique, ces honoraires sont prédéterminés, mais étonnamment, quand il s'agit d'assurance privée, les pharmaciens auraient une marge de manœuvre tant au niveau du prix du médicament qu'au niveau des honoraires professionnels qu'ils peuvent majorer. Même si elle a pour effet de soustraire des patients bénéficiant d'une assurance privée des sommes considérables[3], cette façon de faire serait tout à fait légale dans la mesure où la majoration est la même pour tous les clients d'une même pharmacie.

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2 Les parties n'insistent pas pour faire la démonstration de cette illégalité car tous les témoins la prennent pour acquise et certains réfèrent à ce sujet à l'article 50 du *Code de déontologie des pharmaciens* :

> **50.** Le pharmacien ne doit accepter aucun avantage relatif à l'exercice de la pharmacie, en plus de la rémunération à laquelle il a droit. Il peut toutefois accepter un remerciement d'usage ou un cadeau de valeur modeste.
>
> De même, il ne doit verser, offrir de verser ou s'engager à verser à quiconque tout avantage relatif à l'exercice de sa profession.

3 Les assurés paient des primes en fonction des coûts lesquels sont manifestement plus élevés pour les clients qui se prévalent du régime privé.

[10] Durant l'été 2013, Bertout et les Saffran[4] entament les pourparlers en vue de la transaction envisagée. Saffran fournit à Bertout les rapports de ventes pour les trois dernières années et Bertout signe le 2 juillet 2013, une entente de confidentialité. Lors d'une réunion, tenue après les heures d'affaires à la pharmacie de Saffran, Bertout est informé que Saffran favorise certains clients par des « escomptes »[5]. Bertout ne pose pas de questions sur l'ampleur de ce phénomène et les Saffran ne le quantifient pas non plus. Assez tôt dans le processus de négociation, les parties fixent le prix de l'achalandage à un multiple de 30 $ par prescription remplie.

[11] Par la suite, à la fin de 2013, Bertout sollicite Uniprix pour faire préparer des prévisions financières en lien avec le contrat projeté et retient les services de M^e^ Martin. Saffran engage alors M^e^ Fernet, ces deux avocats étant experts en matière transactionnelle dans le domaine pharmaceutique.

[12] Saffran insiste pour vendre l'immobilier de la pharmacie pour 100 000 $ et l'inventaire pour 230 000 $ (quitte à ce que ce dernier soit calculé de façon exacte le jour de la transaction). Bertout est d'accord et propose d'acheter l'achalandage pour une somme de 2 400 000 $ en multipliant le nombre de 80 000 prescriptions par le prix unitaire entendu de 30 $.

[13] M^e^ Fernet prépare en février 2014 une offre d'achat[6] selon cette entente de principe, laquelle offre est acceptée le 11 février 2014 par Saffran[7]. Le 17 février 2014, Uniprix présente à Bertout un « *proforma* » avec les prévisions financières relatives à l'exploitation de la pharmacie que celui-ci s'apprête à acheter[8].

[14] Dès le début du processus, M^e^ Fernet et Saffran réalisent que les rabais pratiqués sur les prix de médicaments constituent un problème potentiel et qu'il est à prévoir que si Bertout ne les continue pas, la fidélité de la clientèle qui s'en prévaut est en péril. Puisque celle-ci représente entre 20 et 25 % de son chiffre d'affaires, Saffran se dit prêt, dans une telle éventualité, à assumer totalement les pertes jusqu'à 10 % et

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4 Esther Saffran tient un rôle important dans les négociations, notamment à cause de la langue.

5 Ce terme ainsi que les expressions « rabais » ou « prix spéciaux » ont été utilisés indistinctement comme des synonymes tout le long de l'instruction de ce procès.

6 Pièce P-6.

7 Cette offre d'achat a été amendée de consentement le 19 mars 2014 pour modifier certains aspects non pertinents au débat en l'instance.

8 Pièce P-14.

à partager avec l'acheteur les risques de perte d'achalandage jusqu'à hauteur de 25 %. Ainsi, M^e^ Fernet inclut dans l'offre une clause d'ajustement de prix qui se lit ainsi :

> **4.3d)** De la somme prévue au paragraphe a), une somme de CINQ CENT MILLE DOLLARS (500 000$), dont le solde sera payable selon les modalités de remise sont prévues au paragraphe 8.3 des présentes, sera déposée en fiducie auprès des procureurs du VENDEUR à titre de retenue pour la garantie relative à l'achalandage;
>
> **8.3** Le VENDEUR s'engage à indemniser l'ACHETEUR de toute baisse de l'achalandage survenant dans la première année suivant la CLÔTURE, de la manière prévue à la présente disposition. En cas d'une baisse de l'achalandage allant jusqu'à 10% par rapport à l'achalandage ajusté conformément aux dispositions 4.2 et 4.4 des présentes, le VENDEUR s'engage à indemniser l'ACHETEUR pour la valeur de cette baisse.
>
> En cas de baisse de l'achalandage supérieure à 10%, le VENDEUR, s'engage à indemniser l'ACHETEUR :
>
> – de la valeur de la première portion de 10% de baisse de l'achalandage; et
>
> – de la moitié de la valeur pour la portion de la baisse de l'achalandage entre 10% et 25%, au total.
>
> L'ACHETEUR tient le VENDEUR libre de toute responsabilité quant à une baisse de l'achalandage additionnelle, soit au-delà de 25%.
>
> Pour plus de certitude, le VENDEUR reconnaît et accepte que le montant d'indemnisation total pour toute baisse de l'achalandage suivant la clôture ne peut être supérieur à 17,5% de la valeur de l'achalandage.
>
> (…)
>
> Une évaluation finale de l'achalandage aura lieu TROIS CENT SOIXANTE-CINQ (365) jours suivant la CLÔTURE. À ce moment, si une baisse réelle supérieure à la Baisse annualisée est constatée, les procureurs des VENDEURS remettront à l'ACHETEUR la différence entre le montant d'indemnisation basé sur cette baisse réelle et celui basé sur la Baisse annualisée à partir des Fonds en fiducie, et le solde de ces fonds seront remis au VENDEUR. Si une baisse réelle inférieure à la Baisse annualisée est constatée, l'ACHETEUR sera tenu de remettre au VENDEUR la différence entre le montant d'indemnisation basée sur la baisse réelle et celui basé sur la Baisse annualisée, et les procureurs du VENDEUR remettront au VENDEUR le solde des Fonds en fiducie.

[15] Il faut souligner que contrairement à Saffran et à M^e^ Fernet, Bertout affirmera, tout comme son avocat, M^e^ Martin, que la clause d'ajustement visait plutôt à protéger

l'achalandage relié aux résidences privées pour personnes âgées, qu'ils qualifient de très volatile.

[16] Une fois l'offre acceptée, Bertout retient les services d'Uniprix pour procéder à la vérification diligente. Le 5 mars 2014, Pierre Blanchette d'Uniprix produit un rapport composé d'un questionnaire-réponses, de tableaux et de sommaires de ventes[9]. Cette vérification diligente montre quelques éléments inquiétants : tout d'abord, le nombre de prescriptions connaît une baisse récente mais considérable. De 88 565 en 2012-2013, il passe à 71 799 en 2013-2014. De plus, 86 % des prescriptions relèvent du régime étatique, ce qui limite les revenus et la capacité de les augmenter. Ensuite, de ces 71 799 prescriptions remplies, en excluant les ordonnances ne portant aucun honoraire ou récemment perdues[10], seulement 68 878 prescriptions sont « payantes », les autres étant faites sans profit. Enfin, 47 % des affaires est attribuable à la clientèle des résidences de personnes âgées. Toujours dans le rapport de vérification diligente, Saffran affirme se conformer dans l'exploitation de sa pharmacie à toute la législation et la réglementation en vigueur et répond de la façon suivante aux questions cruciales :

> Le vendeur déclare et garantit à l'Acheteur qu'aucun rabais ou prix spéciaux ne sont consentis aux clients faisant en sorte que le montant réel des ventes de prescriptions en dollars serait inférieur à celui apparaissant à l'état des ventes du système informatique du Vendeur.
>
> 5) Prescriptions à rabais (clients particuliers, groupes, employés, etc).
> R. employé au coutant et certain client (sic)
>
> 6) Prescriptions escomptées directement à la caisse. Facturation de la coassurance pour les clients avec assurance privée.
> R. aucun

[17] Blanchette affirme qu'il déconseille à Bertout de procéder à l'acquisition de la pharmacie. Ce dernier ne suit pas cet avis mais choisit plutôt d'amender l'offre d'achat pour que le coût de l'achalandage soit dorénavant de 2 100 000 $ (basé sur un nombre approximatif de prescriptions de 70 000 à 30 $). Par le fait même, la somme retenue en fiducie, aux fins d'ajustement de prix prévu aux paragraphes 4 et 8 du contrat, est diminuée à 400 000 $. Saffran accepte.

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9 Pièce P-19. Blanchette a demandé à Saffran de répondre à un questionnaire et a recueilli toute l'information financière disponible.

10 La résidence pour personnes âgées Viva Life a cessé de faire affaires avec Saffran pendant cette période.

[18] Le *closing* a lieu le 10 juin 2014; l'inventaire est d'environ 137 000 $ et le prix payé pour l'achalandage est fonction du chiffre final réel de 61 650 ordonnances x 30 $, soit de 1 849 500 $. De façon concomitante au contrat d'achat conclu entre Saffran et la compagnie de Bertout, les parties signent une Convention de bail[11] par laquelle Saffran loue le local où se trouve la pharmacie à Bertout personnellement, pour un loyer mensuel de base de 3 700 $ et un loyer additionnel. Il ne réclamera jamais ce dernier.

[19] Dès le 11 juin 2014, Bertout prend possession de la pharmacie. Il est immédiatement interpellé par la caissière qui veut savoir quoi faire avec les rabais octroyés aux clients. Bertout se donne un temps de réflexion. Il contacte M^{e} Martin qui confirme l'illégalité de ce procédé et Bertout décide de cesser cette pratique. Bertout sait à ce moment que Saffran octroyait des escomptes, mais il en ignore l'ampleur. Or, du moment où il commence à exploiter la pharmacie et ne vend plus les médicaments à rabais moyennant paiement en argent comptant, le nombre d'ordonnances préparées diminue de mois en mois, passant de 4 500 en juin 2014 à 3 800 en juillet, 3 200 en août, 3 000 en septembre, 2 800 en octobre, pour finalement se stabiliser à 2 600 en novembre 2014 avec une légère remontée à partir du mois d'avril 2015. Le chiffre d'affaires diminue en conséquence.

[20] En novembre 2014, en application de la clause d'ajustement, Saffran concède d'emblée, sans attendre le terme d'un an prévu pourtant au contrat, le maximum permis par cette disposition contractuelle, soit une diminution de 17,5 % de la valeur de l'achalandage, et procède au remboursement en conséquence en faveur de Bertout.

[21] La diminution de l'achalandage et la baisse des revenus a cependant des conséquences désastreuses sur les affaires de la pharmacie et de la compagnie de Bertout. En effet, les coûts fixes étant toujours les mêmes, le chiffre d'affaires de la pharmacie passe d'environ 300 000 $ de BAIIA[12] à 6 000 $ par an. Étant donné que Bertout s'est considérablement endetté pour acquérir la pharmacie de Saffran, il ne peut continuer l'exploitation de celle-ci, les profits étant même insuffisants pour assumer le service de la dette. En juin 2015, Bertout prend la décision de fermer et de rapatrier ce qui reste des affaires vers sa pharmacie de la rue Décarie. Il s'agit tout au plus de 4 000 prescriptions par mois. Bertout remet alors les clés à Saffran et cesse de payer le loyer.

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11 Pièce P-5.

12 Acronyme de « bénéfices avant intérêts, impôts et amortissement », soit essentiellement les profits bruts.

[22] En rétrospective, il s'avère qu'avec la cessation de la pratique de vente à rabais, Bertout n'a pas acheté une entreprise préparant 70 000 ni même 60 000 prescriptions par an mais environ 40 000, ce qui, considérant l'emprunt engagé, était insoutenable sur le plan financier.

[23] Il faut ajouter que pendant toute cette période de près d'un an suivant la transaction, les Saffran continuent de fréquenter la pharmacie de Bertout pour leurs besoins personnels. Bertout ne les interpelle jamais au sujet de la baisse du nombre de prescriptions. Au contraire, au mois d'octobre 2014, il écrit même un courriel à Esther Saffran visant à s'enquérir d'un immeuble que les Saffran ont mis en vente à proximité de la pharmacie.

[24] C'est uniquement le 7 mai 2015 que Bertout adresse une mise en demeure[13] à Saffran lui reprochant de fausses représentations par rapport à la « stratégie d'affaires » de ce dernier. Le 12 mai 2015, M[e] Fernet répond au nom de Saffran soulevant que, d'une part, Bertout était parfaitement au courant de la situation et que, d'autre part, la clause d'ajustement de prix visait justement à pallier la perte éventuelle de la clientèle. Le 28 mai 2015, Bertout envoie une nouvelle mise en demeure[14] à Saffran invoquant le dol au sujet des rabais octroyés par Saffran à ses clients, en contravention avec ses obligations légales et contractuelles. Peu de temps après, il entreprend la présente demande en justice.

PRÉTENTIONS DES PARTIES

[25] Bertout poursuit Saffran sur deux plans. Premièrement, il exige l'annulation du contrat et la restitution des prestations car il aurait été victime d'une erreur causée par le dol par réticence de Saffran. Deuxièmement, et de façon subsidiaire, il invoque le vice caché en ce que l'ampleur des pratiques commerciales illégales de Saffran lui était inconnue alors que s'il les avait connues, il n'aurait pas acheté la pharmacie ou payé un prix aussi élevé. En effet, il a acquis un achalandage de tout au plus 48 000 prescriptions pour un montant avoisinant 2 millions de dollars et ne produisant un profit brut que d'environ 6 000 $ par an. Bertout ajoute qu'il a perdu toute la clientèle de l'extérieur du quartier car celle-ci lui indiquait que « *si c'est le même prix qu'ailleurs, on ira plus près de chez-nous* ». Selon lui, les déclarations de Saffran lors de la vérification

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13 Curieusement, les parties décident de ne pas produire cette mise en demeure.
14 Pièce P-10.

diligente voulant que les rabais ne visaient qu'une poignée de clients se sont révélées fausses car il y a eu perte de centaines de patients et de milliers de prescriptions.

[26] Bertout affirme que la garantie de rajustement de prix avait pour objectif de protéger l'achalandage au niveau des résidences pour personnes âgées. Aussi, il se dit satisfait de la vérification diligente effectuée par Blanchette et affirme qu'Uniprix lui avait donné le feu vert pour aller de l'avant avec l'acquisition.

[27] En défense, Saffran nie tout dol, avance que Bertout a commis une erreur inexcusable en ne procédant pas à une vérification diligente sérieuse et formule une demande reconventionnelle pour le loyer impayé ainsi que pour les honoraires extrajudiciaires invoquant que la poursuite de Bertout est abusive. Il réclame également 50 000 $ en dommages moraux pour lui-même et pour son épouse, au motif de troubles et inconvénients causés par Bertout. Il ajoute que la baisse du chiffre d'affaires s'explique par la mauvaise gestion de Bertout et non pas par les conséquences de la décision de ce dernier de cesser les pratiques commerciales problématiques.

[28] En défense à la demande reconventionnelle, Bertout nie que Saffran ait subi quelque dommage que ce soit et invoque que la convention de bail, qui était accessoire à l'achat de la pharmacie, doit suivre le même sort que le contrat principal, et qu'elle est donc annulable également.

[29] Il y a lieu de souligner qu'en cas d'annulation de la vente, la remise en état des parties est impossible dans la mesure où Saffran n'est plus membre de l'Ordre des pharmaciens. Aujourd'hui, Saffran et son épouse attendent avec impatience le dénouement du litige qui les empêche de profiter de leur retraite depuis déjà plus de cinq ans alors que Bertout continue d'exploiter sa pharmacie sur le boulevard Décarie et recherche minimalement une diminution du prix payé pour la pharmacie de la rue Sherbrooke.

ANALYSE

Le consentement de Bertout a-t-il été vicié par le dol?

[30] Cet aspect du litige comprend une question préliminaire. Il s'agit de vérifier si la situation dans laquelle Bertout s'est retrouvé découle du contrat d'achat et des représentations de Saffran ainsi que de la décision subséquente de Bertout de cesser les pratiques de vente illégales ou si elle provient d'autres sources.

[31] Saffran évoque certaines autres raisons que la fin de la vente à rabais pour de l'argent comptant pour expliquer la diminution des affaires mais ces raisons ne convainquent pas. Ainsi, Saffran avance que Bertout aurait appliqué une nouvelle tarification préconisée par Uniprix, qu'il a provoqué la démission de certains employés clés et qu'il en a congédié d'autres, qu'il ne s'est pas suffisamment investi personnellement dans l'entreprise devant nécessairement partager son temps entre ses deux pharmacies et, enfin, que la conjoncture économique défavorable a provoqué la baisse des affaires.

[32] Tous ces motifs sont peu probants et demeurent des hypothèses n'ayant fait l'objet d'aucune démonstration sérieuse.

[33] Ainsi, la gestion des ressources humaines par Bertout n'a pu influer sur la baisse du nombre des prescriptions car les démissions et les congédiements de certains employés ont suivi plutôt que précédé la diminution des ventes. Il n'y a absolument aucune preuve que l'imposition d'une nouvelle grille de prix préconisée par Uniprix soit différente de la grille « maison » appliquée par Saffran et que cela ait eu un impact quelconque. La prétention que la conjoncture économique était défavorable n'est soutenue par aucun élément de preuve et est même contredite par l'expert Levasseur, spécialiste dans les finances du domaine pharmaceutique. Ce dernier affirme que la conjoncture économique était plutôt favorable pour les pharmacies et que le marché était en croissance. L'hypothèse de la mauvaise gestion ne se vérifie pas non plus dans la mesure où même si Bertout n'était de service à la pharmacie sur la rue Sherbrooke que deux jours et demi par semaine, les pharmaciens salariés déjà en place ainsi que tous les employés ont continué à œuvrer de la même façon qu'avant la transaction.

[34] Il faut nécessairement en conclure que la seule explication plausible de la baisse des affaires est l'érosion de la clientèle qui bénéficiait auparavant d'escomptes illégaux. Ceci est d'autant plus vraisemblable que le pourcentage avancé par les Saffran au niveau des prescriptions, soit 20 à 25 %, correspond plus ou moins à la diminution des affaires après l'achat par Bertout. Ainsi, le lien de cause à effet est établi de façon satisfaisante; la baisse des revenus découle de la fin de la vente de médicaments à rabais.

[35] Cela étant établi, s'agit-il d'un dol? Les articles pertinents à cet argument sont 1400 et 1401 du *Code civil du Québec* :

> **1400.** L'erreur vicie le consentement des parties ou de l'une d'elles lorsqu'elle porte sur la nature du contrat, sur l'objet de la prestation ou, encore, sur tout élément essentiel qui a déterminé le consentement.
>
> L'erreur inexcusable ne constitue pas un vice de consentement.
>
> **1401.** L'erreur d'une partie, provoquée par le dol de l'autre partie ou à la connaissance de celle-ci, vicie le consentement dans tous les cas où, sans cela, la partie n'aurait pas contracté ou aurait contracté à des conditions différentes.
>
> Le dol peut résulter du silence ou d'une réticence.

[36] Le Tribunal adopte à ce sujet le résumé du droit par le juge Michaud dans *Distributeur MDR inc.* c. *Blanchette*[15] :

> [21] Tout est affaire de circonstances lorsqu'il s'agit de déterminer s'il y a eu dol. Les tribunaux ont considéré la qualité des parties, leur expérience, le lien de confiance qui peut exister entre elles, les demandes d'information et analyses effectuées par l'acheteur, les renseignements fournis par le vendeur, l'objet du contrat. Bref, il faut examiner le contexte dans lequel les représentations ont été faites.
>
> [22] Comme le précise l'article 1401 C.c.Q., le dol peut résulter du silence ou d'une réticence. Il s'agit alors d'un manquement à l'obligation d'agir de bonne foi et d'informer convenablement son contractant. Cela est encore plus vrai lorsque l'un des contractants occupe une position privilégiée en raison de ses connaissances comme l'écrivent les auteurs Baudouin et Jodoin :
>
> > Lorsqu'il s'agit d'identifier le fondement de l'obligation précontractuelle de renseignement, la disposition du second alinéa de l'article 1401 C.c., touchant la réticence dolosive et le silence dolosif, peut s'appliquer aujourd'hui. Cette règle n'est elle-même qu'une application particulière du principe de la bonne foi dans la formation du contrat, énoncé à l'article 1375. Lorsque l'un des futurs contractants occupe une position privilégiée par rapport à l'autre, soit en raison de la connaissance qu'il a de certaines informations, soit en raison de la possibilité d'y avoir accès, il doit parfois, pour ne pas tromper la confiance légitime de l'autre, prendre l'initiative de fournir à ce dernier certains renseignements cruciaux. L'obligation précontractuelle d'information se fonde donc, soit sur les articles 6 et 1375, soit, plus précisément, sur l'article 1401 C.c.
> >
> > (le Tribunal souligne)
>
> [23] Toutefois, l'erreur inexcusable ne constitue pas un vice de consentement. Ainsi, le comportement négligent, naïf ou crédule d'un acheteur est considéré comme une erreur inexcusable.

[15] 2014 QCCS 2204.

> [24] Un acheteur doit prendre les moyens raisonnables pour se renseignerhttps://soquij.qc.ca/portail/recherchejuridique/Selection/3027422?selectionID=7226428 - _ftn11 et faire une vérification diligente des informations. Il doit ainsi adopter la conduite d'une personne raisonnable placée dans les mêmes circonstances et non agir de façon imprudente et insouciante.
>
> (Références omises)

[37] En application de ces principes, le Tribunal retient que Saffran a dévoilé la situation de façon correcte et que Bertout aurait pu ou aurait dû se renseigner davantage et donc, que ce dernier n'a pas été victime d'une erreur provoquée par le dol.

[38] Premièrement, Bertout reconnaît que les discussions qu'il a eues avec Saffran et son épouse ont porté sur les types de clientèle, le nombre de prescriptions et les questions financières. Bertout n'avance pas ni n'allègue qu'il avait posé des questions auxquelles les Saffran n'auraient pas répondu. Il ne contredit pas non plus les affirmations crédibles et fiables des Saffran qui témoignent tous deux avoir informé Bertout de la pratique de vente de médicaments à rabais. De plus, Bertout est contredit par Blanchette, le conseiller sénior chez Uniprix qui a procédé à la vérification diligente de la pharmacie de Saffran. Autant Bertout avance qu'Uniprix a donné le feu vert à la transaction, autant Blanchette est formel sur le fait que même s'il n'a pas émis de recommandation, il a toutefois dit à Bertout de ne pas procéder avec l'acquisition[16]. Surtout, Blanchette confirme que Bertout est au courant de cette pratique illégale d'octroyer des rabais.

[39] Deuxièmement, les deux avocats ayant préparé le contrat, M^e^ Martin et M^e^ Fernet, affirment que la clause d'ajustement de prix était inhabituelle, sinon exceptionnelle. Les parties ne s'entendent pas toutefois sur ce que cette clause visait. Le Tribunal note tout d'abord qu'elle a pour l'objet l'*achalandage* et que le contrat prévoit la définition de ce qu'est l'*achalandage*[17]. Cette définition ne distingue pas entre

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[16] Pour qualifier la transaction, il utilise des termes tels «*ça sent pas bon* », ajoute que la pharmacie de Saffran est « *vendue trop cher* » et qu'*« il n'irait pas là* » en parlant de l'acquisition envisagée.

[17] 2.1.1 « Achalandage » désigne l'ensemble des biens plus amplement décrits aux paragraphes 2.1.2 (vi) des présentes;
(…)
(vi) tout l'achalandage et le droit exclusif pour l'ACHETEUR de poursuivre les opérations et de continuer l'exploitation de l'OFFICINE. L'achalandage comprend également, sans limiter la portée générale de ce qui précède :

les clients privés et les clients des résidences ou autres. On ne peut donc conclure comme le prétend Bertout, que cet aménagement contractuel avait pour but uniquement la protection des clients des résidences pour personnes âgées. Ensuite, Bertout affirme qu'il avait aussi envisagé une clause d'ajustement similaire lors de l'achat de sa première pharmacie sur le boulevard Décarie mais puisque la pharmacienne-vendeuse préférait réduire les prix tout en étant certaine du montant obtenu, les parties ont diminué le coût unitaire de 30 $ par prescription à 22,50 $, avec le prix de vente devenant ainsi final. Pourtant, il n'était pas question dans cette autre transaction de quelconques résidences pour personnes âgées.

[40] Troisièmement, Bertout a un souvenir assez faible des événements pertinents. Il ne se rappelle pas du tout, par exemple, d'avoir signé en juillet 2013 une clause de confidentialité. Il ne se souvient pas non plus d'avoir omis de payer une facture de Saffran[18]. Ses réponses manquent de précision et de conviction. Les Saffran en revanche témoignent de façon claire et sobre. Ainsi, la version de Saffran est à privilégier et le Tribunal ne peut retenir la prétention de Bertout à ce sujet. Il n'est pas contesté que c'est Saffran qui a proposé la clause d'ajustement de prix. Bertout s'en trouvait satisfait. Le Tribunal conclut que cette clause vise surtout la diminution potentielle de la clientèle au cas où Bertout cessait la pratique problématique de vente à rabais.

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a) tous les droits à tous les numéros de téléphone, numéros de télécopieur, adresses électroniques, adresses de sites Web, sites Web et autres modes de communication;
b) tous les dossiers-patients, ordonnances, documents, livres, registres et dossiers (sur document et/ou sous quelque autre support que ce soit, y compris tout support électronique);
c) tous les permis et licences cessibles;
d) tous les noms utilisés par le VENDEUR aux fins de l'opération de l'OFFICINE ainsi que les formules, permis, licences, dessins, œuvres bénéficiant de droits d'auteur, listes de clients et de fournisseurs, dossiers-patients, ordonnances, manuels d'instructions, pamphlets, littérature, livres, pièces, documents d'opération, renseignements, informations confidentielles, listes, listes d'équipement, listes de pièces, documents, registres, pièces justificatives, procédures, technologies et, généralement, tout le savoir-faire que possède le VENDEUR concernant l'OFFICINE ou son exploitation;
e) toutes les informations et tous les renseignements de quelque nature que ce soit, relatifs à l'OFFICINE ainsi que tout support contenant de tels renseignements (documents, manuels, listes, rubans, rubans d'ordinateur, disquettes, disquettes d'ordinateur, disques durs, supports électroniques, etc.);

[18] Les parties ont signé un contrat de travail après l'achat de la pharmacie. Lors des vacances estivales de Bertout, Saffran a visité une résidence pour personnes âgées au nom de Bertout et a facturé ce dernier la somme de 300 $.

[41] Quatrièmement et enfin, les actions et les déclarations contemporaines et immédiatement postérieures de Bertout n'appuient pas ses prétentions qu'il aurait commis une erreur et aurait été victime du dol. Au contraire, elles démontrent plutôt que Bertout était au courant de la façon de faire des Saffran et que ce qu'il ne connaissait pas, à la limite, était l'ampleur du phénomène[19].

[42] C'est ainsi que Bertout n'en parle pas aux Saffran lorsque ceux-ci viennent renouveler leurs prescriptions à la pharmacie, il n'en discute pas avec son avocat de façon contemporaine sauf pour demander si la continuation possible de ce procédé pouvait être envisagée, et bien au contraire, malgré la prétendue manœuvre dolosive dont il serait victime, il compte bien faire affaires avec les Saffran de nouveau en octobre 2014 alors qu'il entretient l'idée d'acheter l'immeuble voisin de la pharmacie. Enfin, il entreprend l'action en justice uniquement en mai 2015 et seulement lorsqu'il s'aperçoit que les ventes qui périclitent ont mis en péril la viabilité même de son entreprise. Aussi, pendant toute cette période, Bertout ne contacte ni Uniprix ni l'Ordre des pharmaciens soit pour se renseigner, soit pour dénoncer le problème. Il attend tout simplement de voir l'impact de sa décision de ne plus octroyer de rabais.

[43] En conclusion, le Tribunal est d'avis qu'il n'y a pas eu de dol, notamment par réticence, viciant le consentement de Bertout dans la conclusion du contrat d'achat de la pharmacie de Saffran. Bertout a sciemment choisi d'ignorer ou de banaliser le problème et s'est satisfait de la clause d'ajustement de prix, ne se souciant pas d'examiner les choses plus en profondeur afin de déterminer l'étendue du phénomène et donc, du risque. Or, sachant qu'il allait probablement mettre fin à cette pratique, il aurait dû ou aurait pu se renseigner davantage sur les effets que pouvait avoir une telle décision sur les revenus provenant de cette clientèle qui gonflaient un peu artificiellement les revenus du commerce.

Y a-t-il vice caché?

[44] Le droit de la vente est plaidé subsidiairement par la demande. Cela se comprend car les notions de «*dol par réticence*» et d'«*obligation de renseignement*»

[19] C'est non seulement le constat du Tribunal compte tenu de la preuve mais aussi, c'est la réponse de Bertout à la question posée à ce sujet lors de la plaidoirie.

sont implicites à l'analyse de la responsabilité du vendeur pour vice caché[20]. À la base de cet argument se trouve l'article 1726 C.c.Q. lequel prévoit :

> **1726.** Le vendeur est tenu de garantir à l'acheteur que le bien et ses accessoires sont, lors de la vente, exempts de vices cachés qui le rendent impropre à l'usage auquel on le destine ou qui diminuent tellement son utilité que l'acheteur ne l'aurait pas acheté, ou n'aurait pas donné si haut prix, s'il les avait connus.
>
> Il n'est, cependant, pas tenu de garantir le vice caché connu de l'acheteur ni le vice apparent; est apparent le vice qui peut être constaté par un acheteur prudent et diligent sans avoir besoin de recourir à un expert.

[45] La norme applicable, qui est objective, est celle de l'acheteur raisonnable, qui se comporte d'une manière prudente et diligente[21] :

> [51] Le caractère caché du vice s'apprécie selon une norme objective, c'est-à-dire en évaluant l'examen fait par l'acheteur en fonction de celui qu'aurait fait un acheteur prudent et diligent de même compétence : P.-G. Jobin, « Précis sur la vente », dans *La réforme du Code civil* (1993), vol. 2, 359, p. 466; M. Pourcelet, *La vente* (5e éd. 1987), p. 149. Autrement dit, on ne s'interroge pas simplement sur l'ignorance du vice; on cherchera aussi à déterminer si un acheteur raisonnable placé dans les mêmes circonstances aurait constaté le vice.

[46] Ici, pour les raisons expliquées ci-dessus, Bertout est manifestement au courant de la pratique commerciale douteuse de Saffran. Cet état de fait ressort aussi du rapport de vérification diligente d'Uniprix. Certes, il ne sait pas quelles seront les conséquences de cesser cette pratique mais connaît le vice affectant l'entreprise. Un acheteur prudent et diligent aurait poussé davantage son enquête et, le cas échéant, aurait refusé de transiger ou exigé que le vendeur corrige le problème avant d'acquérir l'entreprise. Bertout a, en toute connaissance de cause, accepté la clause d'ajustement de prix comme seule conséquence de cette situation. Il ne peut par la suite plaider vice caché.

[47] En somme, le vice était ici apparent et il n'y a pas de dol non plus. Il n'existe donc aucun motif permettant d'annuler le contrat d'achat ou de modifier les prestations.

Demande reconventionnelle

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[20] *ABB Inc.* c. *Domtar Inc.*, 2007 CSC 50; *Perreault* c. *New Apostolic Church Canada*, 2016 QCCA 1657.

[21] *ABB Inc.* c. *Domtar Inc.*, précité, note 20, par. 51; *Desourdy* c. *Lagacé*, 2013 QCCA 1986; *Boleyn* c. *Germain*, 2013 QCCA 326, notamment aux par. 5 à 7.

La réclamation de loyer

[48] Il n'est pas contredit que Bertout a déguerpi et a donc résilié illégalement le bail.

[49] La convention de bail est conclue uniquement entre Bertout et Saffran. Ce contrat prévoit le paiement de six mois de loyer en cas de défaut du locataire. Il est exact que la disposition contractuelle inclut à ce sujet aussi le loyer additionnel, les frais et les intérêts mais Saffran à l'instruction indique qu'il ne demande pas et qu'il n'a jamais exigé de loyer additionnel de Bertout. Ainsi, la réclamation de Saffran à ce titre avoisine vingt-deux mille dollars.

[50] Puisqu'il n'existe pas de motif permettant d'annuler le contrat d'achat de la pharmacie, il n'en existe pas en conséquence afin d'annuler la convention de bail[22], si on voulait qualifier cette dernière de contrat accessoire. De plus, ni l'objet ni la cause de ce contrat ne sont illégaux ou illicites[23] au cas où on considère celui-ci comme autonome et distinct du contrat principal.

[51] Cela dit, il s'agit néanmoins selon le Tribunal d'un cas où il y a lieu d'appliquer une fin de non-recevoir selon les principes énoncés par les maximes *nemo auditur propriam turpitudinem allegans*[24] et *frustra legis auxilium quaerit qui in legem committit*[25]. Celles-ci tirent leur origine du droit romain et ont été reconnues tant dans l'ancien droit français qu'en common law[26] :

> This and other kindred maxims of the Roman law have been adopted by all civilized nations, whether governed by that system of laws or by the common law of England.

[52] Le principe veut que le contractant qui contrevient à la morale ou à la loi ne mérite pas l'appui du système judiciaire, même s'il en subit un appauvrissement injuste. Bien entendu, ces devises romaines ne sont pas applicables sans nuances en droit

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22 Pièce P-5.
23 Articles 1411 et 1413 C.c.Q.
24 *Nul ne peut se prévaloir de sa propre turpitude.*
25 *Celui qui viole la loi recherche en vain son secours.*
26 *Consumer Cordage Co.* v. *Connolly* (1901), 31 SCR 244, p. 298. Voir aussi *Lapointe* c. *Messier* (1914), 49 R.C.S. 271 ou *Hall* c. *Hébert*, [1993] 2 R.C.S. 159. On peut y ajouter que la seconde maxime orne la façade de l'immeuble montréalais de la Cour d'appel ce qui démontre de façon convaincante son actualité.

civil, codifié[27]. Toutefois, elles peuvent fonder une fin de non-recevoir à une action en justice pour cause d'indignité ou d'immoralité.

[53] Or, en l'espèce, le litige tire son origine d'une pratique commerciale de Saffran, frauduleuse ou même illégale. Lorsque Bertout abandonne cette pratique, les revenus de la pharmacie déclinent considérablement ce qui a pour effet de rendre celle-ci non viable financièrement. En conséquence, Bertout doit arrêter l'exploitation de cette entreprise, quitter le local loué et cesser de payer le loyer. Il existe donc un lien de cause à effet entre les activités illicites de Saffran et sa réclamation. Accepter sa demande de loyer équivaut à mobiliser le système de justice au service d'une personne qui manque de probité. Le Tribunal ne peut accepter une telle proposition.

[54] Bien au contraire et paradoxalement, dans l'éventualité où Bertout avait perpétué cette pratique illégale, il aurait probablement maintenu le chiffre d'affaires et continué l'exploitation de la pharmacie avec comme conséquence qu'il n'aurait pas déguerpi et aurait continué à acquitter le loyer entendu. Dans un tel cas, la poursuite d'une situation frauduleuse ou illégale aurait avantagé son auteur original, Saffran, alors que cesser cette illégalité l'a appauvri. Bref, même si cette conséquence paraît injuste ici en fonction du contrat de bail, résilié sans motif, il n'y a pas lieu de condamner Bertout au paiement du loyer car il s'agirait alors de donner effet à des considérants financiers illicites ou immoraux.

Les dommages moraux

[55] Au niveau des dommages réclamés par les Saffran, les mêmes commentaires s'appliquent mais de surcroît d'autres motifs militent contre une condamnation de Bertout ou de sa compagnie sur ce chef.

[56] Tout d'abord, la situation d'Esther Saffran ne peut être compensée d'aucune façon car n'étant pas partie aux procédures, ses problèmes de santé ne peuvent faire l'objet de la présente décision. Ensuite, en ce qui concerne la réclamation d'Irving Saffran, puisqu'il s'agit d'un litige en responsabilité contractuelle, et que seuls les

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[27] Voir la formidable analyse du juge Girouard dans *Consumer Cordage Co.* v. *Connolly*, précité, note 26 aux pp. 296 à 310. Les professeurs Baudouin et Jobin sont toutefois d'opinion, que, depuis l'avènement des articles 1699 et suivants du C.c.Q., la règle *nemo auditur propriam suam turpitidinem allegans* est implicitement abrogée, voir : Jean-Louis BAUDOUIN et Pierre-Gabriel JOBIN, *Les obligations*, 7e éd., par P-G. JOBIN et N. VÉZINA, Cowansville, Éditions Yvon Blais, 2013, no 922 et 923.

dommages directs et prévisibles peuvent être compensés[28], le Tribunal ne peut retenir l'argument voulant que celui-ci a droit à des dommages car il a atteint un certain âge, qu'il est perturbé de façon considérable par l'action en justice et qu'il est empêché de profiter de sa retraite. Tous ces aléas n'ont pas de lien avec le différend sous étude et les inconvénients allégués ne dépassent pas les conséquences normales et attendues d'une transaction commerciale qui tourne mal ou qui conduit à des poursuites. Autrement dit, c'est le prix à payer pour faire des affaires, ce qui engage parfois un contractant sur le terrain des conflits, incluant la possibilité d'être l'objet d'une poursuite judiciaire.

L'abus de procédure

[57] Bien que la demande de Bertout échoue, elle n'était pas pour autant manifestement vouée à l'échec ni abusive et le Tribunal ne voit aucune témérité dans l'exercice du recours par les demandeurs. La question posée justifiait un débat judiciaire et l'illégalité des pratiques commerciales de Saffran a donné lieu à une contestation raisonnable alors que tant Bertout que M^{e} Martin affirmaient que la clause d'ajustement des prix visait surtout la clientèle des résidences des personnes âgées, laquelle aurait été, selon ces deux témoins, particulièrement volatile. De surcroît, pour les raisons avancées ci-dessus, les actions de Saffran sont à l'origine de ce litige et ce dernier ne peut en conséquence réclamer quoi que ce soit en sa faveur.

Les frais de justice

[58] Les deux parties ont présenté des rapports d'expertise et des témoignages d'experts CPA portant sur la valeur de l'entreprise achetée et sur les aspects financiers de ce conflit. Tous ces éléments n'ont aucune pertinence puisqu'il n'y a pas eu de dol ni de vice caché. Compte tenu de l'issue de ce différend et de l'inutilité des expertises de part et d'autre, dans la mesure où la responsabilité du vendeur n'a pas été engagée, chaque partie devra payer ses frais d'expert. De surcroît, le Tribunal ne peut cautionner les actions illégales de Saffran qui, pendant des années a procédé à des rabais de prix sur des médicaments. Chaque partie paiera donc ses frais de justice.

PAR CES MOTIFS, LE TRIBUNAL :

[59] **REJETTE** la demande;

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[28] Article 1613 du *Code civil du Québec*.

[60] **REJETTE** la demande reconventionnelle;

[61] **LE TOUT SANS** frais de justice.

LUKASZ GRANOSIK, j.c.s.

Me Bruno Bourdelin
DE GRANDPRÉ JOLI-CŒUR S.E.N.C.R.L.
Procureur des demandeurs

Me Marc-André Blain
JURIMAB INC.
Procureur du défendeur

Dates d'audience : Les 21, 22, 23 et 24 mai 2019
Argumentations écrites : Les 9, 16 et 26 septembre 2019

ANNEX 282

A FUNCTIONAL APPROACH TO "GENERAL PRINCIPLES OF INTERNATIONAL LAW"

M. Cherif Bassiouni *

INTRODUCTION

"General Principles of International Law" are among the sources of national and international law[1] which have long been recognized and applied in disputes between States.[2] They were embodied in the Statute of the Permanent Court of International Justice ["PCIJ"], article 38 (I)(3), and in the Statute of the International Court of Justice ["ICJ"], article 38 (1)(c), under the terms "general principles of law recognized by civilized nations."[3] As discussed below, both the PCIJ and ICJ have relied on this source.

The terms used to describe this source of international law appear to posit two separate requirements: one, "General Principles," and two, recognition by "civilized nations." With regard to the latter, it would appear, at least in the post-United Nations Charter era, that a presumption exists that all Member-States of the United Nations are "civilized."[4] The use of the term "General Principles" presents more difficulty.

The writings of scholars and opinions of international and national tribunals have invariably confirmed that "General Principles" are, first, expressions of national legal systems, and, second, expressions of other unperfected sources of international law enumerated in the statutes of the PCIJ and ICJ; namely, conventions, customs, writings of scholars, and decisions of the PCIJ and ICJ. It is obvious that if these legal sources are perfected, they are ipso facto creative of international legal obligations. When they are not perfected, however, such as when a custom is not evidenced by sufficient or consistent practice, or when States express opinio juris without any supportive practice, these man-

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1. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 29-30 (H. Lauterpacht 8th ed. 1955).

2. *See infra* Section V.

3. STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE art. 38(I)(3); STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1)(c).

4. This requirement has utility where a given nation, because of peculiar historical circumstances, no longer follows its previously "civilized" system of law, or that of the other "civilized nations."

ifestations, singularly or cumulatively with others, may possibly be considered to be expressions of a given principle.

In the post-United Nations Charter era, principles may also emerge from manifestations of international consensus expressed in General Assembly and Security Council Resolutions.[5]

The decisions of international and national tribunals are, along with the writings of the "most noted publicists," the most useful sources for ascertaining the existence and application of a given legal principle.[6] The effect of "General Principles," inter alia, is that, "when a solution is approved by universal public opinion, the judge is justified in applying it."[7]

As the world's interdependence increases, there will doubtless be greater reliance on international law as a means to resolve a variety of issues which neither conventional nor customary international law is ready to meet. The fast pace of human rights will also bring to the forefront of international, regional, and national adjudication issues which heretofore may have only been viewed as theoretical. The four most pressing issues that will advance to the forefront in the 1990s are: human rights, the environment, economic development, and international and transnational criminality. Even the casual observer will note that in these four areas, conventional and customary international law have not developed the framework, norms, or rules necessary to regulate these issues, nor is it likely that these two sources of law will catch up with the needs of the time. Thus, it is quite likely that "General Principles" will become the most important and influential source of international law in this decade. Existing needs and conflicts will necessarily require some legal basis for their satisfaction and resolution. In this case, the definition, identification, and functional use of "General Principles" will require more rigorous attention than has thus far been given to these questions. For the same reasons, greater rigor will be demanded of the rather loose manner in which *jus cogens* has been defined, identified, and applied by various writers.

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5. *See* Bleicher, *The Legal Significance of Re-citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444 (1969).

6. For decisions of tribunals see Section V and for the writings of scholars see Part I. For examples of "noted publicists," see, e.g. B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953); H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927); H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (rev. ed. 1958) [hereinafter THE DEVELOPMENT OF INTERNATIONAL LAW]; 1 G. SCHWARZENBERGER, INTERNATIONAL LAW (3d ed. 1957); Maki, *General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention*, 10 CAL. W. INT'L L.J. 272 (1980).

7. M. BOS, A METHODOLOGY OF INTERNATIONAL LAW 70 (1984) (quoting PERMANENT COURT OF INTERNATIONAL JUSTICE ADVISORY COMMITTEE OF JURISTS, *Procès-Verbaux* of the Proceedings of the Committee, June 16 - July 24, 1920, at 318 (1920)).

As "General Principles" become decisively more important as a source of international law, more specific rules will be needed for the identification, appraisal, and application of a given principle to a given factual situation and a clearer understanding of the functional uses of such principles.

I. SCHOLARLY DEFINITIONS OF "GENERAL PRINCIPLES"

The scholarly debate does not center so much on dogmatic or doctrinal conceptions, but more pragmatically on what evidences the existence of "General Principles." This orientation reflects the pragmatic empiricism of the Common Law tradition more than the doctrinal or dogmatic approach of the Romanist-Civilist-Germanic legal tradition.[8] Nevertheless, scholarly definitions of "General Principles" abound, even though they are frequently so general and self-evident that they add little to the plain meaning of the very words they intend to define. A review of these definitional approaches is, thus, more revealing than instructive.

Professor Hersch Lauterpacht defines "General Principles" as:

> [T]hose principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character . . . a comparison, generalization and synthesis of rules of law in its various branches—private and public, constitutional, administrative, and procedural—common to various systems of national law.[9]

To Bin Cheng, one of the most authoritative scholars on the subject, "General Principles" are "cardinal principles of the legal system, in the light of which international . . . law is to be interpreted and applied."[10]

Professor Schlesinger refers to "General Principles" as "a core of legal ideas which are common to all civilized legal systems."[11] An-

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8. The exception, however, is in the area of *jus cogens*, discussed in Part VI, *infra*, which is at the other end of the spectrum on this question of theoretical formulation.

9. 1 INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 69, 74 (E. Lauterpacht ed. 1970) [hereinafter COLLECTED PAPERS]. However, in Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5), the International Court of Justice stated:

> In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law.

Id. at 33.

10. Discussion of Bin Cheng, in *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, 38 GROTIUS SOCIETY TRANSACTIONS FOR THE YEAR 1952 125, 132 (1953).

11. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734, 739 (1957).

other distinguished scholar, Verzijl, states that they are "principles which are so fundamental to every well-ordered society that no reasonable form of co-existence is possible without their being generally recognized as valid."[12] Lammers, citing Favre, defines "General Principles" in much the same way. He states that they are " . . . norms underlying national legal orders . . . . [T]hey are the manifestation of the universal legal conscience certified by the law of civilized States."[13] Professor Wolfgang Friedmann seems to be more relativistic when he states that they are intended to embody the "maximum measure of agreement on the principles relevant to the case at hand."[14] Conversely, Gutteridge tends more toward absoluteness when he states that "an international judge before taking over a principle from private law must satisfy himself that it is recognized in substance by all the main systems of law and that in applying it, he will not be doing violence to the fundamental concepts of any of those systems."[15] Jalet is more conceptual in her universalist formulation when she describes "General Principles" as "principles that constitute that unformulated reservoir of basic legal concepts universal in application, which exist independently of the institutions of any particular country and form the irreducible essence of all legal systems."[16]

Except for the literature on *jus cogens* discussed below, the consensus of scholarly definitions stresses the objective character of the term "principles" and recognizes the existence of a common core of objectively identifiable legal principles. The consensus among the most noted publicists is that "General Principles" are found in the underlying or posited principles or postulates of national legal systems or of international law. The definitions that leave room for further elaboration and more specificity, including some of those noted above as well as others not reported here, have the great merit of recognizing that the very generality of the concept is needed to preserve the evolutionary character of international law. The inevitable consequences of this approach are divergent interpretations of the sources, scope, content, functions, and evidence of "General Principles" with respect to their

12. 1 J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 59 (1968) (referring to VON DER HEYDTE, *Glossen zu einer Theorie der allgemeinen Rechtsgrundsätze*, in DIE FRIEDENSWARTE 289 (1933)).

13. Lammers, *General Principles of Law Recognized by Civilized Nations*, in ESSAYS IN THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 53, 57 (F. Kalshoven, P.J. Kuyper & J.G. Lammers eds. 1980) (citing A. FAVRE, PRINCIPES DU DROIT DES GENS 273-90 (1974)).

14. Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 284 (1963).

15. H.C. GUTTERIDGE, COMPARATIVE LAW 65 (2d ed. 1949).

16. *See* Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations*, 10 U.C.L.A. L. REV. 1041, 1044 (1963).

identification, appraisal, and application in international law, as is discussed hereinafter.

II. Sources of "General Principles"

The majority of scholars believe that article 38 (I)(3) of the Statute of the PCIJ and article 38 (1)(c) of the ICJ Statute envision or imply that "General Principles" can be identified from two different legal sources — national and international.[17] Of course, principles deemed basic to international law can emerge in the international legal context without having a specific counterpart in national legal systems because of the differences that characterize these two legal systems. Indeed, it would be incongruous to think that the framers of articles 38 of the PCIJ and ICJ Statutes intended, for example, to exclude from "General Principles of International Law" those principles which emerge from the customary practice of States or from treaties. The writings of scholars not only range from the more positivist objective view of "General Principles" to that of the naturalist subjective one, but also from the broadest possible generalization to that of the narrowest specific norm. Thus, we can find principles with general content, such as justice, fairness, equality, and good faith. Others of a more specific nature are, for example, territorial criminal jurisdiction and treaty and contract interpretation based first upon the plain meaning of the words.

Some authors view "General Principles" as an international common law growing out of the composite concepts, norms, and rules of State legal systems.[18] Other scholars conclude that the fundamental principles of justice which have been accepted by "civilized nations" are part and parcel of the corpus of international law. The appropriate answer depends on the nature or subject of the principle in question. However, whether a fundamental principle of justice rises to the level of a "General Principle of International Law" can best, though not exclusively, be determined by its existence in the national laws of "civilized nations."[19] A common conception of both law and justice, though not necessarily of its contents, exists among all States. The international legal system is a reflection of this fact, as are the norms,

17. There are, however, some scholars who believe that "General Principles" consist only of those principles explicitly recognized in national legal systems. See Lammers, *supra* note 13, at 56-57, citing several authorities.

18. *See, e.g.*, Gutteridge, *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, 38 Grotius Transactions for the Year 1952 125 (1953); C. Rhyne, International Law: The Substance, Processes, Procedures, and Institutions For World Peace With Justice 54-69 (1971).

19. 1 D.P. O'Connell, International Law 10 (1965); *see also* Maki, *supra* note 6.

rules, and customs that regulate international relations.[20]

Baron Descamps, President of the Advisory Committee which drafted the Statute of the PCIJ, expressed such a view when he observed that "the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations [exists in every legal system]."[21] This view is representative of the notion that a common denominator exists between all legal systems. Professor Gordon Christenson refers to "General Principles" as "foundational ordering norms in a global, interdependent community."[22] Thus, if a principle exists in most national laws, it is likewise inherently part of the structure of international law, which can best regulate the conduct of States by applying those principles which are recognized by these States. Professor Gutteridge acknowledges this linkage of principles between national and international law. As he states:

> [i]f any real meaning is to be given to the words "general" or "universal" and the like, the correct test would seem to be that an international judge before taking over a principle from private law must satisfy himself that it is recognised in substance by all the main systems of law, and that in applying it he will not be doing violence to the fundamental concepts of any of those systems.[23]

Comparative legal technique furnishes the judge seeking to identify and apply "General Principles" with an objective test by which to measure breadth and depth of the recognition and applicability of a given principle in national legal systems. One such comparative legal technique is the inductive process, which uses empirical data based on the comparative legal method of analysis. This process is intended to eliminate approximations of what a principle may be and avoids speculation over its reliability or applicability. A methodology for such an inductive process has not yet been agreed upon. This writer would suggest that this is simply due to the fact that comparative legal research has not defined a formula and that its techniques change with time. It is valid to leave the method and the techniques to the evolving science of comparative legal research.

The difference between those who argue that "General Principles" are found only in national legal systems and those who advance the proposition that they are also found in the international legal system is

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20. Cheng, *supra* note 10, at 130.

21. M. Bos, *supra* note 7, at 70 (quoting Baron Descamps).

22. *See* Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 Va. J. Int'l L. 585, 587 (1988).

23. H.C. Gutteridge, *supra* note 15, at 65.

the dual unarticulated desire for specificity and certainty. Principles embedded in national law will usually have undergone the test of time and experience and are more easily ascertainable. Consequently, they are believed to be worthy of great deference. By contrast, principles in the international legal system may prove to be more tentative and thus less specific and more difficult to ascertain. Both of these positions are, however, generalizations, and thus not always correct. There is some interaction between principles found in national legal systems, which are applicable in international law, and principles arising from other sources of international law and practice, which may qualify as "General Principles." As Professor Brierly points out, "[i]nternational law . . . does not borrow from this source [national law] by importing private law institutions lock, stock, and barrel with a ready-made set of particular rules; it rather looks to them for an indication of a legal policy or principle."[24] Thus, Brierly affirms that international tribunals should find and apply rules of international law, which are generally recognized by the legal systems of civilized states and which involve principles of law and equity.

Such "General Principles" may fill the gaps in conventional and customary international law and provide a more objective basis than the value-laden natural law philosophy espoused by some Continental and American scholars.[25] Professor Lauterpacht argues that the ICJ Statute "emphasizes their [i.e., "General Principles"] pragmatic and inductive character inasmuch as they are derived from systems of law actually in operation as distinguished from the speculative and philosophical aspects of the classical law of nature."[26] This view, though more congruent to the Common Law's jurisprudential outlook, has not, however, prevailed in its entirety. Indeed, there is reason to believe that the framers of the PCIJ's article 38 (I)(3) and the ICJ's article 38 (1)(c) may have accepted the notion that natural law may be separate from the naturalists' understanding of that term, and that it may arise from concrete applications and common practices existing in and among "civilized nations."[27] Such a composite conception may be viewed as a compromise between positivism and naturalism, if that is at all possible, and as a blending of Common Law pragmatism and the more conceptual approach of the Romanist Civilist system. But then, is not all international law a process of blending legal concepts in a way that fits the exigencies of the international legal order? One

24. J.L. BRIERLY, THE LAW OF NATIONS 63 (6th ed. 1963).

25. *See* Lammers, *supra* note 13, at 60.

26. COLLECTED PAPERS, *supra* note 9, at 77.

27. *See* Lammers, *supra* note 13, at 61.

author seemed to take such an approach when he observed: "General Principles of International Law" are the "expression of the legal conviction of states . . . directly related to inter-State relations."[28]

III. The Functions of "General Principles"

As objective or pragmatic as one might desire a rule-finding process to be, it is nevertheless always predicated on certain values, just as much as such a process seeks or aims to achieve a value-oriented goal.[29] Indeed, no principle is value-free, nor is it free of a value-oriented goal or outcome. Yet, to define "General Principles," one should first turn to their functions as they are perceived by theorists and applied in practice, whether by international judicial adjudication or as they emerge from customary practices in inter-state relations and international interaction.

Some scholars regard "General Principles" merely as a means of assistance in the interpretation and application of conventional and customary law, while others consider them a primary source embodying an equal or even a higher order of norms.[30] Precisely because that doctrinal debate continues and its outcome is unlikely to be settled, it may prove more useful to look at "General Principles" from the perspective of their functional uses and applications. The most avid proponent of this approach is probably Bin Cheng, who postulates three general functions that "General Principles" may serve. First, they are the source of various rules which are merely an expression of these principles. Second, they constitute the guidelines or framework for the judiciary with respect to the interpretative and applicative functions of positive rules of law. Third, they may be applied as norms whenever there are no formulated norms governing a given question.[31]

To this writer, there are at least four functions that "General Principles" fulfill as a source of international law that are also complementary to the other sources of international law. "General Principles" serve as:

(1) A source of interpretation for conventional and customary international law;

(2) A means for developing new norms of conventional and customary international law;

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28. *Id.* at 67.

29. *See* Law and Public Order: The Legal Regulation of International Coercion (M. MacDougal & F. Feliciano eds. 1961).

30. *See* C. Rhyne, *supra* note 18.

31. B. Cheng, *supra* note 6, at 390.

(3) A supplemental source to conventional and customary international law; and,
(4) A modifier of conventional and customary international rules.

This classification is neither exhaustive nor necessarily certain enough to delineate with specificity the parameters of each one of the four identified functions. The reason simply lies in the very nature of "General Principles," which cannot be so extremely specific and precise as to afford certainty of the law and at the same time be broad and general enough to allow for the growth and evolution of international law.

A. *A source of interpretation for conventional and customary international law*

"General Principles" have been primarily used to clarify and interpret international law. For example, as Schlesinger notes, "General Principles" must be considered in determining the meaning of treaty terms.[32] Lauterpacht points out that recourse by the ICJ to "General Principles" has constituted "no more than interpretation of existing conventional and customary law by reference to common sense and the canons of good faith."[33] This interpretive function is the most widely recognized and applied function of "General Principles" and the one that is evidently the most needed and useful, in contrast to the use of "General Principles" as a method to supplant or remedy deficiencies in conventional and customary international law.[34]

"General Principles" can be utilized to interpret ambiguous or uncertain language in conventional or customary international law, but, foremost, they can be relied upon to determine the rights and duties of States in the contextual, conventional, or customary law. This is particularly the case, for example, with respect to such principles as "good faith" and "equitable performance."

The extent to which one can resort to "General Principles" for interpretative purposes has never been established. Consequently, "General Principles" can logically extend to fill gaps in conventional and customary international law and serve as a supplementary source thereto. From that basis, "General Principles" can be interpreted as a source of law that overreaches other positive sources of international law, and eventually supersedes it.

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32. "[Treaty] terms acquire concrete meaning only by reading into them the general standards of decency which civilized nations recognize in their municipal legal systems . . . ." Schlesinger, *supra* note 11, at 736.

33. *See* THE DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 6, at 166-67.

34. *See* S. CARLSTON, LAW AND ORGANIZATION IN WORLD SOCIETY 216 (1962).

This interpretative approach can be applied *in extenso*. "General Principles" thus become not only a source of new norms, but also a source of higher law, i.e, *jus cogens* [as discussed below].

B. *A means for developing new norms of conventional and customary international law*

The second function of "General Principles" is known as the growth function. Brierly states, "[i]t is an authoritative recognition of a dynamic element in international law and of the creative function of the courts which administer it."[35] Many other writers, including Verzijl,[36] Whiteman,[37] and Gross,[38] recognize this underlying role of "General Principles" as necessary to the development of international law. Thus, it is probably safe to assume that the framers of both the PCIJ and ICJ Statutes anticipated the prospective need for evolution and change in the development of international law—as evidenced by article 38 (I)(3) and article 38 (1)(c).

Professor O'Connell articulated the need for growth in international law:

> If international law is seen as an organic growth reflecting more the life of the international community than the conscious operation of the government will, then the creative role of the judiciary is important, and its pronouncements upon the emanations from basic principles significant.[39]

Indeed, it would be stifling not to inject into the sources of any legal system the capability of growth and development. Every national legal system includes such a process, either through the jurisprudence of its courts or through doctrine as developed by scholars. Thus, it can be said that legal principles evolve and that a legal mechanism or process for the recognition and application of this evolutive aspect of law must exist in international law.

Such an approach injects a dynamic element into international law. This prevents the static application of archaic norms and procedures to what is admittedly an evolving legal process designed to frame or regulate the dynamic exigencies and needs of a community of nations with changing interests and mutable goals and objectives. To state that international law has faced and is likely to face increasing new challenges, if for no other reason than to meet the fast-growing and

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35. *See* J.L. BRIERLY, *supra* note 24, at 63.

36. *See* J.H.W. VERZIJL, *supra* note 12, at 57.

37. *See* 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 90 (1963).

38. *See* 1 L. GROSS, ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 145 (1984); M. WHITEMAN, DIGEST OF INTERNATIONAL LAW AND ORGANIZATION 145 *passim* (1984).

39. *See* D.P. O'CONNELL, *supra* note 19, at 12.

changing technological advances, is a truism. Thus, the demands on international law must be accommodated through an expanded usage of "General Principles."[40] However, as will be discussed below, it has not necessarily been the generalized experience of the jurisprudence of the PCIJ and ICJ that "General Principles" have, in fact, appreciably influenced the growth of new rules.[41] The development of new norms of conventional and customary law required the existence of "General Principles." As one author states: "From its legislative inception until the final determination, law is a 'continuing process.' "[42]

C. *A supplemental source to conventional and customary international law*

"General Principles" may provide a norm or standard when a custom or treaty is inapplicable or nonexistent. Some say this is precisely one of the functions which the framers of article 38 had in mind when they included "General Principles" among the sources of international law.[43] Indeed, the members of the Advisory Committee drafting the PCIJ statute were eager to avoid the danger of having to declare a *non liquet* for lack of a positive rule. One committee member, Hangerup of Norway, pointed out that "[a] rule must be established to meet this eventuality to avoid the possibility of the court declaring itself incompetent through lack of an applicable rule."[44]

Jalet recognizes that the rejection of the admissibility of *non liquet* implies the necessity of creative activity on the part of the judges.[45] Allowing the judge to search through the unbounded fields of legal experience precludes the possibility that, in a given case, an applicable rule of law may be absent.[46] As one commentator observed:

> Another favorite legalistic argument . . . is the doctrine of *Nulla Poena Sine Lege* (No Penalty Without Law). 'But it doesn't follow from this that in the absence of domestic legislation an international court cannot justifiably punish acts well known by all concerned to be contrary to the laws of nations.'[47]

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40. *See* COLLECTED PAPERS, *supra* note 9, at 71.

41. *See* M. SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 145 (1968).

42. *See* M. BOS, *supra* note 7, at 74.

43. *See* Lammers, *supra* note 13, at 64.

44. *See* C. RHYNE, *supra* note 18, at 60.

45. *See* Jalet, *supra* note 16, at 1060.

46. *See* COLLECTED PAPERS, *supra* note 9, at 243.

47. *See* Comment, *International War Criminal Trials and the Common Law of War*, 20 ST. JOHN'S L. REV. 18, 23 (1945), (quoting Glueck, *By What Tribunal Shall War Offenders Be Tried*, 56 HARV. L. REV. 1059, 1081 (1943)); *see also* Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the* Nulla Poena *Principle*, 29 ARIZ. L. REV. 385 (1987).

If this approach were not taken, we would be left with the notion that "General Principles" are meant to prevent an international court from redressing a denial of justice in a case where neither a treaty nor a customary rule could be identified with specifically applicable provisions. Similarly, how could one redress an *abus de droit* without resort to "General Principles"? A pragmatic approach to this function of "General Principles" is that the judge, in the absence of an applicable rule of international law, in order to fill a legal gap, may rely on a principle derived from the national legal systems which represent the major systems of jurisprudence in the world, or from those systems whose legal traditions more particularly apply to the specific case at hand.[48]

Opposition to this function can be advanced on the premise that filling gaps in conventional and customary international law by resorting to "General Principles" creates new law and thus transforms the judicial process into a legislative one. This concern explains the reluctance of international judges to make use of this legal reservoir as a source of principles that can be turned into operative norms. This is particularly a concern where the parties to whom such principles are applied may have never known of these principles or contemplated either their existence or their applicability to the parties' conduct. In this respect, "General Principles" must conform to what is known in criminal law doctrine as the "principles of legality," which prevent judicial lawmaking. The dilemma with respect to this function of "General Principles" is no different from that of national legal systems in which the judiciary is always seeking the proper balance between strict and progressive legal interpretation.[49]

D. *A modifier of conventional and customary international law*

The final function of "General Principles" is described as the corrective function. "General Principles," in this context, would be used to set aside or modify provisions of conventional or customary law in favor of a greater good or higher cause. This is the most controversial of the four functions. This function embodies that of *jus cogens* [discussed below]. The argument that "General Principles" should, in certain circumstances, be utilized to modify conventional or customary law is at the heart of the *jus cogens* doctrine.

Professor Gordon Christenson explains the virtue of using "General Principles" to fulfill this function:

48. *See* COLLECTED PAPERS, *supra* note 9, at 71.

49. *See* Jalet, *supra* note 16, at 1060-62.

> [S]ome principles of general international law are or ought to be so compelling that they might be recognized by the international community for the purpose of invalidating or forcing revision in ordinary norms of treaty or custom in conflict with them.[50]

This statement brings to the surface another important concept: the notion that *jus cogens* is premised on the existence of a hierarchy of "General Principles." Scholars supporting this view argue that only those principles which are "peremptory" may modify or overturn customary or conventional law, holding a State to a higher obligation. For example, as Professor Christenson states, "[the concept of *jus cogens*] invalidates ordinary state-made rules of international law in conflict with powerful norms expressing fundamental exceptions vitally important to overriding community interests."[51]

Simply stated, in cases where protection of a fundamental interest is needed, peremptory norms shall prevail over positive law. Peremptory norms are those which are said to occupy the highest place in the hierarchy of principles, and which must be accepted as overriding by the international community. With this status, they have the power to force revision "in certain conventional and customary prescriptions to maintain the minimum coherence and content demanded of an international public order system."[52]

Theoretically speaking, peremptory norms are said to be an indispensable component of the law of nations because they are the framework of the international legal order.[53] Yet it remains unclear whether such peremptory norms are in a category of their own or if they are merely a semantic variation of "General Principles." In other words, if a "General Principle" has attained a higher level of consensus or even unanimity, it becomes a *jus cogens* peremptory norm. No matter what the outcome of this distinction may be, there exists a separate category or level of norms whose standing is on a higher plane than other principles, norms and rules. The problems of ascertaining the existence of such a peremptory norm and identifying its contents for the purposes of applying it to a factual situation are, however, the same as with respect to other principles, irrespective of whether the source of the peremptory norm or principle arises under international or national law.

Lauterpacht questions this function:

> [I]n practice the situation is not that of simple absence or simple pres-

50. *See* Christenson, *supra* note 22, at 586 (footnote omitted).

51. *Id.* at 589 (footnote omitted).

52. *Id.* at 645.

53. *See id.* at 592.

> ence of rules of customary or conventional international law; that in practice these rules are often obscure or controversial; that, as the result, the question is not one of displacing them but of interpreting them against the background or in the light of general principles of law; and that the difference between disregarding a rule of international law in deference to a general principle of law and interpreting it (possibly out of existence) in the light of a general principle of law may be but a play on words.[54]

Corbett, however, sees it as a form of rhetoric:

> No one has ever improved much on Aristotle's instructions, in *The Art of Rhetoric*, to the advocate who, finding the precedents or code heavily against him, tries to persuade the court to "interpret" or ignore the enacted or judge-made law in favor of a higher justice.[55]

Jurisprudential theories abound in the international and national legal literature as to whether higher principles of law can or should override positive law, and the debate surely will continue as long as there are legal systems evolving to meet societal needs and interests, especially when legislative processes are unable, or unwilling, to respond in a timely fashion to new societal needs and interests.

IV. "General Principles": A Subsidiary or Co-equal Source of International Law?

To determine whether "General Principles" are a subsidiary source of international law presupposes a hierarchy of these sources and their ranking of principles. Such suppositions raise, inter alia, the following issues, which are particularly relevant to this functional approach of "General Principles." They are:

1) The place of "General Principles" in the hierarchy of sources of international law;
2) Hierarchial judicial reliance on "General Principles" as latent rules of law;
3) Functional differences between legal norms and principles; and
4) The binding nature of "General Principles."

A doctrinal approach to these questions would have probably required that the last of these four issues precede the others, but because the approach followed herein is empirical, the issue as to the binding nature of "General Principles" is deemed conclusory.

A. *The place of "General Principles" in the hierarchy of international law sources*

Some consider "General Principles" to be a secondary source of

54. The Development of International Law, *supra* note 6, at 165-66.

55. Corbett, *The Search for General Principles of Law*, 47 Va. L. Rev. 811 (1961).

international law, following conventional and customary international law, only because that is the order in which these sources are listed in articles 38 of the PCIJ and ICJ Statutes. This notion of a hierarchy based on the place of "General Principles" in the listing of international law sources should be rejected. As Cheng states:

> The order in which these components of international law are enumerated is not, however, intended to represent a judicial hierarchy, but merely to indicate the order in which they would normally present themselves in the mind of an international judge . . . . There is nothing to prevent these three categories of rules or principles of international law from being simultaneously present in the mind of the judge. His task consists precisely in declaring which are the relevant rules applicable to the case, in accordance with international law as a whole.[56]

When one examines this issue in the context of legislative intent, it becomes evident that the drafters of article 38 of the PCIJ Statute never intended to create a hierarchy of sources. In fact, the Advisory Committee notes reject the idea of a hierarchy. Descamps said that "[t]he various sources of law should be examined successively."[57] To maintain that the sources should be examined successively requires a judge not to draw upon a given source before first applying the preceding one. This would contravene the drafting committee's intentions, since, in the drafting process, the committee deleted the words "in the order following" (*en ordre successif*), thus eliminating any requirement in order of choice.[58]

Judicial decisions and the teachings of publicists have emphasized a more primary role for "General Principles." These two subsidiary sources do not enunciate rules, but rather serve as a means of determining how rules may properly be considered. They thus have "law-determining agencies."[59]

The view that "General Principles" have the same standing as conventional and customary laws also finds support in Western scholarly writings, but it has been rejected by the socialist legal system[60] and by some Third-World countries. One source of concern for socialist scholars is that the principles of Western capitalism are so different from those of Marxism-Leninism, which inspire their systems. Similarly, Muslim scholars would only accept those principles which are

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56. B. CHENG, *supra* note 6, at 22-23 (footnote omitted).

57. C. RHYNE, *supra* note 18, at 61 (footnote omitted).

58. *Id.* at 62.

59. B. CHENG, *supra* note 6, at 23 (footnote omitted).

60. *See, e.g.*, K. GRZYBOWSKI, SOVIET INTERNATIONAL LAW AND THE WORLD ECONOMIC ORDER (1987); G.I. TUNKIN, THEORY OF INTERNATIONAL LAW (1974); *see also* Rubanov, *The Development of Generally Recognized Rules of International Law*, in INTERNATIONAL LAW AND INTERNATIONAL SYSTEMS (Butler ed. 1987).

compatible with Islam.[61] Other Third-World scholars reject the *a priori* application of principles because they are a product of Western systems that have long dominated many Third-World nations through colonialism.[62] These rejectionist positions are gradually changing, first because conflict between the East and the West — socialism and capitalism — is abating, and second because the very concept of "General Principles" is broad enough to encompass all world legal systems. Indeed, so long as the emphasis is not on those principles emanating solely from Western legal systems, the viability of "General Principles" as one of the co-equal primary sources of international law will prevail. In time, with increased reliance upon them in both national systems and in the international system, and also in the interaction between these systems, "General Principles" are bound to gain greater acceptance and applicability in various functional aspects.

B. *Hierarchical judicial reliance on "General Principles" as utilization of latent rules of law*

Past decisions of the international courts demonstrate that concerns by scholars over eventual arbitrary or subjective application of "General Principles" are unwarranted.[63]

The composition of the ICJ serves as an initial safeguard against arbitrariness and subjectivity. As Professor Sorensen points out:

> [T]he formula [that identifies general principles] suggests a notion of common consent comparable to that requisite for the creation of customary law, but, in this context, to be found in a coincidence of municipal rules of law. In practice, however, the International Court proceeds in a more pragmatic fashion, and is satisfied with a coincidence of opinion amongst its own judges. Such a method affords sufficient safeguards, the judges having been elected so as to ensure 'the representation of the main forms of civilisation and the principal legal systems of the world' (article 9 of the Statute)."[64]

Interestingly enough, the words "recognized by civilized nations," which at one time were regarded with suspicion because they were thought to place Western legal principles above those of socialist and Third-World nations, are now a guarantee of the universality of sources of principles. Indeed, all Member-States of the United Na-

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61. *See* M. KHADDURI, THE ISLAMIC LAW OF NATIONS (1966); Mahmassani, *The Principles of International Law in Light of Islamic Doctrine*, 117 RECUEIL DES COURS 205 (1966); S. RAMADAN, ISLAMIC LAW, ITS SCOPE AND EQUITY (1961); H. HAMIDULLAH, MUSLIM CONDUCT OF STATE (1961); Bassiouni, *Islam: Law Concept and World Habeas Corpus*, 1 RUT.-CAM. L.J. 163 (1969).

62. *See* C. RHYNE, *supra* note 18.

63. *See* Section V(B), *infra*, specifically footnotes 95-97 and accompanying text.

64. *See* M. SORENSEN, *supra* note 41, at 146.

tions are presumed to be "civilized nations."[65] Thus, the basis for ascertaining the existence of a given principle has so broadened that it ensures against the limited basis that was once the reason for criticism of that source.

The Advisory Committee for the ICJ's statute was in agreement that a judge did not legislate by using "General Principles," because although "applying them, [brought] *latent* rules of law to light, [it] did not *create* new rules."[66] As previously mentioned, comparative legal analysis provides a broad empirical basis for objectively ascertaining the "General Principles" found in national legal systems, and that ensures a broader measure of consensus as to what constitutes a given "General Principle." Thus, judicial application of "General Principles" is not a form of judicial legislation if a correct empirical approach is followed in the ascertainment of a given principle and if its judicial application is in accordance with similarly ascertained "principles" of judicial practice.

In the final analysis, it is not the theoretical function of "General Principles" that is outcome-determinative, but rather the manner in which "General Principles" are judicially identified and applied. Assessing judicial application can best be done experientially. As illustrated below, the jurisprudence of both the PCIJ and the ICJ has remained well within the boundaries of judicious identification and application of "General Principles" in cases brought before the courts. That jurisprudence, however, does not necessarily identify the methods of inquiry or the rationale in applying "General Principles," even though the outcome would withstand the tests of empirical methodology in comparative legal research.

C. *Functional differences between legal norms and principles*

Some scholars believe that the word "principle" implies the need for a philosophical content, and that "principles" thus should not be considered on the same level as positive rules of law, which are said to embody concrete and definite elements established by those making the rules. Under this theory, using "General Principles" as a basis of judicial decision-making and as a substitute for positive legal norms would inject certain subjective elements, such as morality and justice, into positive international law.[67]

Certainly, the major difficulty encountered in accepting "General

65. *See* B. CHENG, *supra* note 6, at 25.

66. *See id.* at 19 (emphasis in the original).

67. *See* J.L. BRIERLY, *supra* note 24.

Principles" of morality and justice as a source of international law is the fact that morality and justice are variable concepts in the different legal systems of the world.[68] Lauterpacht finds that "paragraph 3 of article 38 must be regarded as declaratory because 'general principles of law' expresses that vast residuum of social necessity . . . that social and legal necessity without which law, international and other, is inconceivable."[69]

It is misleading, however, to reject "General Principles" of morality and justice as purely subjective because every legal system, no matter how different, has some principle of morality and justice. Conceptual differences can be taken into account in the inductive process of ascertaining the meaning and content of morality and justice. These differences can then be objectivized in their application to specific factual situations. Thus, for example, the principle of access to justice can be objectively demonstrated and thereafter specific localization of the principle can also be objectively applied. Such a technique is used in conflict of laws. Consequently, the various approaches to concepts of justice and fairness do not place their existence in legal doubt, nor do they render their identification and application so impossible or uncertain as to nullify the functional validity of such a principle, even when it is used to supersede positive law.[70] Lastly, it should be remembered that "General Principles" "guide and give life to the [positive] law"[71] and are thus indispensable to its viable application.[72] With this understanding, semantic differences can be overcome and "General Principles" can remain a co-equal primary source, standing with conventions and customs.

D. *The binding nature of "General Principles"*

With regard to the binding nature of "General Principles," a basic question arises under a strict positivist approach, which would see "General Principles" as an undefined and uncertain source of law which would have the capacity of binding States to that to which they have not specifically consented. For example, Hudson believes that "General Principles" could be used in a way that would bind States beyond that to which they have agreed to be bound. He states, "[Arti-

68. *See* G. VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 24-25 (4th ed. 1981).

69. *See* COLLECTED PAPERS, *supra* note 9, at 242.

70. M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 611 (1943), *cited in* M. WHITEMAN, *supra* note 37, at 91.

71. Jalet, *supra* note 16, at 1047.

72. M. HUDSON, *supra* note 70, at 611, *cited in* M. WHITEMAN, *supra* note 37, at 91.

cle 38 of the PCIJ Statute] empowers the Court to go outside the field in which States have expressed their will to accept certain principles of law as governing their relations *inter se*, and to draw upon principles common to various systems of . . . law . . . ."[73]

The possibility that "General Principles" will be used as a basis to modify conventional and customary law, and thus become a primary source of international law, challenges the view that presumptive freedom of any obligation exists where positive law is silent. Two ideas are at the heart of this question: first, the distinction between express and tacit agreement of States, and second, the fact that international law is a permissive rather than a restrictive body of law.

It can be argued that "General Principles" create obligations which have the implicit consent of States.[74] This argument can be construed from the fact that "General Principles" are an accepted source of international law and that they are derived from the States' own principles, as ascertained through the inductive approach. Even if express consent were required, it would be satisfied by empirical evidence that principles existing in the national legal system are applicable in international law.[75]

On a pragmatic level, invalidating the ability of "General Principles" to bind without the express consent of States can produce three possible consequences:

(1) denial of justice;
(2) a static body of international law; and
(3) a judicial system unable to resolve contentious issues on which there is no positive law, or about which the positive law is insufficient, unclear, or ambiguous.

With regard to the permissive character of international law, one commentator stated that: "international law confines the jurisdiction of sovereignties and those rights which are not specifically ruled out accrue to the nations of the world as a residue of power."[76] This presumption of freedom of obligation cannot, however, be limitless. If "General Principles" are considered to be rules from which States may in no case depart, then they are a valid exception to the doctrine of freedom of obligation beyond accepted normative positive law because they too derive from positive law.

The best evidence that international law has not only accepted but

73. M. HUDSON, *supra* note 70, at 610-12, *cited in* M. WHITEMAN, *supra* note 37, at 91.

74. *Id.*

75. *See* COLLECTED PAPERS, *supra* note 9, at 71.

76. *See* Comment, *supra* note 47, at 24 (citing S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 23 (Sept. 7).

relied on "General Principles" is the Vienna Convention on the Law of Treaties, which contains a number of such "principles" in its rules of treaty interpretation.[77] Although that Convention codifies customary rules of international law, it nonetheless incorporates such principles as good faith and others as part of customary international law, even though their origin is found in "General Principles."

The choice of which functions "General Principles" should assume is clearly predicated on whether "General Principles" are deemed a subsidiary or primary source of international law. If they are a primary source, "General Principles" may have a binding legal effect superior to that of positive normative rules of international law. Those who feel the subsidiary role of "General Principles" is more appropriate justify their position by arguing that treaty provisions and customary international law are, by nature, a more direct emanation of the will of States and are also often more specifically related to the subject matter envisaged by treaty provisions and customary rules than are "General Principles." Thus, they contend that a priority of conventional and customary international law should be maintained over "General Principles." Under this view, "General Principles" are only appropriately resorted to for the purposes of explaining inadequacies in the positive normative law and can also occasionally fill gaps in these two primary sources.

In contrast, viewing "General Principles" as a co-equal primary source of law would mean that a court could apply them for the purpose of modifying and superseding conventional and customary rules. While critics have voiced some apprehension about applying "General Principles" in this manner, the jurisprudence of international courts and tribunals has not borne out these concerns. Thus, the question of whether "General Principles" are a binding source of international law is well established and its hierarchical ranking has simply been left to the functional need for their application in specific cases. The exception, as discussed below, remains in the area of *jus cogens*, where confusion seems to thrive.

V. "General Principles" as Applied by the Permanent Court of International Justice and the International Court of Justice

The PCIJ and now the ICJ, under article 38 (I)(3) and article 38 (1)(c) respectively, have the authority to apply the "General Principles

77. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 239/27; *see* T.O. Elias, The Modern Law of Treaties 71-87 (1974); F. Malekian, The System of International Law: Formation, Treaties, Responsibility 110-16 (1987).

of Law Recognized by Civilized Nations." These "General Principles" include "the norms common to the different legislation of the world, united by the identity of the legal reason therefor, or the *ratio legis*, transposed from the internal legal system to the international legal system."[78] Despite this grant of authority, the two courts have, for the most part, been cautious in applying "General Principles" and, as a result, the exact scope of article 38(1)(c) has remained, at least from a doctrinal perspective, somewhat undefined and uncertain. This assertion becomes evident when one examines the decisions of the Permanent Court of International Justice and those of the International Court of Justice, even though both have relied upon and applied "General Principles" in cases before them.

A. *Identifying the Elements of "General Principles"*

Even though the PCIJ and ICJ have usually taken a cautious approach toward "General Principles," decisions of the two courts provide some guidelines as to how to identify the elements of a "General Principle." For a rule to be recognized as a "General Principle" under article 38(I)(3) and 38(1)(c), it now appears that the rule must exist in a number of States, but the rule does not have to meet the test of "universal acceptance," and no quantitative or numerical test for States having such a "principle" has ever been established.

In the *Lotus* case, the PCIJ suggested that article 38(I)(3) requires a rule to be of universal acceptance when it stated that a "General Principle" "is applied between all nations belonging to the community of States."[79] An examination of the facts of this case, however, reveals that the court's finding can be explained by reason of the very principle which was found to be universal. That principle, territoriality of criminal jurisdiction, is indeed universal in its recognition and application. Had the facts of the case been different, the court likely would not have suggested a requirement of universality. This writer's conclusion is that the court did not intend to posit a test of universality for "General Principles," but merely ascertained it in this instance.

The ICJ rejected the test of "universal acceptance" in the *South*

78. *See* North Sea Continental Shelf (W. Ger. v. Den.; W.Ger. v. Neth.), 1969 I.C.J. 101, 134 (Feb. 20) (Sep. Op. Ammoun); *see also* Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 123, 149 (Apr. 21) (Fernandes, J., dissenting) (citing VERDROSS, DERECHO INTERNACIONAL PÚBLICO 205-06 (1955)). Judge Fernandes suggested that "The general principles of law are at the basis of custom and of conventional law. The latter are usually no more than the crystallization of those principles." For the jurisprudence of the PCIJ, *see* M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE (1934); THE DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 6.

79. *See* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 16 (Sept. 7).

West Africa Cases (1966), where Judge Tanaka, in his dissenting opinion, explained that, "[t]he recognition of a principle by civilized nations . . . does not mean recognition by all civilized nations . . . ."[80] That test was also rejected by the ICJ in the *North Sea Continental Shelf* case, where Judge Lachs, in his dissenting opinion, explained that "[t]he evidence should be sought in the behavior of a great number of States, possibly the majority of States, in any case the great majority of the interested States."[81] Furthermore, none of the other cases in which "General Principles" were relied upon required "universality of acceptance."

Decisions of the ICJ further suggest that the term "civilized nations" in article 38(1)(c) is not intended to be an added legal element to evidence "General Principles." If that were the case, such a term would be discriminatory and incompatible with the United Nations Charter,[82] which recognizes the equality of all Member-States. Judge Ammoun of the ICJ suggested that article 9 of the ICJ Statute also requires the court to recognize "as a whole the representation of the main forms of civilization and of the principal legal systems of the world."[83] The import of that statement is consonant with comparative legal research technique, which would look to representative States among the world's major legal systems. Such an inquiry would not seek to identify norms, but rather the sameness of precepts upon which norms are predicated.

In evidencing a "General Principle," the PCIJ and ICJ have also looked for expressions of principles in the international context. "General Principles" have been identified by examining State conduct, policies, practices, and pronouncements at the international level, which may be different from domestic legal principles. Thus, States' foreign policies, bilateral and multilateral treaties, international pronouncements, collective declarations, writings of scholars, international case law, and international customs, even when unperfected, are valid areas of inquiry from which to determine the existence of "principles" within the international context.

In the *Asylum Case*, the ICJ was required to determine if a State had the competence to unilaterally qualify an offense for the purpose of granting asylum to a citizen of another State charged with organiz-

80. *See* South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 299 (July 18) (Tanaka, J., dissenting).

81. *See* North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101, 229 (Feb. 20) (Lachs, J., dissenting).

82. North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101, 133 (Feb. 20) (Ammoun, J., separate opinion).

83. *Id.*

ing a military rebellion in Peru. The court used "General Principles" in order to determine the policies underlying diplomatic asylum and examined United States and Latin American international legal practice, including certain international instruments of a regional and bilateral nature.[84] Judge Castilla noted, "[a]t the Montevideo Conference of 1933, the [asylum] *principle* was accepted by the United States of America following the development of the policy of President Franklin Roosevelt; and pursuant to the confirmation of juridical equality of American States."[85]

Similarly, in the *South West Africa Cases* (1962), Judge Jessup found that the "principle of separation" is evidenced in the practice of states as found in such publications as "Tobin, *Termination of Multipartite Treaties* (1933); Stephens, *Revisions of the Treaty of Versailles* (1939); [and] Hoyt, *The Unanimity Rule in the Revision of Treaties: A Reexamination* (1959)."[86]

The two courts have also looked at prior court decisions, and applied them by close analogy to cases at bar.[87] However, the jurisprudence of the PCIJ and the ICJ cannot be considered as having precedential authority unless it is in harmony with the international law or "General Principles" "common to all nations."[88]

The judges have been known to look for evidence of a principle at the national level by examining all the branches of national law, whether public, constitutional, administrative, private, commercial, or procedural. For example, in the *International Status of South West Africa* case, Judge McNair, in his separate opinion, examined the American and English laws on trusts in order to define the policies and principles underlying the League of Nations Mandate System, which was a newly established institution in the international sphere.[89] As stated above, however, national legal principles do not automatically become part of the international law:

> The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel," ready made and fully equipped with a set of rules . . . . [T]he true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of pri-

84. *See* Asylum Case (Colom. v. Peru), 1950 I.C.J. 359, 369 (Mar. 3) (Castilla, J., dissenting).

85. *Id.* at 378-79 (emphasis added).

86. *See* South West Africa Cases (Ethiopia v. S. Afr., Liberia v. S. Afr.), 1962 I.C.J. 319, 408 (Dec. 21) (Jessup, J., separate opinion).

87. *See* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 16 (Sept. 7).

88. *Id.*

89. *See* International Status of South West Africa, 1950 I.C.J. 146, 148-49 (July 11) (McNair, J., separate opinion).

vate law as an indication of policy and principles rather than as directly importing these rules and institutions.[90]

The courts have sometimes looked to the origins of a given legal system, such as Roman Law, for the Romanist-Civilist systems. In some cases, resort to such origins leads to the examination of natural law.[91] In the words of Judge Tanaka, "[I]nternational protection of human rights . . . is not the application by analogy of a principle or norm of private law to a matter of international character . . . only one and the same law exists and this is valid through all kinds of human societies in relationships of hierarchy and co-ordination."[92]

It should be noted that in applying "General Principles," the courts have not always been clear on where the demarcation line should be drawn between customary law and "General Principles." In some instances, "General Principles" are barely distinguishable from customary international law.[93] In other cases, "General Principles" and customary law are clearly set apart. However, it does appear that some principles that are not encompassed in customary law may be implicated by the term "General Principles." As Lammers suggested, certain principles cannot be evidenced in customary law because they are fairly broad in scope and have not yet been applied in State practice, or have been applied only in a limited form.[94]

B. *Reliance on "General Principles" by the International Courts*

In the view of Judge Hudson, "principles" in judicial practice have loomed "less large" than in the literature which they have inspired.[95] Judge Hudson's opinion holds true for the jurisprudence of both PCIJ and the ICJ. An examination of the two courts' decisions reveals that the judges have only sparingly employed "General Principles" in their opinions. In the words of Lauterpacht, "[e]xperience has shown that the main function of 'general principles of law' has been that of a

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90. *Id.* at 148.

91. For a discussion of the relationship between natural law and positive law, see North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101, 193-95 (Feb. 20) (Tanaka, J., dissenting).

92. *See* South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 296 (July 18) (Tanaka, J., dissenting).

93. In the Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 369 (Mar. 3) (Castilla, J., dissenting), M. Castilla indicated, "These principles of international law cannot be other than those which have been stated in the various treaties on asylum . . . . Acceptance of the application of the principles of international law entails recognition of principles which may be derived from international custom."

94. *See* Lammers, *supra* note 13, at 72. Such principles include the principle of freedom and the principle of the high seas. For a discussion of these principles, see S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

95. *See* M. HUDSON, *supra* note 70, at 610-12, *cited in* M. WHITEMAN, *supra* note 37, at 91.

safety-valve to be kept in reserve rather than a source of law of frequent application."[96] That may explain why on some occasions, when "General Principles" are resorted to, the judges do not refer to them *eo nomine* or by express reference to article 38. Thus, those who feared that "General Principles" would lead to the demise of positivism are proven wrong.[97]

Positivists espouse the view that no gaps or ambiguities exist in international customs and conventions because the only international law that exists is that which has been stated in positive terms. That which has not been established in positive terms is outside the scope of the law. Consequently, there is no need for "General Principles." To take this position, however, is to deny reality and the needs of the international legal system. That which is not covered by positive international law exists and does give rise to conflicting and contentious situations in need of judicial or legally based resolutions. Thus, there is a need for "General Principles" to fill the gaps of positive law. That is why this source of law was included in article 38 of both the PCIJ and the ICJ Statutes.[98]

The real unarticulated fear of positivists is that "General Principles" can be abused and can become a source of judge-made law. The record of the PCIJ and the ICJ belies that fear.

1. "General Principles" as relied upon by the Permanent Court of International Justice

As stated above, the Statute of the PCIJ authorized that court to apply "General Principles of Law Recognized by Civilized Nations" to cases before it.[99] In a number of cases, the court did resort to and apply, "General Principles."[100] As will be illustrated below, the extent of the PCIJ's reliance on "General Principles" and the degree of specificity with which the court utilized them varied from case to case.

One of the earliest references to "General Principles" by the PCIJ is found in the *Mavrommatis Palestine Concessions* case.[101] In his dissenting opinion, Judge John Bassett Moore asserted that the require-

96. *See* THE DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 6, at 166.

97. *See generally* M. BOS, *supra* note 7, for a discussion of general principles of law and legal positivism.

98. *See supra* notes 43-44 and accompanying text.

99. STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE art. 38(I)(3).

100. *See generally* B. CHENG, *supra* note 6.

101. Mavrommatis Palestine Concessions (Greece v. Gr. Brit.),1924 P.C.I.J. (ser. A) No. 2 (Aug. 30).

ment that a court have jurisdiction before it can act is one of the principles common to all legal systems. As he stated:

> There are certain elementary conceptions common to all systems of jurisprudence, and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has not jurisdiction . . . . The requirement of jurisdiction, which is universally recognised in the national sphere, is not less fundamental and peremptory in the international.[102]

In several early cases, the PCIJ based its rulings on "General Principles," but did not articulate the basis of its specific reliance on the principle in question. The PCIJ, in its Advisory Opinion on the *Exchange of Greek and Turkish Populations*, declared that there is a "self-evident" principle, "according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."[103] Similarly, in the case of *Certain German Interests in Polish Upper Silesia*,[104] the court indicated that its laws of procedure contain not only the "Statute or Rules which govern the Court's activities" but also "general principles of law."[105] Again failing to specify the basis of its reliance on a given principle, the court, in its Advisory Opinion in *The Frontier Between Iraq and Turkey* case, simply acknowledged that the "well-known rule that no one can be judge in his own suit holds good."[106] Finally, in its advisory opinion in *Greco-Turkish Agreement of December 1, 1926*, the court simply asserted "the principle that, as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction . . . ."[107]

In the *Chorzów Factory (Judgment)* case,[108] the court continued to rely on "General Principles," but unlike some of the previous cases, it noted the basis of the principle — *nullus commodum capere protest de injuria sua propria* — upon which it relied. The court held that:

> It is, moreover, *a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts*, that one Party can-

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102. Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 57-59 (Aug. 30) (Moore, J., dissenting).

103. Exchange of Greek and Turkish Populations (Greece v. Turk.), 1925 P.C.I.J. (ser.B) No. 10, at 20 (Feb. 21).

104. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25).

105. *Id.* at 19.

106. Article 3, Paragraph 2 of the Treaty of Leusenne (Frontiers Between Turkey and Iraq), 1925 P.C.I.J. (ser. B) No. 12, at 32 (Nov. 21).

107. Interpretation of the Greco-Turkish Agreement of Dec. 1, 1926, 1928 P.C.I.J. (ser. B) No. 16, at 20 (Aug. 28).

108. Factory at Chorzów (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26).

> not avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.[109]

The *S.S. "Lotus"* case[110] is perhaps the most widely cited decision of the PCIJ. Among other reasons, the case is important because it instructs one on how to ascertain if a "General Principle" exists. The court stated that the issue in the case was "whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons."[111] The court went on to explain that:

> [I]n the fulfilment of its task of itself ascertaining what the international law is [the court] has *included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law* . . . . The result of these researches has not been to establish the existence of any such principle.[112]

In its *Chorzów Factory (Claim for Indemnity)* decision,[113] which involved the German government seeking damages for harm sustained by two of its companies caused by the express acts of the Polish government, the PCIJ again articulated the basis of the "General Principle" upon which it relied. The court stated that:

> The essential principle contained in the actual notion of an illegal act — *a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals* — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability, have existed if that act had not been committed.[114]

The court thus affirmed that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[115]

The *Lighthouses* case[116] serves as another example of the court stating where the "General Principle" in question is found: "Contracting Parties are always assumed to be acting honestly and in good

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109. *Id.* at 31 (emphasis added).

110. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

111. *Id.* at 21. More specifically, the issue was whether Turkey acted in conflict with principles of international law when it assumed jurisdiction over an officer of a French ship which had collided with a Turkish ship on the high seas.

112. *Id.* at 31 (emphasis added).

113. Chorzów Factory (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

114. *Id.* at 47 (emphasis added).

115. *Id.* at 29.

116. Lighthouses (Fr. v. Greece), 1934 P.C.I.J. (ser. A/B) No. 62 (Mar. 17).

faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law."[117]

In the *Serbian Loans* case[118], the court referred to a couple of proposed "General Principles of Law." The court found that the requirements of one principle, however, were not met: "[w]hen the requirements of the principle of estoppel to establish a loss of eight are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied . . . ."[119] The court went on to reject the "principle" of impossibility of performance, stating: "It cannot be maintained that war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders."[120] In the companion case to *Serbian Loans*, *Brazilian Loans*, the court did accept and apply the principle of interpretation *contra proferentum*, asserting it as a "familiar rule for the construction of instruments."[121]

In the Advisory Opinion concerning the *Greco-Bulgarian "Communities,"* an issue arose as to which of two conflicting provisions — a convention or a municipal law — should be preferred.[122] The PCIJ held that "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[123] In another of its Advisory Opinions, the case of *Treatment of Polish Nationals in Danzig*, the court again referred to "General Principles of Law," declaring:

> It should . . . be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[124]

The PCIJ continued its use of "General Principles" — though

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117. *Id.* at 47 (Séfériadès, J., separate opinion).

118. Serbian Loans (Fr. v. Serb.-Croat.-Slovans), 1929 P.C.I.J. (ser. A) Nos. 20, 21, at 5 (July 12).

119. *Id.* at 39.

120. *Id.* at 39-40.

121. Brazilian Loans (Fr. v. Braz.), 1929 P.C.I.J. (ser. A) Nos. 20, 21 (July 12).

122. Greco-Bulgarian Communities, 1930 P.C.I.J. (ser. B) No. 17, at 32 (July 31).

123. *Id.* at 32.

124. Treatment of Polish Nationals in Danzig, 1932 P.C.I.J. (ser. A/B) No. 44, at 24 (Feb. 4).

without specific reference to them — in the *Legal Status of Eastern Greenland* case, in which Norway was "estopped" from occupying certain territories in eastern Greenland.[125] The court held:

> In accepting these bilateral and multilateral agreements [the Treaty of 1826 and the Danish-Norwegian Agreements] as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland, and, in consequence, from proceeding to occupy any part of it.[126]

Finally, in the case of *Electricity Company of Sofia and Bulgaria (Interim Protection)*, the PCIJ considered as a "principle universally accepted by international tribunals" that "parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."[127]

2. "General Principles" as relied upon by the International Court of Justice.

The International Court of Justice continued the PCIJ's tradition of utilizing "General Principles." Like its predecessor, the ICJ frequently failed to articulate the method or process by which to identify the existence of a "General Principle" under article 38(1)(c). Moreover, it has given no real guidance regarding how to employ a "General Principle" in a legal dispute between States. The following is an examination of some ICJ cases which resorted to "General Principles of Law."[128]

The *Temple of Preah Vihear* case is indicative of the ICJ's reluctance to use "General Principles" and its failure to articulate what the contents of "General Principles" are. The court failed to refer to the "principle" of "preclusion" *eo nomine* and instead merely stated: "*qui tacet consentire videtur si loqui debuisset ac potuisset*" (he who is silent appears to consent if he should, and could, have spoken).[129] Judge Percy Spender's dissenting opinion, however, articulated the principle of "preclusion" by referring to it *eo nomine* and explaining how the

125. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J.(ser. A/B) No. 53 (Apr. 5).

126. *Id.* at 68-69.

127. Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Dec. 5).

128. *See supra* notes 78, 80-86, 89-93, and accompanying text.

129. Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 23 (June 15). In the *Temple of Preah Vihear* case, the court merely referred to the principle of plea of error as an "established rule of law."

principle operates to prevent a State from challenging a position previously taken expressly or impliedly which one party has relied upon. He then criticized the judgment for treating the principle as a "formless . . . maxim," instead of an instrument of substantive international law.[130]

One principle that the ICJ has specifically applied is that of good faith.[131] In the *Nuclear Test* case, which involved a dispute between Australia and France concerning the atmospheric testing of nuclear weapons in the Pacific Ocean, the court recognized that the principle of good faith governs the creation and performance of an international legal obligation: "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."[132]

In its advisory opinion in the *Western Sahara* case, the ICJ examined the question of self-determination and considered it a fundamental principle.[133] Obviously, the court relied upon the existence of such a principle as arising under international law.[134] In determining the basis for such a principle, the court examined the United Nations Charter, various General Assembly resolutions and its own prior decisions.[135]

It should be noted that, in the *Right of Passage* case, the court applied a "regional custom," which had only been developed between India and Portugal and which reflected the will of the two States, and by-passed "General Principles." In that case, the court was asked to determine if Portugal had a right of passage between the enclaves of Dadra and Nagar-Avril, and the coastal district of Daman, and to determine if India's refusal to allow passage of a proposed delegation of Portuguese nationals in time of war violated Portugal's rights. The court concluded:

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130. *Id.* at 143. That approach was consonant with the common law of equity, which the civilist and socialist systems do not recognize.

131. For a discussion of the good faith principle, see B. CHENG, GENERAL PRINCIPLES OF LAW AS A SUBJECT FOR INTERNATIONAL CODIFICATION 35; Schwarzenberger, *Trends in the Practice of the World Court*, 4 CURRENT LEGAL PROBS. (M. Keeton & G. Schwarzenberger eds. 1951).

132. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20).

133. Western Sahara, 1975 I.C.J. 1, 30-33 (Jan. 3). With specific regard to U.N. General Assembly practices, the court stated: "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting inhabitants of a given territory." *Id.* at 33.

134. As the court notes, "It [the court] is necessarily called upon to take into account existing rules of international law which are directly connected with the terms of the request . . . ." *Id.* at 30.

135. *Id.* at 31-35.

> Portugal also invokes . . . the general principles of law recognized by civilized nations, in support of its claim of a right of passage as formulated by it. Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties . . . the Court does not consider it necessary to examine . . . the general principles of law recognized by civilized nations . . . .[136]

"General Principles" have been used to provide a legal solution in cases where the conventional and customary law does not address a particular legal question; they have thus served a "gap filling function." In the *South West Africa Cases* (1962), for example, Judge Jessup's separate opinion employed "General Principles" to fill a gap in an existing treaty. In that case, the Republic of South Africa had argued that the court lacked compulsory jurisdiction because no dispute existed as envisioned under article 7 of the League of Nations Mandate (which triggered the court's compulsory jurisdiction).[137] By recognizing the principle whereby a party may seek adjudication if that party has a "legal interest" at stake, Jessup rejected South Africa's argument on the grounds that the parties have a "legal interest" in that the outcome of the case directly affected their financial and economic interests. He could also have argued that the meaning of "legal interests" extends beyond economic interests and applies also to humanitarian interests.[138]

In the *International Status of South West Africa* case, Judge Arnold McNair's separate opinion employed "General Principles" in order to interpret the then-existing League of Nations Mandate system. In so doing, he relied on Common Law principles applicable to the law of trusts and he found that an analogy to the mandate system was appropriate.[139]

"General Principles" were also used for "interpretative purposes" when the conventional or customary international law was obscure or unclear, and on rare occasions, they have been used to influence the development of conventional and customary law. In the *Right of Passage* case, Judge Wellington Koo used "General Principles" to deter-

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136. Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 43 (Apr. 12).

137. South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1962 I.C.J. 319 (Dec. 21). Article 7 reads:

> The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

Id. at 401.

138. *Id.* at 425.

139. International Status of South West Africa, 1950 I.C.J. 127, 148-49 (July 11).

mine if Portugal had a right of access to the Dadra enclaves. Here, two conflicting rights existed because Portugal had a sovereign claim over the enclaves while India claimed the right to passage. Based on the elementary principle of justice founded on logic and reason which is evidenced in international customary law, Judge Koo concluded that a principle dictates that States, as a necessity, have a right of passage in surrounding territories and suggested Portuguese sovereignty over the enclaves is subject to the control and regulation by India.[140] Likewise, in the *Asylum* case, Judge Castilla's dissenting opinion resorted to principles of international law in order to determine if the doctrine of asylum as evidenced in various conventions enabled Colombia to unilaterally qualify an offense for the purpose of granting asylum to a Peruvian citizen charged with organizing a military rebellion in Peru.[141]

There are a number of "General Principles" arising out of the international law of treaty interpretation and also out of the law of contracts in national legal systems, and the court frequently resorts to them when dealing with problems that arise when it is adjudicating claims arising out of treaties and international contracts. For example, in the *South West Africa Cases* (1962), Judge Jessup employed one of these principles — that of "separateness" of treaty provisions — which may be resorted to when a treaty provision has become inoperative.[142] In that case, the question arose by reason of the fact that the League of Nations was no longer in existence.[143] By using the principle of "separateness," Jessup determined that the life of the League was not necessary to the operation of a treaty provision (article 7).[144]

Lastly, some cases hold that "General Principles" can also be derived from the natural law. As stated above, in the *South West Africa Cases* (1966), Judge Tanaka suggested that article 38(1)(c) incorporates natural law into international law. Thus, in his dissenting opinion, he indicated that the natural law recognizes the principle of protection of human rights and that such rights are recognized and deserving of protection everywhere because they pertain to individuals.[145]

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140. Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 66-68 (Apr. 12).

141. *See* Asylum Case (Colom. v. Peru), 1950 I.C.J. 359 (Mar. 3).

142. *See* South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1962 I.C.J. 319, 408 (Dec. 21).

143. *Id.*

144. *Id.* at 414.

145. *See* South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 276 (July 18).

C. *The Function of "General Principles" As Revealed by The Jurisprudence of International Courts*

As has been shown, both the PCIJ and the ICJ have made use of "General Principles" in their decisions. However, when the two courts have drawn upon "General Principles," their articulations thereof have been vague. In practice, both the PCIJ and ICJ have been cautious and have often restricted "General Principles" to a limited role that some would see as a subsidiary function, though nothing in the drafting history of the two courts' Statutes warrants that interpretation. However, one cannot rely on the caution of the courts as evidence that they intended to place "General Principles" in a subsidiary position to other sources of international law.

As demonstrated above, scholars have attempted to articulate the meaning and functions of "General Principles" in international law, but there has been some disagreement in their positions. Some Soviet writers suggest that "General Principles" can never play a normative role in international law because of the divergence between Soviet law and the national law of other States.[146] That position may not be valid for long, given changing international and national perspectives. According to Lammers, however, this early Soviet position is untenable. The first sentence of article 38(1)(c) explicitly requires that "the sources of law . . . must be considered as sources of *international* law, i.e., legal norms regulating the relations between States as subjects of international law,"[147] and the USSR is bound by the Statute.

"General Principles" have been used by the two courts in order to fill gaps or *lacunae* in conventional and customary international law.[148] These gaps or *lacunae* arise where conventions and customs (whether general, particular, or regional) fail to address particular legal issues in dispute.

"General Principles" have also been employed as a means of interpreting conventions. They are useful for interpreting words not susceptible to an ordinary or common meaning interpretation, or as a means for ascertaining the intent of the parties (presumably objec-

146. *See* Lammers, *supra* note 13, at 54; *see also* G.I. TUNKIN, *supra* note 60.

147. Lammers, *supra* note 13, at 56.

148. Judge Fernandes advocated this position in the *Right of Passage* case:

> The priority given by Article 38 of the Statute of the Court to conventions and to custom in relation to the general principles of law in no way excludes a *simultaneous* application of those principles and of the first two sources of law. It frequently happens that a decision given on the basis of a particular or general convention or of a custom requires recourse to the general principles . . . . A court will have recourse to those principles to fill gaps in the conventional rules, or to *interpret* them.

Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 123, 140 (Apr. 12) (Fernandes, J., dissenting) (emphasis in original).

tively). In that respect, "General Principles" may merge with the customary law of treaty interpretation.

"General Principles" are also embodied in customary law if for no other reason than the fact that customary practice may emerge from or be based on pre-existing "principles." *Mutatis mutandi*, customs, when consistently practiced, become "principles." Furthermore, unperfected custom and *opinio juris* not followed by practice may evidence a given "principle." Thus, there is an intertwining relationship between customs and treaties where the latter evidence or are a source of custom.

In general, the two courts have adhered to an apparently more positivistic approach by according conventional and customary law a presumptive priority in application, except where these conflict with a *jus cogens* "principle." But whenever "General Principles" are embodied in conventions and customs, it is difficult to conceive how they can be of a lesser standing. Nevertheless, these two sources are presumably given priority standing because they are a more objectively ascertainable reflection of the will of the States.

The two courts have, however, occasionally strayed from this caution and allowed "General Principles" to serve a "normative function" in the regulation of State conduct whenever "[the State's] infraction cannot be looked upon as a mere incident of the proceedings."[149] In that sense, the two courts have overridden the presumption of freedom of action of States.

VI. "General Principles" and Jus Cogens

The very words "*jus cogens*" mean "the compelling law" and, as such, a *jus cogens* principle holds the highest position in the hierarchy of all other norms, rules, and principles. It is because of that standing that *jus cogens* principles have come to be known as "peremptory norms." However, scholars are in disagreement as to what constitutes a peremptory norm and how a given rule, norm, or principle rises to that level. The basic reason for this is that the underlying philosophical premises of the scholarly protagonist view are different. These philosophical differences are also aggravated by methodological disagreements.

Scholars differ as to *jus cogens* substance, sources, content (the positive or norm-creating elements), evidentiary elements (such as universality or less), and value-oriented goals (for example, preservation of world order and safeguarding of fundamental human rights). Further-

149. Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 41-42 (June 15).

more, there is no scholarly consensus on the methods by which to ascertain the existence of such a norm, nor to assess its significance, determine its contents, identify its elements, determine its priority over other competing or conflicting rules, norms, or principles, assess the significance and outcomes of prior application, and gauge its future applicability in light of the value-oriented goals sought to be achieved.[150] Perhaps we cannot expect much progress in this and other multi-disciplinary approaches in an era where the legal generalist has become a downgraded rarity and the highly narrow specialist the upgraded generality. What is needed is a multi-disciplinary approach that can bring together specialists in public and private international law, jurisprudence, philosophy of law and legal methods, and empiricists of various backgrounds. Without such an approach, we will continue to be faced with confusion in this important area of law.

Some scholars see *jus cogens* and customary international law as the same,[151] others properly distinguish between custom and peremptory norms,[152] while still others question whether *jus cogens* is simply not another semantical way of describing certain "General Principles," which for a variety of reasons rise above other "General Principles."[153] No matter how it is described, this appears to be a problem of hierarchy of applicable law. Arguments regarding the justification for this hierarchy continue to feed the flow of legal literature on the subject, albeit too frequently shrouded in such metaphysics that the ordinary legal practitioner has difficulty following, let alone applying, these doctrines to actual cases and controversies. While doctrinal debate is the grist of scholarship, it is in this case all too frequently ambiguous, and, at times, confusing. To that extent, it is the bane of practitioners, whether judges or advocates. Worse yet, it renders no

150. *See generally* Christenson, *supra* note 22; Parker & Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1989); Tunkin, *The Contemporary Theory of Soviet International Law*, 31 CURRENT LEGAL PROBS. 177 (1978); Rubanov, *supra* note 60; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512-15 (3d ed. 1979); G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 5 (1971); 1 H. LAUTERPACHT, INTERNATIONAL LAW 113 (E. Lauterpacht ed. 1970); *see also* Onuf & Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DENVER J. INT'L L. & POL'Y 187 (1974), which states:

> Peremptory norms of international law (jus cogens) have been the subject of much recent interest. In light of their extensive and quite unprecedented treatment by the International Law Commission and the Vienna Conference on the Law of Treaties, it may be surprising that attention has not been greater. At the same time, inquiry into the relationship between peremptory norms and the sources and functions of international law have been virtually non-existent. This is indeed surprising, given the recent substantial interest in these areas as part of a larger "theoretical explosion" in international legal studies.

Id. at 187.

151. A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 132 (1971).

152. *See* Christenson, *supra* note 22.

153. Janis, *Jus Cogens: An Artful Not a Scientific Reality*, 3 CONN. J. INT'L L. 370 (1988).

service to what this writer deems an exigent necessity of law: namely, certainty.[154]

To be sure, certainty exists in some instances. For example, the Vienna Convention on the Law of Treaties[155] uses the term "peremptory norm,"[156] but its context is more justified by the reasons advanced by Professor D'Amato as being the common identity of customary rules[157] than it is by an unidentified higher law.[158] The Law of Treaties indeed embodies customary rules which have emerged from international and national legal experience, as well as national legal principles of the law of contracts.[159] However, adding certain value-laden adjectives to what may be either a custom derived from a principle, or a custom embodying a principle, or a principle reflecting a custom, does not add much to the improved understanding of the concept. Furthermore, the frequent references to *jus cogens*, or its other appellation, "peremptory norm," or the undisciplined use of such terms as "compelling," "inherent," "inalienable," "essential," "fundamental" and "overriding," does not contribute greater clarity to the concept. Perhaps it is as Verdross stated: "no definition is necessary because the idea of *jus cogens* is clear in itself."[160] This facile way out of a difficult conundrum is reminiscent of Justice Stewart's statement regarding the definition of obscenity: ". . . perhaps I could never succeed in intelligibly doing so. But I know it when I see it."[161]

A naturalist would hardly have any difficulty identifying higher principles of positive law based on the values and norms of that philosophy.[162] Conversely, positivists, both from the Common Law and Romanist-Civilist-Germanic traditions, question the sources of such a value-laden approach. Others simply reject subjective sources of law because they contravene the certainty of the law.[163] Thus, by implica-

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154. *See, e.g.*, F. LOPEZ DE OÑATE, LA CERTEZZA DEL DIRITTO (1968).

155. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27.

156. *Id.* art. 53; *see, e.g.*, C. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES (1976).

157. *See* A. D'AMATO, *supra* note 151.

158. *See* Janis, *The Nature of* Jus Cogens, 3 CONN. J. INT'L L. 359, 360 (1988).

159. This position is affirmed by the RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 102 (Tent. Draft No. 6, 1985).

160. 1 Y.B. INT'L L. COMM. 63, 66-67 (1963); Verdross, Jus Dispositivium *and* Jus Cogens *in International Law*, 60 AM. J. INT'L L. 55, 57 (1966).

161. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

162. For a survey, see R. POUND AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) (discussing Beccaria, Grotius, and de Vattel). For a naturalist perspective, see J. MARITAIN, LES DROITS DE L'HOMME ET LA LOI NATURELLE (1942).

163. *See* H.L.A. HART, THE CONCEPT OF LAW (1961); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). *Contra* D'Amato, *The Moral Dilemma of Positivism*, 20 VAL. U.L. REV. 43 (1985) (wherein he states initially: "Not only do positivists

tion, some positivists seek a value-neutral law, though of course there can be no law which is value-neutral.[164] Most positivists acknowledge that law embodies values, and seek no more than to have positive law elaborated to avoid resorting to the subjectivity of a higher law whose determination and application is left to the changing values of those entrusted with its identification and application.

Admittedly, the generality of "General Principles" must be preserved as a means to advance international law. Thus, it appears inevitable that the flexibility needed for the growth of international law must be supplied by a greater degree of flexibility in identifying "General Principles," among them those that rise to the level of *jus cogens*.

The International Court of Justice, in its opinion in *Nicaragua v. United States: Military and Paramilitary Activities in and Against Nicaragua*,[165] relied on *jus cogens* as a fundamental principle of international law. However, that case also demonstrates the tenuous

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insist upon separating law from morality, but they also appear to be unable to deal with moral questions raised by law once the two are separated. This inability stems, I believe, from their simultaneous attempt to assert and to prove that law and morality are separate; the argument reduces to a vicious circle."); D'Amato, *The Relation of the Individual to the State in the Era of Human Rights*, 24 TEX. INT'L L.J. 1 (1989); P. DEVLIN, THE ENFORCEMENT OF MORALS (1968); J. BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (W. Harrison ed. 1948); Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940); *see also* Onuf & Birney, *supra* note 150, who state:

> The concept of peremptory norms originated in the thinking of Western publicists. Their faith in Western culture and institutions shaken by the convulsions of recent decades, these individuals were prompted by a desire to strengthen the international legal order as a vehicle for justice and order. Yet the concept was embodied in the Vienna Convention at the insistence of Asian, African, and Latin American states for altogether different purposes—purposes which looked to the future rather than the past. Specifically, these states saw the concept of peremptory norms as both an immediate symbol and eventual instrumentality for restructuring the international legal order.
>
> It would be instructive at this point to view peremptory norms as a subset of "general principles" of international law, which is something they would seem to be almost as a matter of definition. Non-Western states have demonstrated an active concern for establishing the importance and defining the content of these general principles. The latter task has proven exceedingly difficult and where successful has been undertaken at a level of considerable generality. Inasmuch as general principles are inefficient for identifying individual instances of deviant behavior, we might conclude that their function is not specifically constraint-oriented. The major alternative is that they perform a symbolic function. Concretely, this could mean that such principles stand as generally understood and accepted characterizations of the abiding concerns of the international community. Apparently, general principles perform a service comparable to myth in any culture. A substantial change in the thematic content of such symbols signals the emergence of new concerns in the community including particularly the concern of its newer, more restless members.

Id. at 195-96.

164. *See* Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217 (1969); *see also* Frank & Senecal, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 VAND. J. TRANSNAT'L. L. 195 (1987); Blakesley, *Terrorism, Law and Our Constitutional Order*, 60 COLUM. L. REV. 471, 479-87 (1989).

165. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14. *See generally Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (1987).

relativity of the use of principles in the resolution of cases involving ideological or political issues.

This writer's understanding of *jus cogens* is that it is essentially a label placed on a principle whose perceived importance, based on certain values and interests, rises to a level which is acknowledged to be superior, and thus capable of overriding another norm, rule, or principle in a given instance. However, this definition leaves open the differences of values, philosophies, goals and strategies of those who claim the existence of the norm in a given situation and its applicability to a given case or controversy.

Admittedly, almost all the operative terms used in describing *jus cogens* are value-laden and susceptible of multiple definitions based on differing concepts. They are thus capable of producing several outcomes, some contradictory.[166] Assuming, however, the validity of the issues raised, one must ask the next logical question: in what way are these issues different from those concerning "General Principles?" Surely, it is obvious that these are fundamental legal issues which every legal system has been forced to confront, and for which no definitive answer can, by the nature of the question, ever be found. One must also wonder whether the debate is not really more of a methodological rather than a substantive one. Positivists would probably find a way to reason, for example, that positive law must be obeyed, but that the absence of substantive or formal legitimacy for positive law invalidates its legitimacy. In this case, most positivists would deem such a law null and void, and argue that it need not be followed. The best example of such a situation arises with respect to the non-applicability of the "defence of obedience to superior orders" to a patently illegal order.[167]

The problem of technical positivism becomes more acute when one seeks to fill a void in positive law in the face of an obvious and palpable injustice, such as with respect to "Crimes Against Humanity," as articulated in the London Charter of August 8, 1945.[168] After all, the specific crimes, as enunciated in article 6(c) of the Charter, did not exist in positive international criminal law until the Charter's promul-

166. *See, e.g.*, McDougal, Laswell & Reisman, *The World Constitutive Process of Authoritative Decision Making*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73 (R. Falk & C. Black eds. 1969).

167. *See* Y. DINSTEIN, THE DEFENCE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW (1965); L. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (1976).

168. The London Charter (accompanying the London Agreement), Aug. 8, 1945, 82 U.N.T.S. 279.

gation thereof.[169] In that respect, a conflict exists between the theories a *jus cogens* advocate would advance about the higher legal value to be observed by prosecuting such offenders, and another principle whose values and goals are, at least in principle, of that same dignity, namely the "principle of legality"—*nullum crimen sine lege*.[170] This articulation of a value-neutral theory is indeed difficult, if not to say impossible, when conflicting values are at stake. For example, can the principle of punishing known offenders, for which there is no specific law, override the principle of *nullum crimen sine lege*?

Genocide[171] is now deemed a *jus cogens* violation because its prohibition imposes on states certain duties and obligations *erga omnes*. Yet the very definition of genocide in article II excludes mass killings when unaccompanied "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . . ."[172] On the basis of the *erga omnes* rationale for genocide, "Crimes Against Humanity" should also rise to that standard. Such a theory has not yet been fully accepted, even though the notion certainly merits that equal status.[173] The moral outrage of the world community in the years 1945-46 has subsided and has regrettably even dwindled over the ensuing years.[174]

The *erga omnes* and *jus cogens* doctrines are often presented as two sides of the same coin. The term *erga omnes* means "flowing to all," and thus obligations deriving from *jus cogens* are presumably *erga omnes*.[175] Indeed, legal logic supports the proposition that what is "compelling law" must necessarily engender obligation "flowing to all."

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169. Bassiouni, *International Law and the Holocaust*, 9 CALIF. W. INT'L L.J. 201, 208-14 (1979).

170. *See* Allen, *supra* note 47; Ancel, *La Règle* Nulla Poena Sine Lege *dans les Legislations Modernes*, ANNALES DE L'INSTITUT DE DROIT COMPARÉ 245 (1936); G. VASSALLI, *Nullum Crimen Sine Lege* (1939); Nuvolone, *Le Principe de la Legalité et les Principes de la Défense Sociale*, 1956 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 231.

171. G.A. Res. 96, 1 U.N. GAOR (55th plen. mtg.) at 188, U.N. Doc. A/64 (1946); Convention on Prevention of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; *see* Advisory Opinion of the International Court of Justice on Reservations to the Genocide Convention, 1951 I.C.J. 1, 15 (May 28).

172. Convention on Prevention of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280; *see* Bassiouni, *Introduction to the Genocide Convention*, in 1 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW 281 (1986); Berés, *Genocide and Genocide-like Crimes*, in *id.* at 271.

173. Bassiouni, *Crimes Against Humanity*, in 3 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 51, 65-70 (1987). This position was prevalent in the Nuremberg and Tokyo Charters, Indictments, and Judgments. It was also prevalent in the writings of scholars who dealt with these prosecutions, *see, e.g.*, Schwelb, *Crimes Against Humanity*, 21 BRIT. Y.B. INT'L L. 1 (1944), and others, *see, e.g.*, Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

174. Bassiouni, *Nuremberg: Forty Years After*, PROC. AM. SOC'Y INT'L L. 59 (1986).

175. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 829-30 (1988).

The problem with such a simplistic formulation is that it is circular. What "flows to all" is "compelling," and if what is "compelling" "flows to all" it is difficult to distinguish between what constitutes a "General Principle" creating an obligation so self-evident as to be "compelling" and so "compelling" as to be "flowing to all," that is, binding on all States.[176]

In the *Barcelona Traction* case, the ICJ stated:

> . . . [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[177]

Thus, the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the ICJ, "the obligation(s) of a State towards the international Community as a whole."[178] The ICJ goes on in paragraph 34 to give examples,[179] but it does not define or list precisely what it means by "obligations of a state towards the international community as a whole."[180]

Both the PCIJ and ICJ, particularly through the separate and dissenting opinions of their judges, have tried to bring these norms to the level of a higher law.[181] Despite this recognition, the relationship be-

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176. In an important study bearing on the *erga omnes* and *jus cogens* relationship, Professor Randall notes that, "traditionally international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines . . . ." Randall, *supra* note 175, at 830. However, he, too, seems to accept the *sine qua non* relatively.

> "*Jus cogens* means compelling law." The *jus cogens* concept refers to "peremptory principles or norms from which no derogatory is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any such principles or norms."
> While authoritative lists of obligations *erga omnes* and *jus cogens* norms do not exist, any such list likely would include the norms against hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture. Traditionally, international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines, which addresses violations of individual responsibility. These doctrines nevertheless, may subsidiarily support the right of all states to exercise universal jurisidiction over the individual offenders. One might argue that "when committed by individuals," violations of *erga omnes* obligations and peremptory norms "may be punishable by any State under the universality principle."

177. Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

178. *Id.*

179. *Id.* The court further stated in the ensuing paragraph:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951,* p. 23); others are conferred by international instruments of a universal or quasi-universal character.

180. *Id.* at 32.

181. Judge Fernandes explained,

tween *jus cogens* and "General Principles" is not clearly articulated. The jurisprudence of both courts also has failed to explicitly articulate how a given norm becomes *jus cogens* and when and why it becomes *erga omnes*. Arguably, a *jus cogens* norm rises to that level when the principle it embodies has been universally accepted by the States. Thus, the principle of territorial sovereignty has risen to the level of a "peremptory norm" because all States have consented to the right of States to exercise exclusive territorial jurisdiction.[182]

Where to draw the line between *jus cogens* peremptory norms deriving from a higher order, which Professor Schwelb refers to as the equivalent of an international *ordre public*,[183] and *jus dispositivium*[184] is fertile ground for legal scholarship,[185] as is the relationship between *jus cogens* and *erga omnes*. The more significant issues regarding *jus cogens* are:

(1) How do "principles" develop and rise to the level whereby they override pre-existing positive international law?

(2) By what legal technique can a "principle" override that which certain basic values would deem to be an unjust positive law?

(3) In what way can a "principle" fill the gap of positive international law to avoid injustice, or denial of justice, or to do justice?

(4) When is a *jus cogens* "principle" superseded by another one, or when does it fall in *désuétude*?

None of these issues, among others, has yet been sufficiently addressed by scholarly research. We are left with our imagination to analogize *jus cogens* to a shooting star in the firmament of higher values, without much knowledge of how it got there or why. We do not know how to distinguish between the various trajectories taken by these shooting stars, nor do we know how to compare their relative brilliance. Finally, we have no understanding of how or why such

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It is true that in principle special rules will prevail over general rules, but to take it as established that in the present case the particular rule is different from the general rule is to beg the question. Moreover, there are exceptions to this principle. Several rules *cogestes* prevail over any special rules. And the general principles to which I shall refer later constitute true rule of *ius cogens* over which no special practice can prevail.

Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 123, 135 (Apr. 12) (Fernandes, J., dissenting); *see* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 66 (Ammoun, J., dissenting).

182. *See* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

183. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 949 (1967).

184. Verdross, *supra* note 160.

185. *See* Janis, *supra* note 153; Turpel & Sans, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 369 (1988); *see also* Christenson, *supra* note 22; D'Amato, *The Moral Dilemma of Positivism*, *supra* note 163.

stars dip, lose their brilliance, or disappear from our firmament of higher values. The legal literature abounds with competing descriptions whose many qualities, however, elude those of reliable methodology and intellectual legal rigor which can provide us with predictable and consistent outcomes.

VII. An Appraisal of the PCIJ and ICJ Opinions with Respect to Defining "General Principles" and Establishing a Methodology for Their Identification

As we have seen, the opinions of the ICJ, like its predecessor, the PCIJ, make use of "General Principles." These cases have not, however, explained the courts' technique or methodology for identifying "General Principles." In those cases where the courts relied on international law manifestations and expressions of States' policies and practices, as evidenced by multilateral treaties, custom, and United Nations resolutions, they did not indicate how they were doing so. In short, the courts have not identified the process or the methodology for identification and appraisal of the evidentiary sources of "General Principles."

In the few cases where the courts relied upon the inductive method of ascertaining "General Principles" as deriving from the national legal systems, there was also no indication of the methodology employed. This may be due to the fact that the courts implicitly relied upon techniques of comparative legal research, and were unwilling to take a position on a question of methods, which may be best left to scholarly and doctrinal works.

To identify "General Principles" of international law which arise from the various national legal systems, the inductive method of research is employed. By that method, one identifies the existence of a legal principle in the world's major legal systems. More specifically, however, how one searches for an identity or commonality that exists with respect to a given principle — under the domestic laws of different countries which represent the world's major legal systems — needs more particularity. Obviously, such an inductive method is both the most logical and simplest approach to comparative research methodology, but it will have to be particularized with respect to each subject, or specific inquiry, for which the research is to be undertaken. Thus, if the principle which is being researched is one of great generality, it will more likely be easier to identify in the various major legal systems, and in specific domestic legal systems representing the world's major legal systems. If, however, the principle inquired of is narrow or spe-

cific, then the focus of the research will have to be on the more relevant or particularized sources of law within the various domestic legal systems representing the major legal systems of the world.[186]

Professor Akehurst confirms in his research on customs that this methodology has been recognized and relied upon by international and national courts, and by policy-makers in different countries.[187] Among the countries he specifically cites are Great Britain and the United States.[188] As early as 1877, the British Foreign Office recognized the validity of this approach, particularly with respect to criminal matters, and so instructed the British Minister in Rio de Janiero as follows: " 'Her Majesty's Government . . . would not be justified' in protesting against a law extending the jurisdiction of Brazilian criminal courts because the law was similar to the laws of several other countries."[189]

The United States of America has also followed this position since the late 1800s.[190] The *Cutting* case involving the United States and Mexico is a landmark ruling on this point.[191] Both the United States and Mexico relied on the laws of different countries to establish the existence of a principle or custom or both, but of particular relevance in this case was the emphasis on the representativeness of the countries referred to and the sufficiency of their number.[192] The United States has also relied on this approach in its national courts[193] as has, for example, Italy.[194]

The ICJ, like its predecessor, the PCIJ, also examined national legal systems to derive from them the existence of a custom or "General Principle." Both courts used the same methodology of empirical research, though obviously the relevance of the laws discovered and their widespread similarity made for their inclusion in these two sources of international law. The PCIJ used the methodology of em-

186. It should be noted that this empirical methodology is also relied upon in the identification of customary rules of international law. *See, e.g.*, A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); Akehurst, *Custom As a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 16-18 (1977).

187. *See* Akehurst, *supra* note 186, at 8-11.

188. *Id.* at 8-9.

189. *Id.*

190. *See* 1887 FOREIGN RELATIONS OF THE UNITED STATES 859-67 (1888).

191. *Id.* at 751.

192. *Id.* at 754-55, 781-817.

193. *See* The Scotia, 81 U.S. (14 Wall.) 170, 186-87 (1871); The Paquete Habana, 175 U.S. 677, 688-700 (1900).

194. Lagos v. Baggianini, 22 INT'L L. REP. 533 (1953). To decide a question of diplomatic immunity, the court looked to the custom and practice of states to determine " 'the generally accepted rule.' " *Id.* at 534.

pirical research in the *Lotus* case.[195] In the *Nottebohm* case[196] the ICJ comparatively examined national legal provisions on nationality law, and in the *North Sea Continental Shelf's*[197] case, the court looked for relevant national laws on exploration of continental shelves.[198]

Akehurst concludes: "Obviously a law which is frequently applied carries greater weight than a law which is never or seldom applied; any kind of State practice carries greater weight if it involves an element of repetition."[199] Thus, the more a given national or international principle is reiterated in national and international sources, the more it deserves deference.[200]

It should be noted that the empirical methodology used for demonstrating the existence of "General Principles" is substantially similar to the one used to demonstrate the existence of a customary rule of international law.[201] While this same method can serve as a valid technique for identifying a custom and a principle, the appraisal of the research will be different with respect to establishing the existence of a custom as compared to the identification of a given principle.[202] The connection between customs and principles does not, however, end there, as customs draw on principles and principles may derive from customs. Interestingly, however, neither PCIJ nor the ICJ identified these methods nor indicated any views on their application, or for that matter even commented on the difference between research methods relevant to principles and customs.

Some initial, important methodological questions that may arise concern the selection of legal systems, the relevant sources within each system and within each State which is part of a system, and whether or how to quantify the data deriving from the comparative research.

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195. *See* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 21 (Sept. 7).

196. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 22 (Apr. 16).

197. *See* North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101 (Feb. 20).

198. *Id.* at 129, 175, 228-29, containing the views of Ammoun, Tanaka, and Lachs.

199. Akehurst, *supra* note 186, at 9.

200. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444 (1969).

201. *See supra* notes 186-99.

202. The difference will depend on the nature of the custom and the principle, which in some cases could be the same. This is indeed an overlap between sources of international law. Professor D'Amato, *supra* note 186, looks at treaties as evidence of custom and practice. Akehurst, *supra* note 186, and both the PCIJ and ICJ, *supra* notes 196 and 197, use national laws as evidence of practice. Many of the PCIJ and ICJ cases, such as those cited in Part V, use national laws as evidence of "General Principles."

A. *The Major Legal Systems of the World*

Scholars in comparative legal studies recognize the major legal systems of the world as:[203]

(1) The Romanist-Civilist-Germanic Family of Legal Systems
(2) The Common Law Family of Legal Systems
(3) The Marxist-Socialist Family of Legal Systems
(4) The Islamic Family of Legal Systems
(5) The Asian Family of Legal Systems

There is no significant dispute as to this step in the methodology, but there is no recognized yardstick to determine the representative quality of choice of states within a given system.

For example, the Common Law family of legal systems includes, *inter alia*: the United States, the United Kingdom, Canada, Australia, Ghana, India, Nigeria, and Malaysia. However, various aspects of United States law are entirely different from the laws of the other countries in terms of purpose, scope, and substance. Thus, it would not be appropriate to consider the United States as the only representative country for the Common Law.

B. *Identifying Legal Principles*

The opinions of the courts do not draw a distinction between broad and narrow legal principles. For example, a broad principle may be whether a right to life exists in the world's major legal systems. A narrow principle may be whether the taking of the life of one person by another without legal justification constitutes a crime or, even more specifically, what crime it constitutes. The type of inquiry will determine the appropriateness of the choice of legal sources. Where broad principles are involved, these sources can be as general as religious laws or national constitutions.

In the instance of comparative research and analysis, a question arises as to whether constitutions can be compared without regard to whether their provisions are general or specific, and what weight should be given to the terminology employed in the various texts. Also, questions arise as to whether comparative evaluation should be validated by research of other national laws and eventually research inquiring into the application of the "principle," and whether there should be, whenever relevant, a comparison between principles or

203. René David, who is recognized as the world's leading authority on comparative law, states that the major world systems are: 1. The Romanist-Germanic; 2. The Socialist; 3. The Common Law; 4. Islamic Law; 5. Asian Legal Systems. He refers to them as "famille" or families of law. R. DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAIRES 22-32 (5th ed. 1973).

rights enunciated in multilateral conventions and provisions in national constitutions. In the cases that give rise to these concerns, the inquiry is whether there is a numerical or quantitative standard for correlating or comparing that data.[204]

C. *Correlation Between the Sources of Law to be Consulted and the Principle Sought to be Identified*

Both courts have failed to address this question except with broad generalities. Presumably, the sources of law to be consulted with respect to narrow or specific legal principles are the relevant statutes, laws, and other normative sources. Thus, inquiring whether the killing of one person by another without legal justification constitutes murder would necessarily entail an examination of the criminal laws of the countries representing the world's major legal systems with appropriate geo-political representativeness.

However, the number of national legal systems that need to be consulted within the world's major legal systems will depend upon the type of inquiry and the degree of identity or similarity of findings that may emerge from the research. Thus, the more obvious the similarity in the different legal systems, the more likely it is that adding more countries with the same general legal basis may not significantly add to the outcome of the research. However, if there is only general similarity, which is only vaguely equivalent but not of such sufficient comparative equivalence to ensure a broad consensus, then it would appear that a larger number of national legal systems would have to be consulted.

It is obvious that no two legal systems are alike, and certainly the legal provisions or normative formulations of different countries are not likely to be identical. The question, therefore, is whether, by the notion of sameness, one comprehends: (i) identical normative formulations; (ii) identical legal elements; or (iii) substantial similarity, irre-

204. For a study of the basic rights in criminal processes protected under six international instruments, which correlates them to more than one hundred national constitutions, see *The Protection of Human Rights in the Criminal Process Under International Instruments and National Constitutions*, in 4 NOUVELLES ÉTUDES PÈNALES 6-31 (1981); *see also* Maki, *supra* note 6; C. STRONG, A HISTORY OF MODERN CONSTITUTIONS: AN INTRODUCTION TO COMPARATIVE STUDY OF THEIR HISTORY AND EXISTING FORMS (1964); K. AZIZ, COMPARATIVE CONSTITUTIONAL AND ADMINISTRATIVE LAW (1979). For a research project on ACCESS TO JUSTICE which compared various legal system's constitutional and normative approaches in several volumes, *see also* A WORLD SURVEY (M. Cappelletti & B. Garth eds. 1978); PROMISING INSTITUTIONS (M. Cappelletti & J. Weisner eds., vol. 1, 1978, vol. 2, 1979); EMERGING ISSUES AND PERSPECTIVES (M. Cappelletti & B. Garth eds. 1979); and ANTHROPOLOGICAL PERSPECTIVE (K.F. Koch ed. 1979). Unfortunately, this comprehensive study has no described methodology. For what is probably the best study on methodology, see J. HALL, COMPARATIVE LAW AND SOCIAL THEORY (1963).

spective of identical normative formulation or required elements. In short, the question is whether or not one must seek sameness of normative provisions or comparative equivalence of normative provisions. The answer to that question will depend on whether the inquiry involves a broad "General Principle" or not. By its very nature, a broad "General Principle" does not require sameness in terms of its specific normative formulation, but a narrower or specific principle will require greater similarity.

Comparative criminal law research involving the determination of what constitutes a crime in different national legal systems reveals a substantial historical basis and national practice which provide a foundation for such an inquiry. This foundation is embodied in the law of international extradition, which has been in existence for a substantial period of history and has been relied upon by almost all of the countries in the world. In the comparative criminal law research process, the search for comparative criminal legal provisions is referred to as the "Principle of Double Criminality" or as the "Principle of Dual Criminality."[205]

Under this principle, the requested State in an extradition process examines the crime charged by the requesting state and seeks to determine whether that crime also constitutes a crime under the domestic criminal laws of the requested State. Two methods may be applied in the course of that inquiry: *in concreto* and *in abstracto*.[206] Under the *in concreto* approach, the use of which has been gradually abandoned since the late 1800s, the focus is on whether or not the elements of the

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205. *See* A. LAFOREST, INTERNATIONAL EXTRADITION TO AND FROM CANADA 52-56 (1961). The author notes that

> . . . [A]n exact correspondence between offenses in two countries cannot be expected. It is, therefore, not necessary that the crime concerned bears the same name in both countries. It is sufficient if the acts constituting the offence in the demanding state also amount to a crime in the country from which the fugitive is sought to be extradited even though it may be called by a different name. As already mentioned it is the essence of the offence that is important.

Id. at 54-55; *see also* LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES (Council of Europe, European Committee on Crime Prevention 1970); T. VOGLER, AUSLIEFERUNGSRECHT UND GRUNDGESETZ (1970); I. SHEARER, EXTRADITION IN INTERNATIONAL LAW (1971); Vieira, *L'Evolution Recent de l'Extradition dans le Continent Americain*, 185 RECUEIL DES COURS 155 (1978); V.E.H. BOOTH, BRITISH EXTRADITION LAW AND PROCEDURE (1980); B.P. BORGOÑÓN, ASPECTOS PROCESALES DE LA EXTRADICION EN DERECHO ESPAÑOL (1984); H.A. BOUKHRISS, LA COOPERATION PENALE INTERNATIONALE PAR VOI D'EXTRADITION AU MOROC (1986); O. LAGODNY, DIE RECHTSSTELLUNG DES AUSZULIEFERNDEN IN DER BUNDESREPUBLIK DEUTSCHLAND (1987); M.C. BASSIOUNI, INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE 319-80 (2d rev. ed. 1987); M.T. LUPACCHINI, L'ESTRADIZIONE DALL'ESTERO PER L'ITALIA (1989).

206. *See* 39 REVUE INTERNATIONALE DE DROIT PENALE (1968) dedicated to national reports on extradition from: Austria, Belgium, Brazil, Chile, Czechoslovakia, Finland, France, Federal Republic of Germany, Greece, Hungary, Italy, Japan, Poland, Sweden, Switzerland, United States and Yugoslavia.

crime in the laws of the requested State are the same as the elements of the crime in the laws of the requesting State — in other words, greater specificity and sameness of incentive provisions. Under the *in abstracto* approach, which is now used by almost all States, the focus is on whether or not the crime in the requested State is generally comparable to the crime in the requesting State. The modern trend is to examine the underlying facts of the criminal charge to determine whether or not the same facts that would give rise to a charge in the requested State would give rise to the same or to a comparable charge in the requesting State.[207]

Therefore, a person who is charged with the killing of another person without legal justification may be charged in different legal countries under different types of statutes involving criminal homicides. These homicide laws may have different labels, require different levels of intent, and have different elements. Still, all of these laws would have the same general elements in common: the material element of one person engaging in conduct which produced the death of another; the mental element of intention (however described); and causation (between conduct and resulting death). If, as a result of the above, the fact that a person would be charged in one country with a crime called murder whereas in another he would be charged with a crime called intentional killing or voluntary manslaughter would not be legally relevant to a finding that "dual criminality" exists. The reason is that the underlying fact, would give rise to a similar, though not necessarily identical, charge in the requested State.

The inquiry, then, focuses on the general characteristics of the crime charged in comparative analysis, and not on the sameness or identity of the label of the crime, or the legal elements needed to prove

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207. This position is required in all modalities of international cooperation in penal matters. *See* E. MULLER-RAPPARD & M.C. BASSIOUNI, EUROPEAN INTER-STATE COOPÉRATION IN CRIMINAL MATTERS, LA COOPÉRATION INTER-ÉTATIQUE EUROPÉNNE MATIÉRE PENALE (3 vols. 1987). For different modalities of international cooperation in penal matters, see Muller-Rappard, Schutte, Epp, Poncet, Zagaris, *et al.*, in 2 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: PROCEDURE (1986); Grutzner, *International Judicial Assistance and Cooperation in Criminal Matters*, in A TREATISE ON INTERNATIONAL LAW 189 (M.C. Bassiouni & V.P. Nanda eds. 1973). For a survey of recent Mutual Legal Assistance Treaties between the United States and other countries, see Nadelman, *Negotiations in Criminal Law Assistance Treaties*, 33 AM. J. COMP. L. 467 (1985); Zagaris & Simonetti, *Judical Assistance under U.S. Bilateral Treaties*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM 219 (M.C. Bassiouni ed. 1989). For a Socialist perspective, see Krapac, *An Outline of the Recent Development of the Yugoslav Law of International Judicial Assistance and Cooperation in Criminal Matters*, 34 NETHERLANDS INT'L L. REV. 324 (1987); Gardocki, *The Socialist System of Judicial Assistance and Mutual Cooperation in Penal Matters*, in 2 M.C. Bassiouni, INTERNATIONAL CRIMINAL LAW: PROCEDURE 133 (1986); Shupilov, *Legal Assistance in Criminal Cases and Some Important Questions of Extradition [in the USSR]*, 15 CASE W. RES. J. INT'L L. 127 (1983).

it.[208] The same technique and approach is valid in other areas of comparative legal research.

As stated above, with respect to other issues of comparative research, the two courts have not provided much guidance. The same can be said with respect to international law sources of "General Principles." Should there be a quantified technique to assess principles embodied in United Nations resolutions, treaties, or, customary practices of States? If so, can common practices of States, because of their recurrence, rise to the level of principles?

One of the reasons for the courts' lack of guidance on these issues may be the fact that they may not have wished to establish precedents that may impact on future cases. The courts, through the history of their jurisprudence, seem to have avoided including the types of formulations in their opinions that may lead to the notion that their opinions could be deemed the basis for future jurisprudential development. Unlike the jurisprudence of the Common Law courts, which relies on precedents and adheres to *stare decisis*, the PCIJ and the ICJ have carefully avoided having their opinions couched in formulations that can lead to such a jurisprudential development. This is why one can only find a more detailed explanation of what constitutes "General Principles" and how they are applied in the separate and dissenting opinions of the two courts; especially in those of the ICJ. However, these difficulties are more prevalent in the area of *jus cogens*, as discussed above.

CONCLUSION

"General Principles" are recognized as a source of international law in the Statutes of the Permanent Court of International Justice and International Court of Justice, but their identification, appraisal, content, ranking, enforceability, and applicality are the subject of different scholarly and judicial perceptions.

There is a well established consensus that "General Principles" are to be derived from national legal systems. Thus, "General Principles" are a common denominator of certain basic principles embodied in

208. It would be of no consequence to the requested State if the charge by the requesting State is murder, intentionally killing, voluntary manslaughter, or, for that matter, involuntary manslaughter, as long as the crime charged, irrespective of the specificity of its elements, generally corresponds to an equivalent counterpart crime in the requested State. The issue will not turn on what type of mental element is required, for example, for the offense of murder, first degree murder, voluntary manslaughter, or involuntary manslaughter. Rather, the inquiry will be whether the facts allegedly committed by the individual sought are such that they constitute the material element of the killing of one person by another accompanied by some type of mental state and that a resulting death ensued. If these basic facts would constitute a homicidal offense in both the requested and requesting States, then extradition shall be granted.

national legal systems which, because of their commonality, rise to an internationally enforceable level. However, the process and methodology of identification and appraisal of these national legal principles remains open for further elaboration. There is no simple method that can be applied, but surely an agreed methodology could be recognized. In its absence, protagonists for different philosophical propositions will rely on what they consider to be "General Principles" for self-serving support. This practice does not aid in making the law more certain.

In the meantime, there is little consensus about the processes and methods of identifying, appraising, and applying "General Principles" evidenced through various sources of international law. Scholarly writings on this question are few, and what writings exist are unclear. Opinions of international and national tribunals on this subject are also vague and permit many inferences to be draw from reliance, for example, on United Nations resolutions.

Recent jurisprudential scholarly debates on *jus cogens* have overshadowed earlier, more legalistic, debates on "General Principles." In the process, and before resolving the pending issues concerning "General Principles" discussed above, *jus cogens* became, at least for some scholars, a higher source of peremptory norms, superceding all other sources of positive international law. By no means does this writer purport to presume to know better or more, but only to know enough to wage a critical re-examination.

In less than two decades, *jus cogens* emerged out of "General Principles" and, for its ardent proponents, immediately moved up to become a separate and higher ranking source of law, though technically the positive legal recognition of *jus cogens* only comes under the label of "General Principles."

The jurisprudence of the PCIJ and the ICJ has not yet been affected by the jurisprudential, and, I suspect, ideological debate concerning *jus cogens*. In fact, the position of the two courts has been, in the aggregate of its opinions, reserved in its reliance on "General Principles" as a source of international law. Whenever the two courts did rely on "General Principles," they were mainly using principles as a means to interpret positive international law and only rarely to supersede it. Only a few cases give us a glimpse of how the courts applied *jus cogens*. The tension between proponents of *jus dispositivium* and *jus naturales* as well as between advocates of the *lex lata* and those arguing for a *lexe desiderata* has become particularly evident in the legal literature of the last decade. But the passion of their advocacy is

not necessarily matched by the intellectual and legal technical rigors which such important legal issues deserve.

Regardless, these legal traditions are evolving and have achieved in contemporary times a significant rapprochement. Similarly, differences in legal philosophies are being compromised by greater concessions to pragmatism. Modern positivists have lessened their historical rigidity; some have even conceded that legitimacy may be found elsewhere than in positive texts. Thus, differences between modern positivism and the new socio-ethical foundation of modern naturalism are gradually being narrowed.

The gray areas that have developed as a result of the reduction of these dual contrasting lines of legal and philosophical analysis have, however, added to the lack of clarity of the entire subject. What is needed, perhaps, is a convention to codify "General Principles of International Law," much as the Vienna Convention on the Law of Treaties codified customary international law and those "General Principles" relating to treaty law.

Annex 282

ANNEX 283

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Mixed Claims Commission (France-Venezuela)

1903-1905

VOLUME X pp. 9-355

MIXED CLAIMS COMMISSION
FRANCE - VENEZUELA
CONSTITUTED UNDER THE PROTOCOL
SIGNED AT WASHINGTON
ON 27 FEBRUARY 1903

REPORT: Jackson H. Ralston-W. T. Sherman Doyle, *Venezuelan Arbitrations of 1903,* **including Protocols, personnel and Rules of Commission, Opinions, and Summary of Awards, etc., published as Senate Document No. 316, Fifty-eighth Congress, second session, Washington, Government Printing Office, 1904, pp. 483-493.**

PROTOCOL, FEBRUARY 27, 1903[1]

[Washington protocol.]

The undersigned, Herbert W. Bowen, Plenipotentiary of the Republic of Venezuela, and J. J. Jusserand, Ambassador of the French Republic at Washington, duly authorized by their respective Governments, have agreed upon and signed the following protocol:

ARTICLE I

All French claims against the Republic of Venezuela, which have not been settled by diplomatic agreement or by arbitration between the two Governments, shall be presented by the French foreign office or by the French legation at Caracas, to a mixed commission, which shall sit at Caracas, and which shall have power to examine and decide the said claims. The Commission to consist of two members, one of whom is to be appointed by the President of Venezuela and the other by the President of the French Republic.

It is agreed that Her Majesty the Queen of the Netherlands will be asked to appoint an umpire.

If either of said commissioners or the umpire shall fail or cease to act, his successor shall be appointed forthwith in the same manner as his predecessor was. Said commissioners and umpire are to be appointed before the first day of May, 1903. The commissioners and the umpire shall meet in the City of Caracas on the first day of June, 1903. The umpire shall preside over their deliberations and shall be competent to decide any question on which the commissioners disagree. Before assuming the functions of their office, the commissioners and the umpire shall take solemn oath carefully to examine and impartially decide, according to justice and the provisions of this convention, all claims submitted to them, and such oaths shall be entered on the record of their proceedings. The Commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity without regard to objections of a technical nature, or of the provisions of local legislation.

The decisions of the Commissioners, and, in the event of their disagreement, those of the umpire, shall be final and conclusive. They shall be in writing. All awards shall be made payable in French gold or its equivalent in silver.

ARTICLE II

The commissioners, or the umpire, as the case may be, shall investigate and decide said claims upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of or in answer to any claim, and to hear oral or read written arguments made by the agent of each Government on every claim. In case of their failure to agree in opinion upon any individual claim, the umpire shall decide.

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[1] Original texts: English and French: For the French text see the Report mentioned on the previous page.

Every claim shall be formally presented to the commissioners within thirty days from the day of their first meeting, unless the Commissioners, or the umpire, in any case extend the period for presenting the claim, not exceeding three months longer. The commissioners shall be bound to examine and decide upon every claim within six months from the day of its first formal presentation, and, in case of their disagreement, the umpire shall examine and decide within a corresponding period from the date of such disagreement.

ARTICLE III

The commissioners and the umpire shall keep an accurate record of their proceedings. For that purpose, each commissioner shall appoint a secretary versed in the language of both countries to assist them in the transaction of the business of the Commission. Except as herein stipulated, all questions of procedure shall be left to the determination of the Commission, or in case of their disagreement, to the umpire.

ARTICLE IV

Reasonable compensation to the commissioners and to the umpire for their services and expenses, and the other expenses of said arbitration, are to be paid in equal moieties by the contracting parties.

ARTICLE V

In order to pay the total amount of the claims to be adjudicated as aforesaid, and other claims of citizens or subjects of other nations, the Government of Venezuela shall set apart for this purpose, and alienate to no other purpose, beginning with the month of March, 1903, thirty per cent. in monthly payments of the customs-revenues of La Guaira and Puerto Cabello, and the payments thus set aside shall be divided and distributed in conformity with the decision of the Hague Tribunal.

In case of the failure to carry out the above agreement, Belgian officials shall be placed in charge of the customs of the two ports and shall administer them until the liabilities of the Venezuelan Government in respect of the above claims shall have been discharged.

The reference of the question above stated to the Hague Tribunal will be the subject of a separate protocol.

ARTICLE VI

All existing and unsatisfied awards in favor of France shall be promptly paid according to the terms of the respective awards.

Done in duplicate in the French and English texts at Washington, February 27, 1903.

JUSSERAND [SEAL]
H. W. BOWEN [SEAL]

PERSONNEL OF FRENCH-VENEZUELAN COMMISSION [1]

Umpire. — J. Ph. F. Filtz.
French Commissioner. — Peretti de la Rocca.
Venezuelan Commissioner. — José de Jesús Paúl.
French Secretary. — Charles Piton.
Venezuelan Secretary. — J. Padrón Ustáriz.

[1] No rules of procedure were formulated by this Commission.

ANNEX 284

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Aroa Mines Case (on merits)

1903

VOLUME IX pp. 402-445

AROA MINES (LIMITED) CASE — SUPPLEMENTARY CLAIM

(By the Umpire:)

Damages will not be allowed for injury to persons, or for injury to or wrongful seizure of property of resident aliens committed by the troops of unsuccessful rebels. [1]

Interpretation of the meaning of the words "claim," "injury," "seizure," "justice," and "equity," as used in the protocol.

CONTENTION OF BRITISH AGENT

In supporting the claim of the Aroa mines for damages due to the action of revolutionaries, it is desirable that the position taken up by His Majesty's Government should be clearly stated and explained.

During the events which led to the signing of the protocol of February 13, 1903, and when a decision was necessary as to what demands ought to be made on the Venezuelan Government, the question of damage due to the acts of insurgents naturally became prominent. His Majesty's Government, having carefully considered the past and present circumstances of Venezuela, which are of a very exceptional kind, came to the conclusion that in dealing with claims of this nature two alternative methods were possible:

(1) That foreign claimants should not receive compensation for damage caused by revolutionaries.

(2) That if any foreign claimants received such compensation British subjects should receive the same treatment.

Great Britain enjoys by treaty the advantages of the most-favored nation, and for this as well as other reasons took the view stated above. To show that His Majesty's Government had always consistently held this view, it may be pointed out that in forwarding claims to the Venezuelan Government the British minister had, long before the blockade, always asked that they should be settled on the same principle as might be applied to other nations.

In the view of His Majesty's Government it was preferable that of the two principles stated above No. 1 should be the one adopted, failing this it was essential to secure the alternative, No. 2.

At the same time it was considered that, owing to the light in which revolutions had come to be regarded by the people of Venezuela, there would be nothing contrary to justice in acting upon the latter principle.

The only way to give effect to these views seemed to be to obtain from Venezuela an agreement wide enough to cover the second principle if it should become necessary to act upon it.

His Majesty's Government have throughout acted consistently on these lines and have made no secret of the position taken up by them on the matter.

Accordingly, upon the sitting of the Commission, His Majesty's Government brought foward only such claims as were based upon the acts of the Venezuelan Government itself, without in any way giving up the right to present those of the other category if it should prove necessary. This course was followed until revolutionary awards had been made in favor of French and German claimants.

[1] This principle was followed in the cases of A. A. Pearse, F. G. Fitt, heirs of Christian Philip, W. N. Meston, W. A. Guy, Fortunato Amar, L. L. Michenaux, and Abdool Currim, which are not reported in this volume. For discussion of principle here laid down see the German - Venezuelan Commission (Kummerow Case), the Italian - Venezuelan Commission (Sambiaggio Case, Guastini Case) and the Spanish - Venezuelan Commission (Padrón Case, Mena Case), in Volume X of these *Reports*.

Since therefore, it was no longer possible to act upon the principle originally favored, it was decided to present to the Commission claims for damages due to the acts of the insurgent forces. These claims are supported upon the ground that the recovery of damages so caused is recognized by the protocol of February 13.

In order to show what the terms of the protocol were meant to include, it is necessary to refer to the circumstances under which the protocol was signed and to what had occurred previously.

His Majesty's Government having for a long time presented to the Venezuelan Government claims due not only to the acts of their own troops, but also to the acts of insurgents, without being able to obtain any redress, were at length compelled, in common with the German Government, to declare a blockade of Venezuelan ports. This blockade was not raised until after the signing, and upon the terms of the protocol of February 13.

This protocol was settled after negotiations between His Majesty's representative and Mr. Bowen as representing the Venezuelan Government. In order correctly to interpret the terms of the protocol regard should be paid to the stage of the negotiations at which the exact words ultimately used first appear, and to the connection in which they are there used.

The first step taken by the Venezuelan Government toward the raising of the blockade was a communication from Mr. Bowen through the Government of the United States to His Majesty's Government, asking that they and the German Government would refer " the settlement of claims for alleged damage to the subjects of the two nations during the civil war to arbitration."

To this a reply was sent by the two Governments, which is here quoted, December 23, 1902:

His Majesty's Government have in consultation with the German Government taken into their careful consideration the proposal communicated by the United States Government at the instance of that of Venezuela.

The proposal is as follows:

That the present difficulty respecting the manner of settling claims for injuries to British and German subjects during the insurrection be submitted to arbitration.

The scope and intention of this proposal would obviously require further explanation. Its effect would apparently be to refer to arbitration only such claims as had reference to injuries resulting from the recent insurrection. This formula would evidently include a part only of the claims put forward by the two Governments, and we are left in doubt as to the manner in which the remaining claims are to be dealt with.

Apart, however, from this some of the claims are of a kind which no government would agree to submit to arbitration. The claims for injuries to the persons and properties of British subjects owing to the confiscation of British vessels, the plundering of their contents and the maltreatment of their crews, as well as some claims for the ill usage and false imprisonment of British subjects, are of this description. The amount of these claims is apparently insignificant, but the principle at stake is of the first importance, and His Majesty's Government could not admit that there was any doubt as to the liability of the Venezuelan Government in respect of them.

His Majesty's Government desire, moreover, to draw attention to the circumstances under which arbitration is now proposed to them.

The Venezuelan Government have, during the last six months, had ample opportunities for submitting such a proposal. On the 29th of July and again on the 11th of November it was intimated to them in the clearest language that unless His Majesty's Government received satisfactory assurances from them, and unless some steps were taken to compensate the parties injured by their conduct, it would become necessary for His Majesty's Government to enforce their just demands. No attention was paid to these solemn warnings, and, in consequence of the manner in which they were disregarded, His Majesty's Government found themselves

reluctantly compelled to have recourse to the measures of coercion which are now in progress.

His Majesty's Government have, moreover, agreed already that in the event of the Venezuelan Government making a declaration that they will recognize the principle of the justice of the British claims, and that they will at once pay compensation in the shipping cases and in the cases where British subjects have been falsely imprisoned or maltreated, His Majesty's Government will be ready, so far as the remaining claims are concerned, to accept the decision of a mixed commission which will determine the amount to be paid and the security to be given for payment. A corresponding intimation has been made by the German Government.

This mode of procedure seemed to both Governments to provide a reasonable and adequate mode of disposing of their claims. They have, however, no objection to substitute for the special Commission a reference to arbitration with certain essential reservations. These reservations, so far as the British claims are concerned, are as follows:

1. The claims (small, as has already been pointed out, in pecuniary amount) arising out of the seizure and plundering of British vessels and outrages on their crews and the maltreatment and false imprisonment of British subjects, are not to be referred to arbitration.

2. In cases where the claim is for injury to or wrongful seizure of property, the question which the arbitrators will have to decide will only be (a) whether the injury took place and whether the seizure was wrongful, and (b) if so, what amount of compensation is due. That in such cases a liability exists must be admitted in principle.

3. In the case of claims other than the above, we are ready to accept arbitration without any reserve. * * *

It will be seen from this that in the first place all claims are to be submitted to arbitration; that as regards claims "arising from the recent insurrection" where such claims are for injury to or wrongful seizure of property the allied Governments will only accept arbitration on the express terms "that in such cases a liability exists must be admitted in principle." Finally, in the case of other claims arbitration without any reserve is accepted.

It is clear that a meaning beyond the ordinary submission to arbitration must be given to this very pointed and special admission of liability. It admits as not open to discussion some principle which might be open to argument if nothing more than a bare submission to arbitration were found.

As it occurs in this document the meaning is plainly that —

As regards all claims arising out of the recent insurrection, whether due to their own acts or to those of insurgents, the Venezuelan Government must admit their liability. Otherwise the blockade will not be raised.[1]

These particular terms were never afterwards discussed. In the protocol the Venezuelan Government admit their liability in these very words, and therefore with the same meaning.

There is nothing unreasonable in this. This treaty was made under pressure of a blockade. Under such circumstances what is more natural than to find that the blockading power has insisted upon its own standard of right?

To say that in face of the words "the Venezuelan Government admit their liability" the Venezuelan Government are only to be held liable under accepted and recognized principles of international law is to say that these words carefully and deliberately inserted in an important section of a treaty are without meaning or bearing on the effect of the treaty.

If it be suggested that "admit their liability" means that the Venezuelan Government agree not to raise as a defense that these specially mentioned

[1] See Appendix to original report, p. 1033. Not reproduced in this series.

claims are a matter for the law courts, it may be pointed out that if a claim which would otherwise be the subject of ordinary litigation be submitted to arbitration, that fact alone means that all other jurisdictions are, as regards that claim, set aside and superseded by the jurisdiction of the arbitral tribunal. Therefore, the further provision that the Venezuelan Government admit their liability would be superfluous and meaningless in the class of claims here submitted to arbitration.

This admission, then, is an acknowledgment on the part of the Venezuelan Government that they take upon themselves liability for all claims of the kind specified arising out of the insurrection, whether done by themselves or by insurgents.

Since injury to or seizure of property is necessarily wrongful in the case of insurgent forces, it is only needful to prove that they took place and arose out of the insurrection, and liability at once attaches to the Venezuelan Government, the only remaining question being one of amount.

It has already been indicated that this liability for the acts of insurgents in the case of a country so circumstanced is a doubtful point of international law, depending as it does upon the question whether the country is " well-ordered to an average extent " (Hall, p. 226), a point difficult and embarrassing to discuss. The admission of liability found here is therefore just such as would be expected under the circumstances.

It is not necessary to pursue the matter further, since, for the present purpose, it is sufficient to rely on the liability admitted in the protocol, without reference to the principles of international law. Attention is called to the point merely to show that His Majesty's Government have not acted in an arbitrary or unreasonable manner.

Upon another ground also this tribunal ought to interpret the words " admit their liability" in the sense above stated.

The treaty between Great Britain and Venezuela contains the following provision:

> In whatever relates to the safety of * * * merchandise, goods, or effects, * * * as also the administration of justice, the subjects and citizens of the two contracting parties shall enjoy * * * the same liberties, privileges, and rights as the most favored nation.

All awards given by the Mixed Commissions are to be paid out of one fund. It would therefore, in view of the above treaty, be a denial of equity if the subjects of any other nation were to be paid sums of money out of this fund upon a more favorable principle than British subjects.

German and French subjects have now obtained awards for damage caused by revolutionaries, which will be so paid.

When, therefore, words have to be interpreted which admit of any possible doubt as to their meaning — though it is contended that no such doubt exists here — regard must be paid first to the treaty, and secondly to the provision of the protocol, that decisions are to be based upon absolute equity. In such a case it is the duty of this tribunal to give to the words the most favorable possible interpretation as regards British subjects if by so doing the treaty rights of British subjects will be the better maintained. Therefore, in view of the treaty, the admission of liability must be read in the sense of a stipulation that, in awarding payments out of the common fund, British subjects shall be paid on as favorable a principle as the subjects of any other nation.

That is, since subjects of other nations receive payments on the ground of the liability of the Venezuelan Government for acts of insurgents, " admit their liability " must be read as conceding to British subjects the right to be paid

France-Mexico, 1886;[1] France-Colombia, 1892;[2] Germany Mexico; San Salvador-Venezuela, 1883.[3]

The learned British agent also raises the point that an international rule applicable to "well-ordered States" in regard to the irresponsibility of governments for the acts of unsuccessful revolutionists may not be easily applied to States possessing the history of the respondent Government.

Concerning this point the umpire is content to accept the concrete judgment, practically uniform, of States whose skilled and trained diplomatists have given this question long years of patient consideration. This concrete judgment he has in the treaties made between Germany and Colombia and Italy and Colombia heretofore quoted and between the other countries above cited, as well as by the historic attitude of the British Government and the Government of the United States of America in their diplomatic treatment of these question in relation to countries having the same general characteristics, in this regard, as Venezuela.

There now remains to consider only the "most favored-nation" proposition. Regarding this it is sufficient in the judgment of the umpire to say that Venezuela has granted to no other country any favors in these protocols not granted to the Government of His Britannic Majesty. He says this modestly, but conscientiously, after careful study. He would avoid, if he could, the clash in judgment this statement involves, but he can not do so and be true to his solemn convictions. That there have been interpretations of several protocols with which the present umpire can not agree and with which this opinion will not accord, he admits to be true. But these interpretations were had and the consequent results followed against the earnest protest and vigorous opposition of the Government of Venezuela, and were therefore clearly not favors granted by her.

In considering, determining, and applying the protocols to this case and to all others; in weighing and settling the facts and the law in each case; in meeting and answering every proposition connected with the proceedings of this Mixed Commission the umpire must never lose sight of the most essential part of the protocols which is none other than the solemn oath or declaration which it prescribes. Before we were allowed to assume the functions of our high office we were required by its provisions to make solemn agreement and declaration —

carefully to examine and impartially decide, according to justice and the provisions of the protocol of the 13th February, 1903, and of the present agreement, all claims submitted to them (us).

While the oath adds to the requirements of administering our trust according to justice the provisions of the protocol, it is not to be presumed or admitted that there is aught in either of those protocols which is contrary to or subversive of its high and principal behest — justice. This, then, is the ultimate purpose and required result of all our inquiries, examinations, and decisions. It is made, as it should be made, the chief cornerstone of this arbitral structure. There is one other and very important rule of action prescribed to govern us in our deliberations: it is that we "shall decide all claims upon a basis of absolute equity." The way is equity, the end is justice. There is no other way and no other end within the purview of the protocol. Not only must each particular case be determined on these two bases, but each part of the protocols relating to this Commission must be interpreted and construed in accordance therewith. If there be two views of some provisions which, although differing, strike the mind

[1] British and Foreign St. Papers, vol. 77, p. 1090.
[2] *Id.*, vol. 84, p. 137.
[3] *Id.*, vol. 74, p. 298.

with equal force and there is a hesitancy which to adopt, the one must be taken which best withstands the application of this supreme test. The protocols will permit no construction of any part which in its adaptation may deviate from the chosen path or lead to a conclusion at war with the required end. All and every part thereof must be read and interpreted with this fact always predominant. If a question arises, not readily to be apprehended, wherein equity and justice differentiate, then the former must yield, because the obligation of the prescribed oath is the superior rule of action.

International law is not in terms invoked in these protocols, neither is it renounced. But in the judgment of the umpire, since it is a part of the law of the land of both Governments, and since it is the only definitive rule between nations, it is the law of this tribunal interwoven in every line, word, and syllable of the protocols, defining their meaning and illuminating the text; restraining, impelling, and directing every act thereunder.

Webster thus defines equity:

> Equality of rights; natural justice or right; * * * fairness in determination of conflicting claims; impartiality.

Bouvier says in part:

> In a more limited application, it denotes equal justice between contending parties. This is its moral signification, in reference to the rights of parties having conflicting claims; but applied to courts and their jurisdiction and proceedings it has a more restrained and limited signification. (Vol. 1, p. 680.)

The phrase, " absolute equity," used in the protocols the umpire understands and interprets to mean equity unrestrained by any artificial rules in its application to the given case.

Since this is an international tribunal established by the agreement of nations there can be no other law, in the opinion of the umpire, for its government than the law of nations; and it is, indeed, scarcely necessary to say that the protocols are to be interpreted and this tribunal governed by that law, for there is no other; and that justice and equity are invoked and are to be paramount is not in conflict with this position, for international law is assumed to conform to justice and to be inspired by the principles of equity.

> International law is founded upon natural reason and justice. * * * (Wharton, vol. 1, sec. 8, p. 32.)
>
> The law of nations is the law of nature realized in the relations of separate political communities. (Holland's *Studies in Int. Law*, 169.)
>
> It is the necessary law of nations, because nations are bound by the law of nature to observe it. It is termed by others the natural law of nations because it is obligatory upon them in point of conscience. (Kent's Com., vol. 1, 2.)
>
> The end of the law of nations is the happiness and perfection of the general society of mankind, etc. (*Ib.*)
>
> International law * * * is a system of rules * * * not inconsistent with the principles of natural justice. (Woolsey, *Introd. to Int. Law*, secs. 2 and 3.)
>
> The rules of conduct regulating the intercourse of States. (Halleck, chap. 2, sec. 1.)
>
> The intercourse of nations, therefore, gives rise to international rights and duties, and these require an international law for their regulation and enforcement. That law is not enacted by the will of any common superior upon earth, but it is enacted by the will of God; and is expressed in the consent, tacit or declared, of independent nations. * * * Custom and usage, moreover, outwardly express the consent of nations to things which are naturally — that is, by the law of God — binding upon them. (*Ib.*, sec. 6, quoting Phillimore, vol. 1, preface.)
>
> That when international law has arisen by the free assent of those who enter into certain arrangements, obedience to its provisions is as truly in accordance with

natural law — which requires the observance of contracts — as if natural law had been intuitively discerned or revealed from Heaven, and no consent had been necessary at the outset. (Bouvier's *Law Dict.*, vol. 1, p. 1102.)

The rules which determine the conduct of the general body of civilized States in their dealings with one another. (Lawrence, *Int. Law*, sec. 1.)

International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country. (Hall, *Int. Law*, 1.)

In what has been stated I have referred exclusively to the international obligations imposed on the United States by the general principles of international law, which are the only standards measuring our duty to the Government of Honduras. (Mr. Bayard, Sec. of State, to Mr. Hall, Feb. 6, 1886.)

International law in its practical result guides, restricts, and restrains the strong states, guards and protects the weak.

The guide, commonly safe and constant and usually to be followed, is international law. But if in the given case, not easily to be assumed, it should occur that its precepts are opposed to justice, or lead away from it, or are in disregard of it, or are inadequate or inapplicable, then the determination must be made by recourse to the underlying principles of justice and equity applied as best may be to the cause in hand. The umpire will apply the precepts of international law in all cases where such use will insure justice and equity for this reason, if for no other — that well-defined principles and precepts which have successfully endured the test of time and the crucible of experience and criticism are safe in use, and should never carelessly be departed from in order that one may step out into a way unknown to walk by a course unmarked. But these precepts are to be used as a means to the end, which end is justice.

The rule of justice, equity, and law deduced by the umpire and to be applied here is well expressed in the treaties of Germany and Italy with Colombia hereinbefore quoted. Adapted for our use, the rule will read as follows:

The Government of Venezuela will not be held liable to the British Government for injuries to property or wrongful seizures thereof, or for damages, vexations, or exactions committed upon or suffered by British subjects in Venezuela during any unsuccessfull insurrection or civil war which has occurred in that country unless there be proven fault or want of due diligence on the part of the Venezuelan authorities or their agents.

The Aroa mines supplementary claim is based wholly on the seizure of their property by revolutionary troops without proof of any fault or lack of due diligence on the part of the titular and respondent Government.

Under the rule adopted this claim must be, and is hereby, disallowed, and judgment will be entered to that effect.

BOLÍVAR RAILWAY COMPANY CASE

A nation is responsible for the acts of a successful revolution from the time such revolution began.[1]

PLUMLEY, *Umpire*:

When this claim came to the umpire on the disagreement of the honorable commissioners, as to parts thereof there had been agreed to and allowed by the commissioners the following amounts:

[1] See also *Supra*, p. 119.

ANNEX 285

ADJUSTMENT OF CLAIMS

Convention signed at Guayaquil November 25, 1862
Senate advice and consent to ratification January 28, 1863
Ratified by the President of the United States February 13, 1863
Ratified by Ecuador July 26, 1864
Ratifications exchanged at Quito July 27, 1864
Entered into force July 27, 1864
Proclaimed by the President of the United States September 8, 1864
Terminated in March 1874 upon payment of claim

13 Stat. 631; Treaty Series 77 [1]

The United States of America and the Republic of Ecuador desiring to adjust the Claims of citizens of said States against Ecuador, and of citizens of Ecuador against the United States, have, for that purpose, appointed, and conferred full powers respectively, to wit: The President of the United States on Frederick Hassaurek, Minister Resident of the United States in Ecuador, and the President of Ecuador on Juan José Flores, General-in-Chief of the armies of the Republic, who, after exchanging their full powers, which were found in good and proper form, have agreed on the following articles:

ARTICLE 1st

All claims on the part of Corporations, Companies, or individuals, citizens of the United States upon the Government of Ecuador, or of Corporations, Companies or individuals, citizens of Ecuador, upon the Government of the United States, shall be referred to a board of Commissioners consisting of two members one of whom shall be appointed by the Government of the United States, and one by the Government of Ecuador. In case of death, absence, resignation, or incapacity of either Commissioner, or in the event of either Commissioner omitting or ceasing to act the Government of the United States, or that of Ecuador respectively, or the Minister of the United States in Ecuador, in the name of his Government, shall forthwith proceed to fill the vacancy thus occasioned. The Commissioners so named shall meet in the City of Guayaquil, within ninety days from the exchange of the ratifications of this Convention; and before proceeding to business, shall make

[1] For a detailed study of this convention, see 8 Miller 869.

solemn oath that they will carefully examine, and impartially decide, according to justice, and in compliance with the provisions of this Convention, all Claims that shall be submitted to them; and such oath shall be entered on the record of their proceedings.

The Commissioners shall then proceed to name an arbitrator or umpire, to decide upon any case or cases concerning which they may disagree, or upon any point of difference which may arise in the course of their proceedings. And if they cannot agree in the selection, the umpire shall be appointed by Her Britannic Majesty's Chargé d'Affaires, or (excepting the Minister Resident of the United States) by any other Diplomatic Agent in Quito whom the two high contracting parties shall invite to make such appointment.

ARTICLE 2d

The arbitrator or umpire being appointed the Commissioners shall, without delay, proceed to examine the claims which may be presented to them by either of the two Governments; and they shall hear, if required, one person in behalf of each Government on every separate claim. Each Government shall furnish, upon request of either commissioner, such papers, in its possession, as may be deemed important to the just determination of any claim or claims.

In cases where they agree to award an indemnity, they shall determine the amount to be paid. In cases in which said commissioners cannot agree, the points of difference shall be referred to the umpire before whom each of the Commissioners may be heard, and whose decision shall be final.

ARTICLE 3d

The Commissioners shall issue Certificates of the Sums to be paid to the claimants, respectively, whether by virtue of the awards agreed to between themselves, or of those made by the umpire; and the aggregate amount of all sums decreed by the Commissioners, and of all sums accruing from awards made by the Umpire under the authority conferred by the fifth Article, shall be paid to the Government to which the respective claimants belong. Payment of said sums shall be made in equal annual instalments to be completed within nine years from the date of the termination of the labors of the Commission; the first payment to be made six months after the same date. To meet these payments both Governments pledge the revenues of their respective nations.

ARTICLE 4th

The Commission shall terminate its labors in twelve months from the date of its organization. They shall keep a record of their proceedings and may appoint a Secretary versed in the knowledge of the English and Spanish languages.

ARTICLE 5th

The proceedings of this Commission shall be final and conclusive with respect to all pending claims. Claims which shall not be presented to the Commission within the twelve months it remains in existence, will be disregarded by both Governments and considered invalid. In the event that, upon the termination of the labors of said Commission, any case or cases should be pending before the Umpire, and awaiting his decision, said umpire is hereby authorised to make his decision or award in such case or cases, and his certificate thereof, in each case, transmitted to each of the two Governments, shall be held to be binding and conclusive; provided, however that his decision shall be given within thirty days from the termination of the labors of the Commission, at the expiration of which thirty days his power and authority shall cease.

ARTICLE 6th

Each Government shall pay its own Commissioner; but the umpire as well as the incidental expenses of the commission shall be paid one half by the United States and the other half by Ecuador.

ARTICLE 7th

The present Convention shall be ratified, and the ratifications exchanged in the City of Quito.

In faith whereof we, the respective Plenipotentiaries, have signed this Convention and hereunto affixed our Seals in the City of Guayaquil this twenty fifth day of November, in the year of our Lord 1862.

F. HASSAUREK [SEAL]
JUAN JOSÉ FLORES [SEAL]

ANNEX 286

GENERAL PRINCIPLES OF LAW

as applied by

INTERNATIONAL COURTS AND TRIBUNALS

BY

BIN CHENG, PH.D., LICENCIÉ EN DROIT

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WITH A FOREWORD BY

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PART THREE

GENERAL PRINCIPLES OF LAW IN THE CONCEPT OF RESPONSIBILITY

PART FOUR

GENERAL PRINCIPLES OF LAW IN JUDICIAL PROCEEDINGS

Venezuela on the other hand, the claims of Capt. Clark were successively and separately put forward before these commissions.

These claims were allowed by Umpire Upham before the Granadine-United States Claims Commission (1857).[71]

The Ecuadorian-United States Claims Commission (1862), however, rejected them. The American Commissioner Hassaurek, after pointing out that the conduct of Clark was in violation of both United States municipal law and treaty provisions between the United States and Spain, the latter considering such conduct as piracy, asked:—

"What right, under these circumstances, has Captain Clark, or his representatives, to call upon the United States to enforce his claim on the Colombian Republics? Can he be allowed, as far as the United States are concerned, to profit by his own wrong? *Nemo ex suo delicto meliorem suam conditionem facit.* He has violated the laws of our land. He has disregarded solemn treaty stipulations. He has compromised our neutrality. . . . What would be the object of enacting penal laws, if their transgression were to entitle the offender to a premium instead of a punishment? . . . I hold it to be the duty of the American Government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. A party who asks for redress must present himself with clean hands."[72]

Subsequently a new Claims Commission (1864) was set up between the United States and New Granada (which had by then changed its name to Columbia). Sir Frederick Bruce, the Umpire of this Commission, adopted the views of Commissioner Hassaurek and reversed the decision of Umpire Upham.[73]

Finally, on the same principle, the case was dismissed by Umpire Findlay before the United States-Venezuelan Claims Commission (1885).[74]

[71] 3 *Int.Arb.*, p. 2730.
[72] *Ibid.*, p. 2731, at pp. 2738–9.
[73] *Ibid.*, p. 2743.
[74] *Ibid.*, p. 2743, at p. 2749. Hassaurek's opinion was cited and the same principle was applied in U.S.-Ven.M.C.C. (1903): *Jarvis Case*, *Ven.Arb.1903*, p. 145. See also Span.-U.S. Cl.Com. (1871): *The Mary Lowell* (1879) 3 *Int.Arb.*, p. 2772. Claimants who aided insurgents by supplying arms were estopped from claiming damages for capture of these arms on the high seas by the Spanish Government (pp. 2774, 2775, 2776). "On those principles of equity which the Umpire does not feel at liberty to disregard he is bound to decide that the owners of the ship and cargo are, as such, estopped in their present claim to indemnity for the consequences of their unlawful venture" (p. 2776). *Cf.* also Mex.-U.S. Cl.Com. (1868): *Cucullu* [*i.e.*, *Cuculla*] *Case*, 4 *Int.Arb.*, p. 3477, at p. 3479.

The principle does not, however, appear to be *jus cogens*. For although a Government

" could not be justified, under the law of nations, in interposing its authority to enforce a claim of one of its citizens growing out of services rendered in violation of its own laws, and its duties as a neutral nation, yet if the nation against whom such claim exists sees proper to waive the objection, and agrees to recognise the claim as valid and binding against it, the tribunal to which it is referred for settlement cannot assume for it a defence which it has expressly waived." [75]

Unless, however, there is such a waiver, the principle is of such a fundamental character that where an award disregarded it, a State, even if the award were in its favour, would hesitate to insist upon its enforcement. In the *Pelletier Case* (1885), compensation was allowed to an American claimant whose ship was seized by Haiti for an attempt at slave trading. In recommending that it should not be enforced, the United States Secretary of State, Mr. Bayard, took occasion to say:—

" Even were we to concede that these outrages in Haitian waters were not within Haitian jurisdiction, I do now affirm that the claim of Pelletier against Haiti . . . must be dropped, and dropped peremptorily and immediately by the . . . United States . . . *Ex turpi causa non oritur actio*: by innumerable rulings under Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied." [76]

The award was never enforced.[77]

The principle, however, only applies in so far as the claim itself is based upon an unlawful act. It does not apply to cases

[75] U.S. Domestic Commission for Claims against Mexico (1849): *Meade Claim*, 4 *Int.Arb.*, p. 3430, at p. 3432. The waiver referred to was deduced from decisions of the Mex.-U.S. Cl. Com. (1830) which dealt with a number of claims arising out of supplies furnished to the Mexican revolutionaries in their struggle for independence against Spain. In these cases, no question was raised by either the Mexican or the U. S. Commissioners as to the admissibility of the claims. The Mexican Commissioners concurred in allowing the claims without discussion, except where questions of evidence gave rise to differences of opinion. In each case, the Commissioners referred to the supplies as having been furnished for " the promotion of the great object aforesaid," *viz.*, the independence and self-government of Mexico. The *Meade Claim* arose out of similar circumstances. See *ibid.*, pp. 3426–8.

[76] U.S.F.R. (1887), pp. 606–7.

[77] See *Pelletier Case* (1885) 2 *Int.Arb.*, pp. 1749–1805.

ANNEX 287

DIPLOMATIC PROTECTION

[Agenda item 2]

DOCUMENT A/CN.4/546

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

[*Original: English*]
[*11 August 2004*]

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Introduction

1. It has been suggested that the clean hands doctrine should be reflected in an article in the draft articles on diplomatic protection approved by the Commission in 2004.[1] The present report considers that suggestion.

2. According to the clean hands doctrine no action arises from wilful wrongdoing: *ex dolo malo non oritur actio*. It is also reflected in the maxim *nullus commodum capere potest de injuria sua propria*. According to Fitzmaurice:

> "He who comes to equity for relief must come with clean hands." Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it.[2]

In the context of diplomatic protection the doctrine is invoked to preclude a State from exercising diplomatic protection if the national it seeks to protect has suffered an injury in consequence of his or her own wrongful conduct.

3. The following arguments have been raised in support of the suggestion that the clean hands doctrine should be included in the draft articles on diplomatic protection:

(*a*) The doctrine does not apply to disputes relating to inter-State relations where a State does not seek to protect a national;[3]

(*b*) The doctrine does apply to cases of diplomatic protection in which a State seeks to protect an injured national. On 5 May 2004, Mr. Alain Pellet, who supported the inclusion of a provision on clean hands, declared:

> The vague concept of "clean hands" was not very different from the general principle of good faith in the context of relations between States, and had no autonomous consequences and little practical effect on the general rules of international responsibility. However, in the context of diplomatic protection, which involved relations between States and individuals, the concept took on new significance: it became functional, for in the absence of "clean hands" the exercise of diplomatic protection was paralysed. If a private individual who enjoyed diplomatic protection violated either the internal law of the protecting State—and it should be noted that internal law played no role at all in cases involving relations between States—or international law, then in the general context of the claim, the State called upon to exercise protection could no longer do so.[4]

The doctrine produces an effect only in the context of diplomatic protection;[5]

(*c*) "Numerous cases"[6] have applied the clean hands doctrine in the context of diplomatic protection. The *Ben Tillett* arbitration case is a good example;[7]

(*d*) Invocation of the clean hands doctrine renders a request for diplomatic protection inadmissible.[8]

4. The present report will address the above four arguments.

---

[1] *Yearbook ... 2004*, vol. II (Part Two), para. 54.

[2] "The general principles of international law considered from the standpoint of the rule of law", p. 119.

[3] See *Yearbook ... 2004*, vol. I, 2792nd meeting, pp. 10–11, para. 48, and 2793rd meeting, p. 11, para. 2.

[4] *Ibid*., 2793rd meeting, para. 5.

[5] *Ibid.*

[6] *Ibid*.

[7] See Fenwick, *Cases on International Law*, pp. 181–184. See also RGDIP, vol. 6, No. 46 (1899).

[8] See *Yearbook ... 2004*, vol. I, 2793rd meeting, p. 12, para. 5.

Chapter I

Non-applicability of the clean hands doctrine to disputes involving inter-State relations properly so called

5. It may be correct that the clean hands doctrine does not apply to disputes involving inter-State relations. However, in practice the doctrine has most frequently been raised in the context of inter-State relations where States or dissenting judges have sought to have a claim declared inadmissible or dismissed for the reason that the applicant State's hands are unclean. The following cases illustrate that practice:

(*a*) Most recently the argument has been raised by Israel in the advisory proceedings on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In that case, Israel contended that:

> Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullus commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request.[9]

ICJ did not consider this argument to be "pertinent"[10] on the ground that the opinion was to be given to the General Assembly, and not to a specific State or entity. Significantly the Court did not reject the relevance of the argument to inter-State disputes in contentious proceedings;

(*b*) In the *Oil Platforms* case, the United States of America raised an argument of a "preliminary character"[11] in which it asked ICJ to dismiss the claims of the Islamic Republic of Iran because of the latter's own unlawful

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[9] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion. I.C.J. Reports 2004*, p. 163, para. 63. See also A/ES–10/273 and Corr.1.

[10] *Ibid.*, p. 164, para. 64.

[11] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 176, para. 27.

conduct. The Islamic Republic of Iran categorized the argument as a "clean hands" argument, which was, so it claimed, irrelevant in direct State-to-State claims, as opposed to claims for diplomatic protection, as a ground for inadmissibility of a claim. The Islamic Republic of Iran did acknowledge that the principle might have significance at the merits stage. The Court rejected the argument that the claim of the United States was one of inadmissibility and found that it was unnecessary to deal with the request of the United States to dismiss the claim of the Islamic Republic of Iran on the basis of conduct attributed to the latter. The Court made no comment on the argument of the Islamic Republic of Iran that the clean hands doctrine might only be raised as a ground for inadmissibility of a claim in the context of diplomatic protection.[12]

(*c*) In *LaGrand*, the United States raised an argument against Germany's claim that appeared to fall into the category of clean hands. The United States contended that Germany's submissions were inadmissible on the ground that Germany sought to have a standard applied to the United States that was different from its own practice. According to the United States, Germany had not shown that its system of criminal justice required the annulment of criminal convictions where there had been a breach of the duty of consular notification; and that the practice of Germany in similar cases had been to do no more than offer an apology. The United States maintained that it would be contrary to basic principles of administration of justice and equality of the parties to apply against the United States alleged rules that Germany appeared not to accept for itself. Germany denied that it was asking the United States to adhere to standards that Germany itself did not comply with. The Court found that it need not decide whether the argument of the United States, if true, would result in the inadmissibility of Germany's submissions as the evidence adduced by the United States did not justify the conclusion that Germany's own practice failed to conform to the standards it demanded from the United States;[13]

(*d*) An argument similar to that described above in *LaGrand* was raised in *Avena*.[14] The United States did not, however, describe it as a "clean hands" argument. Instead the objection was presented in terms of the interpretation of article 36 of the Vienna Convention on Consular Relations[15] in the sense that, according to the United States, a treaty may not be interpreted so as to impose a significantly greater burden on any one party than the other. ICJ dismissed the argument, citing *LaGrand*. It added that:

> Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim.[16]

(*e*) In the case concerning the *Gabčikovo-Nagymaros Project* ICJ declined to apply the clean hands doctrine. It stated:

> The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation—or the practical possibilities and impossibilities to which it gives rise—when deciding on the legal requirements for the future conduct of the Parties.
>
> This does not mean that facts—in this case facts which flow from wrongful conduct—determine the law;[17]

(*f*) In the *Arrest Warrant* case the Belgian judge *ad hoc*, Judge van den Wyngaert, in her dissenting opinion, held that:

> The Congo did not come to the Court with clean hands. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith;[18]

(*g*) In the *Military and Paramilitary Activities in and against Nicaragua* case, Judge Schwebel, in his dissenting opinion, held that the clean hands doctrine should be applied against Nicaragua:

> Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible—but ultimately responsible—for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail.[19]

In support of that reasoning he cited a number of PCIJ and ICJ decisions. All of the cases cited can be labelled as direct inter-State cases;

(*h*) In the oral argument at the phase of both provisional measures and jurisdiction in the cases brought by Yugoslavia against members of NATO concerning the *Legality of the Use of Force*, several respondents argued that the injunctions sought by Yugoslavia should not be granted because Yugoslavia did not come to Court with clean hands.[20]

6. The above-mentioned cases make it difficult to sustain the argument that the clean hands doctrine does not apply to disputes involving direct inter-State relations. States have frequently raised the clean hands doctrine in direct inter-State claims and in no case has ICJ stated that the doctrine is irrelevant to inter-State claims.

7. While it is possible to draw a distinction between direct and indirect claims for some litigational purposes

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[12] *Ibid.*, pp. 177–178, paras. 28–30.

[13] See *LaGrand* (*Germany* v. *United States of America*), *Judgment, I.C.J. Reports 2001*, pp. 488–489, paras. 61–63.

[14] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 12.

[15] Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.

[16] *I.C.J. Reports 2004* (see footnote 14 above), p. 38, para. 47.

[17] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 76, para. 133.

[18] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 160, para. 35.

[19] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 392, para. 268.

[20] *Legality of the Use of Force (Yugoslavia* v. *Belgium; Yugoslavia* v. *Canada; Yugoslavia* v. *France; Yugoslavia* v. *Germany; Yugoslavia* v. *Italy; Yugoslavia* v. *Netherlands; Yugoslavia* v. *Portugal; Yugoslavia* v. *Spain; Yugoslavia* v. *United Kingdom, and Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, pp. 124, 259, 363, 422, 481, 542, 656, 761, 826 and 916, respectively.

(notably in respect of the exhaustion of local remedies), it is a distinction that should be drawn with great caution as a result of the fiction that an injury to a national is an injury to the State itself. This fiction introduced by Vattel, proclaimed in the *Mavrommatis* case[21] and adopted by the Commission in the draft articles on diplomatic protection, is fundamental to an understanding of diplomatic protection. One of the cornerstones of diplomatic protection is that "[o]nce a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant".[22] Surely it is not suggested that this fiction should be abandoned and instead the State in a claim for diplomatic protection should be seen as simply the agent acting on behalf of its national?

[21] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*.

[22] *Ibid.*, p. 12.

Chapter II

Applicability of the clean hands doctrine to diplomatic protection

8. If an alien is guilty of some wrongdoing in a foreign State and is as a consequence deprived of his liberty or property in accordance with due process of law by that State, it is unlikely that his national State will intervene to protect him. Indeed it would be wrong for the State of nationality to intervene in such a case because no internationally unlawful act will have been committed in most circumstances. In this sense, the clean hands doctrine serves to preclude diplomatic protection. The position assumes a different character, however, where an internationally wrongful act is committed by the respondent State in response to the alien's wrongful act—where, for instance, an alien suspected of committing a criminal offence is subjected to torture or to an unfair trial. In such a case, the State of nationality may exercise diplomatic protection on behalf of the individual because of the internationally wrongful act. The clean hands doctrine cannot be applied in the latter case to the injured individual for a violation of international law, first, because the claim has now assumed the character of an international, State *v.* State claim and secondly, because the individual has no international legal personality and thus cannot (outside the field of international criminal law) be held responsible for the violation of international law. In short, as a consequence of the fiction that an injury to a national is an injury to the State itself, the claim on behalf of a national subjected to an internationally wrongful act becomes an international claim and the clean hands doctrine can be raised against the protecting State only for its conduct and not against the injured individual for misconduct that may have preceded the internationally wrongful act.

9. As a consequence of the above reasoning, it follows that the clean hands doctrine has no special place in claims involving diplomatic protection. If the individual commits an unlawful act in the host State and is tried and punished in accordance with due process of law, no internationally wrongful act occurs and the unclean hands doctrine is irrelevant. If, on the other hand, the national's misconduct under domestic law gives rise to a wrong under international law as a result of the respondent State's treatment of the national's misconduct, the claim becomes international if the injured national's State exercises diplomatic protection on his behalf. Then the clean hands doctrine may only be raised against the plaintiff State for its own conduct. This is illustrated by the *LaGrand* and *Avena* cases. In both cases, foreign nationals committed serious crimes, which warranted their trial and punishment, but in both cases the United States violated international law in respect of their prosecution by failing to grant them consular access. At no stage did the United States argue that the serious nature of their crimes rendered the hands of the foreign nationals unclean, thereby precluding Germany and Mexico respectively from protecting them under the Vienna Convention on Consular Relations. On the contrary, in both cases (as has been shown above) the United States contended that the plaintiff States themselves had unclean hands by virtue of their failure to apply the Vienna Convention in the manner required of the United States.

Chapter III

Cases of application of the clean hands doctrine in the context of diplomatic protection

10. Unlike cases involving direct inter-State claims in which the clean hands doctrine has been frequently raised, the cases involving diplomatic protection in which the doctrine has been raised are few.

11. The cases relied upon by some authors are the *Ben Tillett* arbitration[23] and the *Virginius*.[24] Carreau cites there two incidents as examples to support his statement that "[l]'individu pour qui l'État exerce ou prétend exercer sa protection diplomatique ne doit pas lui-même avoir eu une 'conduite blâmable'".[25] A close consideration of *Ben Tillett* and *Virginius* reveals that neither of them has anything to do with the clean hands doctrine, nor do they employ the language of the doctrine.

12. First, the *Ben Tillett* case.[26] On 21 August 1896, Ben Tillett, a British national and a labour union activist, arrived in Belgium to participate in a meeting of dock workers. The day he arrived in Belgium, he was arrested, detained for several hours and deported back

[23] See footnote 7 above.

[24] See Moore, *A Digest of International Law*, p. 895.

[25] Carreau, *Droit international*, pp. 467–468.

[26] See footnote 7 above.

to the United Kingdom. The latter, claiming on behalf of Ben Tillett, argued that Belgium had violated its own law and demanded monetary compensation of 75,000 francs. After negotiations failed, the case was decided by an arbitrator. It is clear from the text of the arbitration agreement between Belgium and the United Kingdom, as well as from the arbitral award, that the issue of inadmissibility of diplomatic protection was not even considered. The United Kingdom undoubtedly exercised diplomatic protection on behalf of Ben Tillett. It lost the case on substantive grounds, the main reason being that the act committed by Belgium was not an internationally wrongful act (contrary to Carreau's interpretation, who states that "l'arbitre débouta la Grande-Bretagne en raison de la violation par Ben Tillett du droit belge. En bref, il n'avait pas les 'mains propres'").[27]

13. Secondly, the case of the *Virginius*.[28] On 31 October 1873, the steamer *Virginius* was captured by a Spanish man-of-war on the high seas. *Virginius*, which flew an American flag (as later determined, without a right to fly it), carried arms, ammunition and potential rebels destined for Cuba. *Virginius* was taken to Santiago de Cuba, where 53 persons out of 155 crew members and passengers were summarily condemned for piracy by court-martial and executed. Among the executed persons were nationals of the United Kingdom and the United States. It is clear from the documents produced during negotiations between Spain and the United States that there was no disagreement between the parties involved about the right of the United States to exercise diplomatic protection in this particular situation. Also, both countries agreed that Spain was responsible for a violation of international law regardless of whether "*Virginius"* rightfully flew the United States flag and was engaged in transporting military supplies and potential rebels to Cuba. The case was not referred to arbitration, as Spain paid compensation to both the United Kingdom and the United States for the families of the executed British and American nationals.

14. Several writers express support for the clean hands doctrine in the context of diplomatic protection, but they offer no authority to support their views.[29] Cheng does, however, cite the *Clark* claim of 1862, in which the American Commissioner disallowed the claim on behalf of an American national in asking: "Can he be allowed, so far as the United States are concerned, to profit by his own wrong? … A party who asks for redress must present himself with clean hands."[30]

15. Many writers are sceptical about the clean hands doctrine and the weight of authority to support it (see, in particular, the views of Salmon,[31] Rousseau[32] and Garcia-Arias[33]). Rousseau's views are of special importance. He states: "[I]l n'est pas possible de considérer la théorie des mains propres comme une institution du droit coutumier général, à la différence des autres causes d'irrecevabilité à l'étude desquelles on arrive maintenant."[34]

[27] Carreau, *op. cit*., p. 468.

[28] See footnote 24 above.

[29] Ruzié, *Droit international public*, p. 95; Combacau and Sur, *Droit international public*, pp. 596–597; and Malanczuk, *Akehurst's Modern Introduction to International Law*, pp. 263–269.

[30] Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 156.

[31] "Des 'mains propres' comme condition de recevabilité des réclamations internationales", and *Dictionnaire de droit international public*, pp. 677–678.

[32] *Droit international public*, p. 172.

[33] "La doctrine des 'clean hands' en droit international public".

[34] *Op. cit.*, p. 177.

Chapter IV

A plea to admissibility?

16. On occasion, an argument premised on the clean hands doctrine has been raised as a preliminary point in direct inter-State cases before ICJ. It is not clear, however, whether the intention has been to raise the matter as a plea to admissibility. If the doctrine is applicable to claims relating to diplomatic protection, it would seem that the doctrine would more appropriately be raised at the merits stage, as it relates to attenuation or exoneration of responsibility rather than to admissibility.

Chapter V

Concluding remarks

17. In paragraph 332 of his second report on State responsibility,[35] Mr. James Crawford suggested that the defence of clean hands was raised "mostly, though not always, in the framework of diplomatic protection". In paragraph 334, he added:

> Even within the context of diplomatic protection, the authority supporting the existence of a doctrine of "clean hands", whether as a ground of admissibility or otherwise, is, in Salmon's words, "fairly long-standing and divided".[36] It deals largely with individuals involved in slave-trading and breach of neutrality, and in particular a series of decisions of the United States–Great Britain Mixed Commission set up under a Convention of 8 February 1853 for the settlement of shipowners' compensation claims. According to Salmon, in the cases where the claim was held inadmissible:
>
> "In any event, it appears that these cases are all characterized by the fact that *the breach of international law by the victim was the sole cause of the damage claimed*, [and] that the *cause-and-effect relationship*

[35] *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4, p. 82.

[36] *Loc. cit*., p. 249.

between the damage and the victim's conduct was pure, involving no wrongful act by the respondent State.

"When, on the contrary, the latter has in turn violated international law in taking repressive action against the applicant, the arbitrators have never declared the claim inadmissible."[37]

18. The present report has shown that the evidence in favour of the clean hands doctrine is inconclusive. Arguments premised on the doctrine are regularly raised in direct inter-State cases before ICJ, but they have yet to be upheld. Whether the doctrine is applicable at all to claims involving diplomatic protection is highly questionable. There is no clear authority to support the applicability of the doctrine to cases of diplomatic protection. Such authority as there is is uncertain and of ancient vintage, dating mainly from the mid-nineteenth century—as the above-cited passages from Salmon demonstrate. Although some authors support the existence of the doctrine in the context of diplomatic protection, they are unsupported by authority. Moreover, there are strong voices—Salmon and Rousseau—against such a doctrine. In these circumstances the Special Rapporteur sees no reason to include a provision in the draft articles dealing with the clean hands doctrine. Such a provision would clearly not be an exercise in codification and is unwarranted as an exercise in progressive development in the light of the uncertainty relating to the very existence of the doctrine and its applicability to diplomatic protection.

[37] *Ibid*., p. 259.

ANNEX 288

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The Clean Hands Doctrine as a General Principle of International Law

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Abstract

The question of the scope and application of the doctrine of clean hands by investment tribunals is controversial. This article examines how scholars, international courts and tribunals and investment tribunals have analysed the concept. I will show that while the doctrine has rarely been used by international tribunals, they have nonetheless recognised and applied the clean hands doctrine in several awards. I will critically assess the reasoning of the *Yukos* award and, most importantly, the recent *South American Silver Limited* award, which have both held that the clean hands doctrine is not a general principle of law. I will argue, like many writers, that the doctrine should be considered as a general principle of international law. The article examines this concept and describes how such principles emerge on the international plane in a manner different from general principles grounded in the domestic laws of States.

Keywords

doctrine of clean hands – general principle of international law – general principle of law – investment arbitration – *Yukos* award – *South American Silver Limited* award

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1 Introduction

The clean hands doctrine (or 'unclean' hands) is often defined as 'he-she who comes into equity must come with clean hands'. The principle is also sometimes expressed in a number of Latin maxims, including *ex delicto non oritur actio* ('an unlawful act cannot serve as the basis of an action at law') and *ex turpi causa non oritur actio* ('an action cannot arise from a dishonourable cause').[1] In simple terms, it means that 'if some form of illegal or improper conduct is found on the part of the investor, his or her hands will be "unclean", his claims will be barred and any loss suffered will lie where it falls'.[2] Importantly, the act must be 'connected with the instant litigation and of such a nature as to affect the clean hands of the applicant'.[3] In the words of Cheng, the 'claim itself [must be] based upon the unlawful act'.[4]

The question of the scope and application of the doctrine of clean hands by investment tribunals is highly controversial. I have published an article in this Journal on this topic in 2016.[5] Since then, many writers have participated in this debate,[6] including one article in this Journal in 'response' to my earlier

1 Richard Kreindler, 'Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine' in Kaj Hober and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (Juris Publication 2010) 319: 'Reliance on the maxim *ex turpi causa non oritur actio* can and should be considered as another application of the Unclean Hands Doctrine'.

2 Aloysius Llamzon, '*Yukos Universal Limited* (*Isle of Man*) *v The Russian Federation*: The State of the "Unclean Hands" Doctrine in International Investment Law: *Yukos* as Both Omega and Alpha' (2015) 30(2) ICSID Rev 316.

3 Aloysius Llamzon and Anthony Sinclair, 'Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct' in Albert Jan van den Berg (ed), *Legitimacy: Myths, Realities, Challenges* (Kluwer 2015) 451, 509.

4 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens 1953) 156. See also ibid at 157–58: the doctrine 'does not apply to cases where, though the claimant may be guilty of an unlawful act, such act is judicially extraneous to the cause of action'.

5 Patrick Dumberry, 'State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration After the *Yukos* Award' (2016) 17 JWIT 229.

6 See Mariano De Alba Uribe, 'Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration' (2005) 12 Brazilian JIL 323; Marcin Kałduński, 'Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration' (2015) 4(2) Polish Rev of Intl and Eur L; Caroline Le Moullec, 'The Clean Hands Doctrine: A Tool for Accountability of Investor Conduct and Inadmissibility of Investment Claims' (2018) 84(1) Arbitration 15–37; T Leigh Anenson, 'Announcing the "Clean Hands" Doctrine' (2017) 51(5) UC Davis L Rev 1829; Julien Ancelin, 'À propos de la "théorie des mains propres": Observations

paper.[7] The present article examines additional (and sometimes new) evidence and material and arrives at the conclusion that the doctrine of clean hands should be considered as a general principle of international law in the context of international investment law.[8] The article also critically assesses the opposite conclusion reached by the recent *South American Silver Limited* award that the doctrine is not a general principle of law (GPL).[9]

This article is structured as follows. I will first briefly examine the scope of the doctrine of clean hands and its controversial application in general international law (Section 2). This will be followed by an analysis of how the concept has been considered by scholars and investment tribunals in the specific field of investment arbitration (Section 3). In that section, I will show that investment tribunals have recognised and applied the clean hands doctrine in several awards. I will also critically examine the reasoning of the *Yukos* and *South American Silver Limited* awards which have both held that the clean hands doctrine is not a GPL. Section 4 will introduce the concept of 'general principle of international law' and describe how such principles emerge on the international plane in a manner different from GPL grounded in the domestic laws of States. I will explain the reasons why, in my view, the doctrine of clean hands should be considered as a general principle of international law. Finally, I will say a few words on how tribunals could concretely apply the doctrine in arbitration proceedings (Section 5).

2 The Doctrine Under International Law

2.1 *Numerous Scholars Have Considered the Doctrine as a General Principle of Law*

The doctrine of clean hands has been endorsed by several public international law scholars.[10] One such author is Schwebel, who was one of the three arbitra-

sur les sentences arbitrales Yukos de la Cour Permanente d'Arbitrage du 18 juillet 2014' (2015) 61 AFDI 831.

7 Ori Pomson, 'The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry' (2017) 18(4) JWIT 712–34.

8 Patrick Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (OUP 2020), examining 17 concepts (including the doctrine of clean hands) and assessing whether or not they should be considered as GPL.

9 *South American Silver Limited v Bolivia*, PCA Case No 2013-15, Award (22 November 2018).

10 Cheng (n 4) 155; Elisabeth Zoller, *La bonne foi en droit international public* (Pedone 1977) 298; Gerald Fitzmaurice, 'The General Principles of International Law, Considered from the Standpoint of the Rule of Law' (1957) 92 Recueil des Cours 119; Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 420–21; James Crawford, *Brownlie's Principles*

tors in the *Yukos* case (further examined below). A number of scholars have also considered the doctrine as a GPL.[11] I have come to the same conclusion in previous writings.[12]

The question as to whether or not the doctrine should indeed be considered as a GPL is controversial. The starting point of the analysis is to mention the undeniable fact that the doctrine exists under common law. This obvious point has been recognised by several scholars,[13] as well as by a few investment tribunals. Thus, in the *Niko* case, the Tribunal agreed with the Respondent's affirmation stating that the clean hands principle is 'well recognised in common law'.[14] The same conclusion was reached by the *Churchill Mining* tribunal referring to the 'common law doctrine of unclean hands'.[15] Similarly, in the *World Duty Free v Kenya* case, the Tribunal examined English law (which was the governing law of the contract) in some detail, and concluded that the maxim *ex turpi causa non oritur actio* (which has been considered by authors as one element of the clean hands doctrine[16]) was undoubtedly part of

of Public International Law (8th edn, OUP 2012) 701; Margaret White, 'Equity – A General Principle of Law Recognised by Civilised Nations?' (2004) 4 Queensland U Tech L J 110; Christopher R Rossi, *Equity and International Law: A Legal Realist Approach to the Process of International Decision Making* (Transnational Publication 1993) 81; Aleksandr Shapovalov, 'Should a Requirement of "Clean Hands" Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate' (2005) 20 Am U Intl L Rev 829, 840–42; Kevin Lim, 'Upholding Corrupt Investors' Claims Against Complicit or Compliant Host States – Where Angels Should Not Fear to Tread' (2011–2012) YB Intl Invest L & Pol 608.

11 One example is Kreindler (n 1) 317–18. Many writers have also adopted the same position, as further examined below.

12 Patrick Dumberry and Gabrielle Dumas-Aubin, 'The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law' in Ursula Kriebaum (ed), *Transnational Dispute Management Special Issue: Aligning Human Rights and Investment Protection* (2013) 3; Dumberry, 'State of Confusion' (n 5) 246 et seq; Dumberry, *Guide to General Principles* (n 8) 194 et seq.

13 Llamzon and Sinclair (n 3) 508; Llamzon (n 2) 316; Le Moullec (n 6) 14.

14 *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, Bangladesh Oil Gas and Mineral Corporation*, ICSID Case No ARB/10/11 and ICSID Case No ARB/10/18, Decision on Jurisdiction (19 August 2013) para 476. The Tribunal also stated: 'The principle of clean hands is known as part of equity in common law countries' (para 477).

15 *Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia*, ICSID Case No ARB/12/14 and 12/40, Award (6 December 2016) para 493. See *Glencore Finance (Bermuda) Limited v Bolivia*, PCA Case No 2016–39, Procedural Order No 2: Decision on Bifurcation (31 January 2018) para 46, where the Tribunal agreed with the statement made by the *Churchill* tribunal.

16 See Kreindler (n 1) 319; Llamzon and Sinclair (n 3) 510.

English law.[17] The concept is also part of US law; the Supreme Court stated that '[H]e who comes into equity must come with clean hands'.[18]

The recognition of the doctrine extends beyond common law. According to one author, 'the general principle underpinning the clean hands doctrine dates to antiquity', adding that 'commentators have traced the genesis of unclean hands to Chinese customary law and to the Roman period of Justinian'.[19] He also noted that 'in civil law countries without a separate body of law called "equity," a kindred idea can be found in the recognition of wrongdoing for an abuse of right'.[20] The same assessment was made by the US Secretary of State (Mr Bayard) in the *Pelletier* case of 1885 where he mentioned that the doctrine (specifically referring to the maxim *ex turpi causa non oritur actio*) had been recognized 'by innumerable ruling under roman common law' and was 'held by nations holding Latin traditions, and under the common law as held in England and the United States'.[21] Notably, the principle is also found in Islamic law.[22] The existence of the doctrine in different legal systems led Judge Weeramantry to conclude in his dissenting opinion in the *Legality of Use of Force* that '[t]he Respondent invokes the "clean hands" principle, a principle of equity and judicial procedure, well recognized in all legal systems, by which he who seeks the assistance of a court must come to the court with clean hands. He who seeks equity must do equity'.[23]

Investment arbitration scholars have also come to the same conclusion. Two authors have recently indicated that the doctrine was 'a well-established principle of equity jurisprudence found in many municipal systems of law'.[24]

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17 *World Duty Free Co Ltd v Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006) para 179. It should be added that recently, the Supreme Court of the United Kingdom in *Patel v Mirza* [2016] UKSC 42 adopted a 'proportionality' analysis rather than the strict clear hands doctrine (the question as to whether a 'proportionality' test should be applied is further examined in Section 5, below). This new case does not undermine per se the status of the clean hands doctrine as a GPL. This is because, as further discussed below, the concept can be considered as a 'general principle of international law', based on international law material, rather than one grounded in domestic laws.

18 *Precision Instrument Mfg Co v Automotive Co*, US Supreme Court, 324 US 806 (1945) 814, quoted in Llamzon (n 2) 316.

19 Leigh Anenson (n 6) 1848.

20 ibid.

21 *Pelletier Case* (1885), referred to in Cheng (n 4) 157.

22 See Ancelin (n 6) 837, indicating that the concept is included in the notion of abuse of right and referring to the work of writers on Islamic law.

23 *Legality of Use of Force* (*Serbia and Montenegro v Belgium*) (Order on Precautionary Measures), dissenting opinion of Judge Weeramantry [1999] ICJ Rep 184.

24 Llamzon and Sinclair (n 3) 508 (referring to John Norton Pomeroy, *Equity Jurisprudence* (5th edn, Filmer Brothers 1941) s 397–404).

Writers have indeed indicated that the principle is found in 'many' States[25] of both civil and common law jurisdictions.[26] More generally, a number of authors have highlighted the fact that the principle is rooted in Roman law,[27] 'which form the basis of the laws of most civilised countries'.[28] The position of many scholars has been summarized as follows by one author:

> Considering that the idea underlying the clean hands doctrine has been recognized in both common and civil law systems since ancient times through several legal maxims, I believe that it would very difficult to conclude that the clean hands doctrine does not constitute a principle derived from the municipal law of at least a majority of the States of the international community. Thus, recognizing that the Yukos tribunal was limited on its findings by the evidence cited by the parties to that dispute, this author believes that irrespectively of the finding of such tribunal, there are sufficient grounds to conclude that, although circumvented with controversy, the clean hands doctrine amounts to a general principle of international law.[29]

A crucial point to add is that none of these investment arbitration scholars have actually undertaken a comparative study of different legal orders. While some authors have been more reluctant to recognize the doctrine as having GPL status,[30] to the best of one's knowledge, only one author, Pomson, seems

25 Kreindler (n 1) 317, indicating that the principle could be found in the laws of 'many jurisdictions' of both common law and civil law traditions (explicitly referring to the German Civil code). See also: Llamzon and Sinclair (n 3) 508 (the doctrine 'today can be found in the laws of many civil and common law jurisdictions'), 511 (the doctrine 'having been adopted in the domestic legal orders of many States, is frequently asserted to qualify as a "general principle of law" pursuant to art 38(1)(c) of the ICJ Statute').

26 Kreindler (n 1) 317; Llamzon (n 2) 316; Andrea K Bjorklund and Lukas Vanhonnaeker, 'Yukos: The Clean Hands Doctrine Revisited' (2015) 9(2) Diritti umani e diritto internazionale 367 ('The clean hands doctrine can be found in the laws of both common and civil law jurisdiction. It is rooted in the general principle of good faith and is closely related to several Latin maxims'); De Alba Uribe (n 6) 323 ('the doctrine has been no stranger in civil law systems').

27 Aloysius P Llamzon, 'On Corruption's Peremptory Treatment in International Arbitration' in Domitille Baizeau and Richard H Kreindler (eds), *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Kluwer Law International 2015) 37.

28 Kreindler (n 1) 317.

29 De Alba Uribe (n 6) 324–25.

30 Charles T Kotuby Jr and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017) 132, noting that 'there is no strict or uniform principle in national legal orders that prohibits judicial

to be strongly opposed to such a conclusion. In a recent article, Pomson indicated that the clean hands doctrine 'manifests itself in different ways, based on the circumstances where it is invoked' and that, in fact, it can 'be broadly divided into three variations, one of these being divided into three further variations'.[31] He conducted an analysis of four laws (Unites States, United Kingdom, Germany and France).[32] While acknowledging the non-exhaustive nature of his analysis,[33] he came to the conclusion that none of the three distinct 'variations' of the doctrine he identified were firmly established under these laws.[34] Therefore, he concluded that the doctrine of clean hands does not exist as a GPL.[35]

I have found no comparative law scholarship that specifically examines the doctrine in varying jurisdictions. I have myself not conducted a comprehensive analysis of domestic legal orders. Nevertheless, in my opinion, it is probably unnecessary to undertake any such a comparative study looking at different laws to determine whether they include the doctrine (or any of its variations). This is because I believe that the doctrine should be considered as a general principle of international law. The reasons for arriving at this conclusion are discussed further below when dealing with investment arbitration case law (Section 3). Before doing so, I will examine how international law tribunals have analysed the doctrine.

2.2 *There Is Limited Support for the Doctrine in International Case Law*

As rightly acknowledged by the *Yukos* tribunal, the status of the clean hands principle is 'controversial' in international law.[36] Thus, in the context of State responsibility, the International Law Commission (ILC) Special Rapporteur James Crawford explained that 'if it exist[s] at all,' the doctrine would operate as a ground of inadmissibility rather than as a circumstance precluding

relief whenever a Claimant has contravened the law or fulfilled its contractual obligations'. See also Ancelin (n 6) 837.

31 Pomson (n 7) 715.

32 ibid 728–29.

33 ibid 729. He also noted that this small sample is sufficient based on the affirmation by Malcolm Shaw, *International Law* (7th edn, CUP 2014) 71, that 'Anglo-American common law has influenced a number of states throughout the world, as have the French and Germanic systems'.

34 Pomson (n 7) 729 et seq, 733.

35 ibid 729 et seq, 733 ('In light of the above, it would seem difficult to conclude that any of the different forms of the clean hands doctrine today constitute general principles of law').

36 *Hulley Enterprises (Cyprus) Limited v Russia,* PCA Case No AA226, UNCITRAL, Final Award (18 July 2014) paras 1358–59.

wrongfulness or responsibility.[37] International tribunals have been reluctant to recognize the existence of the doctrine. As noted by two authors, the actual application of the principle by courts and tribunals has been so far 'rare'.[38] Consequently, the status of the doctrine has been described by many as 'unsettled' in international law.[39] In fact, some authors consider that case law shows that the doctrine is not a GPL.[40]

In a 2007 Permanent Court of Arbitration (PCA) arbitration between Guyana and Suriname, the Tribunal underlined that the clean hands doctrine had been inconsistently applied by tribunals:

> No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries of the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms. The ICJ has on numerous occasions declined to consider the application of the doctrine, and has never relied on it to bar admissibility of a claim or recovery. However, some support for the doctrine can be found in dissenting opinions in certain ICJ cases, as well as in opinions in cases of the Permanent Court of International Justice (PCIJ) … These cases indicate that the use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent.[41]

37 'Second Report on State Responsibility by Mr James Crawford, Special Rapporteur' (30 April 1999) UN Doc A/CN.4/498/Add.2, para 334, in *International Law Commision Yearbook*, vol 2(1) (1999) 83, 333, 336. See also, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 162.

38 Kotuby and Sobota (n 30) 133.

39 Llamzon and Sinclair (n 3) 510. See also: Andreas R Ziegler and Jorun Baumgartner, 'Good Faith as a General Principle of (International) Law' in Andrew D Mitchell, Muthucumaraswamy Sornarajah, and Tania Voon (eds), *Good Faith and International Economic Law* (OUP 2015) 29; Attila Tanzi, 'The Relevance of the Foreign Investor's Good Faith in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 207 ('the notion has not established itself with certainty as a general principle of international litigation').

40 Ancelin (n 6) 837–38.

41 *Guyana v Suriname*, Arbitral Tribunal Constituted Under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), Award (17 September 2007) para 418. See also, para 421, where the Tribunal used expressions such as 'to the extent that such a doctrine may exist in international law' as well as 'even if it were recognised as a rule of international law'.

For these reasons, ILC Special Rapporteur Crawford concluded (quoting Rousseau[42]) that 'it is not possible to consider the "clean hands" theory as an institution of general customary law'.[43] However, the relevant question is whether the doctrine is a GPL, not a rule of custom.

At the opposite end of the spectrum, ILC Special Rapporteur Dugard (in a report dealing with clean hands in the specific context of diplomatic protection) stated that international law cases 'make it difficult to sustain the argument that the clean hands doctrine does not apply to disputes involving direct inter-State relations'.[44] While ultimately denying the application of the doctrine in the context of diplomatic protection,[45] Dugard also rightly noted that 'States have frequently raised the clean hands doctrine in direct inter-State claims'.[46] The doctrine has indeed been invoked by States in many ICJ cases.[47] Dugard mentioned that 'in no case has ICJ stated that the doctrine is irrelevant to inter-State claims'.[48] While it is true that the Court never denied the existence of the doctrine (despite having had many opportunities to do so),[49] it must also be recognised that it has never upheld the doctrine either.

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42 Charles Rousseau, *Droit international public Tome v Les rapports conflictuels* (5th edn, Sirey 1983) 177, para 170 ('il n'est pas possible de considérer la théorie des mains propres comme une institution de droit coutumier général').

43 Crawford (n 37) 83, para 334.

44 See 'Sixth Report on Diplomatic Protection by John Dugard' (57th Session, ILC, 2005) A/CN.4/546, para 6.

45 ibid para 18, stating that the 'evidence in favour of the clean hands doctrine is inconclusive' and that there was 'no clear authority to support the applicability of the doctrine to cases of diplomatic protection'. On this specific question, see: Shapovalov (n 10) 829–66; Jean Salmon, 'Les principes généraux du droit: une insaisissable source du droit applicable aux contrats d'Etat' in Raymond Vander Elst (ed), *Mélanges Raymond Vander Elst*, vol II (Nemesis 1986).

46 ibid.

47 See eg, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 63–64; *Case Concerning the Oil Platforms* (*Iran v United States*) (Judgment) [2003] ICJ Rep 161, paras 29–30. See analysis of Dugard (n 44) paras 5 et seq, also referring to three other cases. See recently *Maritime Delimitation in the Indian Ocean* (*Somalia v Kenya*) (Preliminary Objections) [2017] ICJ Rep paras 139–40, with Kenya endorsing the doctrine and Somalia indicating that it 'has never been recognized by the Court' and that 'the Court's case law confirms that accusations of bad faith of the type levelled against Somalia cannot bar the admissibility of an Application'. The Court said that in that case there was no need 'to address the more general question whether there are situations in which the conduct of an applicant would be of such a character as to render its application inadmissible' (para 143).

48 Dugard (n 44) para 6.

49 Rahim Moloo, 'A Comment on the Clean Hands Doctrine in International Law' (2011) 8(1) TDM 4.

In other words, the ICJ has adopted a rather 'neutral' position regarding the application of the concept under general international law. In a recent 2019 case before the ICJ, the United States acknowledged that situation,[50] but the Court decided that it was not necessary to take position on the question of the status of the doctrine.[51]

Although one can agree with the general assessment that the doctrine of clean hands has rarely been applied by international law tribunals, it remains that there is, nevertheless, some support for its recognition in older international law cases. Thus, Cheng cites several older arbitration cases where tribunals have indeed applied the doctrine, including the *Medea and the Good Return cases* decided by an Ecuador-United States Commission.[52] Some have also pointed out that support in favor of the doctrine can be found in the separate opinion of Judge Hudson[53] and the dissenting opinion of Judge Anzilotti[54] in the 1937 PCIJ case of *The Diversion of Water from the Meuse*. In a recent

50 *Certain Iranian Assets* (*Islamic Republic of Iran v United States of America*) (Preliminary Objections) (13 February 2019) para 117: 'The United States recognizes that in the past the Court has not upheld an objection based on the "clean hands" doctrine, but argues that it has not rejected the doctrine either, and that, in any event, the time is ripe for the Court to acknowledge it and apply it. According to the United States, the Court need not address the merits of this case to assess the legal consequences of Iran's conduct'. Iran's position was slightly different, para 119 ('Iran also points out that there is uncertainty about the substance and binding character of the "clean hands" doctrine and that the Court has never recognized its applicability').

51 ibid para 121.

52 Cheng (n 4) 155, citing several cases, including: *Cases of the Good Return and the Medea*, opinion of Hassaurek (8 August 1865) in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol 3 (Washington Government Print Office, 1898) 2739: 'I hold it to be the duty of the American Government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress. It would be against all public morality, and against the policy of all legislation, if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties, and on the perpetration of outrages committed by an American citizen against the subjects and commerce of friendly nations'.

53 *The Diversion of Water from the Meuse* (*Netherlands v Belgium*) (opinion of Judge Hudson) PCIJ Ser A/B, No 70, 77, 87, referring to the principle that 'who seeks equity must do equity' and concluding that a tribunal will 'refus[e] relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper' (quoting from Douglas McGarel Hogg (ed), *Halsbury's Laws of England*, vol 13 (2nd edn, Butterworths 1934)).

54 ibid, dissenting opinion of Judge Anzilotti, 50, stating that the principle of *inadimplenti non est adimplendum* 'is so just, so equitable, so universally recognized that it must be applied in international relations'. He also referred to the doctrine in his dissenting opinion in *Legal Status of Eastern Greenland* (Judgment) PCIJ Ser A/B, No 53, 95.

article, one author argued, however, that these two examples are instances of the application of one 'variation' of the clean hands doctrine. He referred to this variation as 'reciprocal obligations' and defined it as follows: 'a party to a case may not argue that the other party has committed some illegality if the former itself has committed a reciprocal illegality in their relations'.[55] It is true that the two judges were, in fact, referring to the specific maxim of *inadimplenti non est adimplendum* ('one has no need to respect his obligation if the counter-party has not respected his own') which is not usually identified with the clean hands doctrine *per se* (the question is further examined below).[56] In other words, these two opinions do not seem to provide much support to the more specific aspect of the doctrine which is examined in this section.

Yet, one can hardly deny the existence of some support for the doctrine in the opinions of other judges. Thus, the principle has also been endorsed by several ICJ judges in their dissenting opinions,[57] including that of Judge Schwebel in the *Nicaragua* case.[58] In this context, it seems that one can agree with the conclusion reached recently by the *Churchill Mining* tribunal which noted that the doctrine of 'unclean hands' had 'found expression at the international level, although its status and exact contours are subject to debate and have been approached differently by international tribunals'.[59]

One author has dismissed the relevance of the separate and dissenting opinions of judges mentioned in the previous paragraph as examples of

55 Pomson (n 7) 716.

56 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States*) (Merits) Dissenting Opinion of Judge Schwebel [1986] ICJ Rep 259, para 269, indicating that this is a 'variation' of the doctrine.

57 See eg *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) (Judgment) Dissenting Opinion of Judge ad hoc Van den Wyngaert [2002] ICJ Rep 137, para 35 ('The Congo did not come to the Court with clean hands. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith') 84; *Tehran Hostages* (*United States v Iran*), ICJ Rep 1980, dissenting opinion of Judge Morozov, para 3.

58 *Nicaragua v United States* (n 56) dissenting opinion of Judge Schwebel, paras 240, 268–72. See para 268: 'Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible – but ultimately responsible – for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus, both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail.'

59 *Churchill Mining* (n 15) para 493. See *Glencore Finance* (*Bermuda*) *Limited v Bolivia* (n 15) para 46, where the Tribunal agrees with the statement made by the *Churchill* tribunal.

'variations' of the doctrine which are said to be different from the one at the heart of this section.[60] It is not entirely clear whether the sophisticated distinctions made by Pomson are actual very useful in practice. As a matter of fact, all these different 'variations' (except for the specific maxim *inadimplenti non est adimplendum* mentioned in the opinions of Judges Hudson and Anzilotti in *The Diversion of Water from the Meuse*) have been considered by scholars, such as Cheng, as being under the umbrella of the clean hands doctrine. In any event, the present discussion focuses on investment arbitration proceedings commenced by an investor against the host State of the investment. To use Pomson's own terminology, this is the so-called third 'variation' of the doctrine ('unlawful conduct relating to the subject-matter of the case'[61]). This is the only 'variation' that is relevant in the context of investment arbitration.[62] I will show in the next section that investment tribunals have both implicitly and explicitly endorsed the doctrine of clean hands.[63]

3 The Doctrine in International Investment Law

In recent years, a number of authors have openly supported the application of the doctrine of clean hands in the field of investment arbitration to operate as a bar to the admissibility of claims submitted by investors that have committed violations of host States' laws.[64] It seems that only one author, Pomson,

60 Thus, Pomson (n 7) believes that the opinion of Judge Anzilotti in the *Legal Status of Eastern Greenland* (n 54) is an illustration of the 'causal link' approach which he defines as 'an instance in which the alleged right the claimant is invoking against the respondent was obtained through an unlawful act' (ibid 719). He also believes that the opinion of Judge Schwebel in the *Nicaragua* case (n 56) is an illustration of yet another 'variation' of the 'causal link' approach to the clean hands doctrine which he called 'provocation' (ibid 721). He also refers (ibid 723) to the dissenting opinion of Judge Morozov in the *Tehran Hostages* (n 57) as a third form of the doctrine he calls 'unlawful conduct relating to the subject-matter of the case' ('in circumstances where a claimant has committed an illegality related to the subject-matter of a case, the claimant is precluded from invoking the respondent's alleged illegality').

61 Pomson (n 7) 723.

62 ibid 723.

63 Pomson believes on the contrary that investment tribunals have 'implicitly reject the existence of a variation of the clean hands doctrine according to which illegal activity related to the subject-matter of a claim may render it inadmissible' (ibid para 726).

64 Kreindler (n 1) 309; Carolyn B Lamm, Hansel T Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration' in Ballesteros MA Fernández and David Arias (eds), *Liber Amicorum Bernardo Cremades* (Kluwer 2010) 723–26; Moloo (n 49); Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in

strongly rejects the application of the doctrine in investor-State arbitration.[65] Writers who are sceptical about the status of the doctrine have relied on the *Yukos* award (Section 3.1). I will also highlight that other investment tribunals have recognised and applied the clean hands doctrine in previous awards (Section 3.2). Finally, I will critically assess the *South American Silver Limited* award which has also held that the clean hands doctrine is not a GPL (Section 3.3).

3.1 *The* Yukos *Award's Confusing Analysis on General Principles*

The *Yukos* awards involved three separate claims filed by three controlling shareholders of OAO Yukos Oil Company (Yukos).[66] The same Tribunal (composed of the same three arbitrators) rendered three awards in July 2014 (they will be collectively referred to as the *Yukos* award).[67] The *Yukos* award was, until very recently, the most important investment award examining the question of clean hands.[68] This specific feature of the award has been analysed by numerous authors,[69] including myself.[70] For the purpose of this article, suffice it to focus on the Tribunal's findings regarding the GPL status of the doctrine.

The *Yukos* tribunal rejected the proposition that the unclean hands doctrine was a general principle of law on the following ground:

> The Tribunal is not persuaded that there exists a 'general principle of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called 'unclean hands'.

International Law' (2010) 34 Fordham Intl L J 1485–86; Bjorklund and Vanhonnaeker (n 26) 367–68. See also, Dumberry and Dumas-Aubin (n 12).

65 Pomson (n 7) 724 et seq.

66 Hulley Enterprises Limited (a company organized under the laws of Cyprus), Yukos Universal Limited (a company organized under the laws of the Isle of Man), and Veteran Petroleum Limited (a company organized under the laws of Cyprus).

67 *Hulley Enterprises* (n 36) para 1360. See also *Yukos Universal Limited* (*Isle of Man*) *v Russia*, UNCITRAL, PCA Case No AA227, Final Award (18 July 2014); *Veteran Petroleum Limited* (*Cyprus*) *v Russia*, UNCITRAL, PCA Case No AA228, Final Award (18 July 2014).

68 It should be added that the final awards in all three cases were subsequently set aside by the The Hague District Court in a Judgment of 20 April 2016. The Dutch Appeals Court overturned that ruling in its judgement of February 2020.

69 See Bjorklund and Vanhonnaeker (n 26) 365–86; Llamzon (n 2); Ancelin (n 6).

70 Dumberry, 'State of Confusion' (n 5).

> General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an 'unclean hands' principle in international law.[71]

The Tribunal's remark that the clean hands doctrine is not a GPL is open to criticism.[72] One cannot help noticing a certain degree of confusion in the award regarding the proper terminology. Thus, it is unclear whether the Tribunal actually dealt with one concept (GPL *foro domestico*) or the other (general principle of international law). The confusion may be the result of the parties' own pleadings and the way they have used these terms. The Claimants seem to have considered the doctrine both from the perspective of a general principle of international law[73] and a GPL *foro domestico*.[74] The Respondent used the term as a GPL *foro domestico*.[75] It is quite possible that this confusing terminology may have led the Tribunal to view the two synonymously. This seems to be the case when considering the manner in which the Tribunal started and ended its analysis of this point. Thus, the Tribunal started its analysis by asking the following question in the title of the section devoted to this issue: 'Does the

71 *Hulley Enterprises* (n 36) paras 1358–59.

72 Dumberry, 'State of Confusion' (n 5); Chester Brown, 'The End of the Affair? *Hulley Enterprises Ltd (Cyprus) v Russian Federation*' (2016) 17(1) JWIT 137 (noting that the reasoning of the Tribunal on this point 'may be questioned; is the rule against profiting from one's wrongs, which is analogous to the 'clean hands' doctrine, not a general principle of law?') 138 ('The Tribunal's findings on the 'clean hands' doctrine is therefore open to question'); De Alba Uribe (n 6) 324 (rejecting the position of the tribunal that the principle is not a GPL). Other writers have taken a different position: Pomson (n 7) (arguing that the reasoning of the Tribunal was correct); Llamzon (n 2) 317 ('There seems to be no reason to doubt the Yukos Tribunal's conclusion that no unclean hands doctrine 'proper' exists as a principle of international law').

73 *Hulley Enterprises* (n 36). This is clear from para 80 of the Claimants' Skeleton Arguments cited at ibid para 108 of the award:

> The Respondent's position is fundamentally unfounded for several reasons. First, the so-called 'unclean hands' theory finds no support in the text of the ECT, customary international law, or investment treaty jurisprudence. Second, even assuming the existence of such a *general principle of international law*, which the Claimants deny, its scope would be dramatically more limited than the Respondent contends, such that the Respondent has not alleged any facts that could establish its applicability in the present case (emphasis added).

See also ibid para 1329 ('Claimants emphasize that the bar for recognition of *general principles of international law* is set "extremely high"') (emphasis added).

74 See ibid paras 1326, 1330.

75 See ibid para 1325.

"Clean Hands" Doctrine Constitute a "General Principle of Law Recognized by Civilized Nations"?' (quoting Article 38(1)(c) of the ICJ Statute).[76] Two pages of analysis later, the Tribunal closed its reasoning by indicating: 'The Tribunal therefore concludes that "unclean hands" does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case'.[77] Therefore, the Tribunal introduced the word 'international' when referring to GPL under Article 38(1)(c) of the Statute of the ICJ. The same expression is also used earlier in the award.[78] In sum, it remains unclear whether the Tribunal had in mind one concept or the other, or (perhaps) both. The next paragraphs examine these two scenarios separately.

On the one hand, in the event that the Tribunal was actually dealing with GPL *foro domestico*, I have explained in prior publication,[79] that it should have undertaken a comparative analysis to assess whether the doctrine could be found in the most representative legal systems of the world.[80] Instead, the Tribunal seems to have relied on what other courts and tribunals have concluded about the status of the clean hands doctrine. Such *renvoi* to the work of other tribunals is, of course, not problematic in and of itself. This is certainly the case whenever the referred decision of the tribunal does contain a comprehensive analysis of the issue.[81] A good example is the *Niko* award (discussed below) where the Tribunal made reference to the *World Duty Free* case as an authoritative analysis on the status of the prohibition of corruption.[82] Yet, there is no evidence in the *Yukos* award that the decisions mentioned by the parties in their pleadings (and cited by the Tribunal in its award) have actually done such a comparative analysis of the status of the clean hands doctrine under municipal law.[83] Moreover, since the pleadings are not publicly available

76 ibid, see title just before para 1357.

77 ibid para 1363 (emphasis added).

78 ibid para 1347: 'The Parties dispute whether "clean hands" exists as a "general principle of international law recognized by civilized nations" in the meaning of Article 38(1)(c) of the Statute of the ICJ'.

79 Dumberry, 'State of Confusion' (n 5).

80 Dumberry, *Guide to General Principles* (n 8) 93, explaining the proper methodology that should be (in an ideal world) followed.

81 C McLachlan, 'Investment Treaties and General International Law' (2008) 57(2) ICLQ 391–92.

82 *Niko Resources* (n 14) paras 431–33.

83 In its award, the Tribunal noted that 'the Parties have dedicated to this controversy [ie the clean hands doctrine] several hundreds of pages of pleadings in the merits phase alone, citing in the process dozens of arbitral awards and decisions rendered by the Permanent Court of International Justice (the "PCIJ"), the International Court of Justice ("ICJ") and mixed-claims commissions' (*Hulley Enterprises* (n 36) para 1312). See also ibid fn 1714, where the Tribunal lists all cases referred to by the Respondent.

in this case, it is impossible to know whether any such analysis of municipal law was actually put forward by the parties.

On the other hand, if the Tribunal's goal was to examine the doctrine of clean hands as a 'general principle of international law', the analysis can be considered as technically sound. Thus, such principles emerge on the international plane (not under domestic law) and can be identified by, inter alia, examining how other international tribunals have analysed the issue and whether the principle is found in treaties (a point further discussed in Section 4). In short, the Tribunal looked at the right place to determine the issue.

At the end of the day, all will agree with the *Yukos* tribunal's observation that the doctrine is (at the very least) controversial under international law and that it has received uneven support amongst other international law courts and tribunals. In my opinion, however, the Tribunal's analysis of how other investment tribunals have assessed the clean hands doctrine is more problematic. This question is examined in the following section.

3.2 *Investment Tribunals Have Already Recognised and Applied the Clean Hands Doctrine in Previous Awards*

In its award, the *Yukos* tribunal noted that the Respondent referred to a number of dissenting opinions by judges in ICJ and PCIJ cases where the principle of 'unclean hands' was invoked (including the dissenting opinion of Judge Schwebel, a member of the Tribunal, in the *Nicaragua* case).[84] Importantly, the *Yukos* tribunal added that the Respondent had been

> unable to cite a single majority decision where an international court or arbitral tribunal ha[d] applied the principle of "unclean hands" in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.[85]

This remark about the (alleged) absence of any 'majority decision' applying the doctrine may have been designed by the Tribunal to distance itself from the position previously adopted by Judge Schwebel in his dissenting opinion in the *Nicaragua* case,[86] and in his earlier writing.[87] As noted by two authors,

84 *Hulley Enterprises* (n 36) para 1361.

85 ibid para 1362.

86 *Nicaragua v United States* (n 56), dissenting opinion of Judge Schwebel.

87 In an article published in 1999 (Stephen Schwebel, 'Clean Hands in the Court' (1999) 31 Studies in Transnatl Legal Policy 74), Schwebel affirmed that the doctrine of clean hands 'is supported in international law' and referred to the 'equitable considerations that are at the heart of the general principles of law that the doctrine of clean hands embodies' (ibid

Schwebel had 'unambiguously acknowledged the nature of the clean hands doctrine as being that of a general principle of law'.[88] In other words, the Tribunal had no other choice but to make some fine distinguishing in order to conclude that the doctrine was not a GPL.[89]

Nonetheless, some may question the accuracy of the Tribunal's observation about the lack of any 'majority decision' in favour of the doctrine. For instance, a number of authors[90] have argued that the doctrine of clean hands has, in fact, been adopted by the majority of the Permanent Court of International Justice (PCIJ) in the 1937 *Meuse River* case.[91] According to Schwebel himself, the majority decision in this case is indeed 'the most notable exposition and application of the principle [of 'unclean hands'] (or more precisely, of an allied principle) in modern international law'.[92] However, Schwebel pointed out that this case did not involve the application of the clean hands doctrine *per se*,

78). In an updated version of this article later published (Stephen Schwebel, 'Clean Hands, Principle' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2009)) he, however, seems to have adopted a different position on the matter. Thus, he mentioned that the question as to whether the principle of clean hands is a principle of contemporary international law 'is a question on which opinion is divided' (ibid para 3), noting that while 'a number of States have maintained the vitality and applicability of the principle of clean hands in inter-State disputes', '[t]he ICJ has not rejected the principle though it has generally failed to apply it' (ibid para 12).

88 Bjorklund and Vanhonnaeker (n 26) 368.

89 See the comment ibid 373: 'it is interesting to note that the Tribunal, composed *inter alia* of Judge Schwebel, reached the conclusion that the clean hands doctrine is not a general principle of public international law despite Judge Schwebel's earlier finding to the contrary. Judge Schwebel did not issue a dissenting or concurring opinion in the *Yukos* decision'.

90 Llamzon and Sinclair (n 3) 511 (The PCIJ 'applied the clean hands doctrine'); Le Moullec (n 6) 17.

91 In this case, the Netherlands sought to prevent Belgium from making use of waters from the Meuse River which it considered contrary to the terms of a bilateral 1863 treaty relating to the regime of diversions from the River Meuse. Importantly, the Netherlands had itself constructed certain works contrary to the terms of the treaty. Belgium therefore argued that the Netherlands should not be permitted to invoke the treaty against it. The Court mentioned that '[i]n these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past' (*The Diversion of Water from the Meuse* (n 53)).

92 Schwebel, 'Clean Hands' (n 87) para 2. See also, in his dissenting opinion in *Nicaragua v United States* (n 56) para 240, where he refers to the opinion of Judge Husdon and mentions the work of C Wilfred Jenks, *The Prospects of International Adjudication* (Stevens and Sons 1964) 326, stating that the majority of the Court had endorsed the position of Hudson. This reference suggests that Schwebel also believe that the majority of the Court adopted the doctrine in this case. See also *Nicaragua v United States* (n 56) para 269.

but a 'variation' of the doctrine.[93] As mentioned above, one can agree with the positioning of Pomson on the specific point[94] that the Court (and both Judges Hudson and Anzilotti in their opinions) actually applied the principle *inadimplenti non est adimplendum*, which is typically considered as different from the clean hand doctrine per se. In any event, it should be added that the Court, in this case, applied that principle more as a supplementary argument, rather than as the main reason for rejecting the claim.[95]

In my opinion, there is another reason why the previously mentioned affirmation by the *Yukos* tribunal is incorrect.[96] I have examined elsewhere how investment tribunals have analysed the concept of clean hands[97] and argued that the inclusion of a provision in an investment treaty to the effect that protected investments are only those made 'in accordance with the law' is a manifestation of the doctrine of clean hands. The same position has also been adopted by other authors.[98] Investment tribunals have thus already used the doctrine of clean hands to decide cases.[99] One clear example is the *Inceysa* award where the Tribunal stated that a 'foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can

93 *Nicaragua v United States* (n 56) dissenting opinion of Judge Schwebel, paras 269 et seq.

94 Pomson (n 7) 716–17.

95 *The Diversion of Water from the Meuse* (n 53). Thus, the Court made this observation after having already concluded that Belgium's Neerhaeren Lock was not contrary to the treaty.

96 Against cf Llamzon (n 2) 317, stating that 'no international court or tribunal – or more precisely, no majority decision or award – has ever explicitly recognized the existence of the unclean hands doctrine'.

97 Dumberry, 'State of Confusion' (n 5).

98 Moloo (n 49) 6–7; Moloo and Khachaturian (n 64) 1485; Llamzon and Sinclair (n 3) 509; Bjorklund and Vanhonnaeker (n 26) 367, 369 ('the translation of the doctrine into treaty language can be found in explicit provisions that an investment, for example, must be undertaken 'in accordance with the law' of the host state'); De Alba Uribe (n 6) 324 ('the doctrine has been recognized (and embodied) … in the express text of some BITs, which require that any investment be made in compliance with the laws and regulations of the host State'); Kałduński (n 6) 96 (arguing that 'the principle of clean hands does not have an autonomous character and that it is enshrined in the obligation to make investments in accordance with law'). Against cf Le Moullec (n 6) 24, 29; Pomson (n 7) 724–25.

99 Moloo (n 49) 7.

benefit from his own fraud".'[100] This Latin maxim is an expressions of the clean hands doctrine.[101]

Many other tribunals have also concluded to the existence of an implicit legality requirement even in the absence of such a clause in the instrument.[102] This is also an expression of the clean hands doctrine.[103] A good illustration is the *Plama* case.[104] Having concluded that the investment was 'obtained by deceitful conduct that is in violation of Bulgarian law', the Tribunal stated that granting the Energy Charter Treaty (ECT)'s protections to Claimant's investment would be contrary to the principle *nemo auditor propriam turpitudinem allegans* and 'the basic notion of international public policy – that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal'.[105] Therefore, the Tribunal held that 'in light of the *ex turpi causa* defense' it could not 'grant the substantive protections of the ECT' as requested by the Claimant.[106] While the *Plama* tribunal did not use the term 'clean hands', it nevertheless based its decision on Latin maxims which are manifestations of the doctrine.[107] It can be argued that the *Plama* award is an example of a majority decision where a tribunal concretely applied the

100 *Inceysa Vallisoletana SL v El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) para 242.

101 Kreindler (n 1) 317–19; Llamzon and Sinclair (n 3) 509–10; Schwebel, 'Clean Hands Principle' (n 87) para 1.

102 See for instance, *Phoenix Action, Ltd* v *Czech Republic*, ICSID Case No ARB/06/5, Award, (15 April 2009) para 101 (while the bilateral investment treaty (BIT) in this case included an 'in accordance with the law' provision, the tribunal indicated that the obligation for investors to make their investments in accordance with the host State's law 'is implicit even when not expressly stated in the relevant BIT'). See also *Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) paras 123–24 (it should be noted that this case involved a BIT containing a legality requirement); *Yaung Chi Oo Trading Trading Pte Ltd v Myanmar*, ASEAN Case No ARB/01/01, Award (31 March 2003) para 58; *Fraport Ag Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/11/12, Award (10 December 2010) para 328. *SAUR International v Argentina*, ICSID Case No ARB/04/4, Décision sur la compétence et sur la responsabilité (6 June 2012) para 306; *Mamidoil Jetoil Greek Petroleum Products Société Anonyme SA v Albania*, ICSID Case No ARB/11/24, Award (30 March 2015) para 293.

103 Moloo and Khachaturian (n 64) 1485: Bjorklund and Vanhonnaeker (n 26) 370; De Alba Uribe (n 6) 324–25, 326.

104 *Plama Consortium Limited v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, (8 February 2005).

105 ibid para 143.

106 ibid para 146. The Tribunal also indicated that the principle of *nemo auditur propriam turpitudinem allegans* was one of the 'applicable rules and principles of international law' applicable to the case (para 140).

107 Llamzon and Sinclair (n 3) 515.

principle of clean hands operating as a bar to the investor's claim.[108] The same position has been adopted by the *Fraport II* tribunal in its 2014 award:

> Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case according to the above analysis, or, absent an express provision in the treaty, based on rules of international law, such as the 'clean hands' doctrine or doctrines to the same effect.[109]

Another relevant case not mentioned in the *Yukos* award (but which was actually rendered in August 2013, i.e. one year before the award[110]) is *Niko v Bangladesh*.[111] The *Niko* tribunal (quoting from the aforementioned *Guyana v Suriname* award) stated that 'the question whether the principle of clean hands forms part of international law remains controversial and its precise content is ill defined'.[112] The Tribunal did not itself take position on this issue, remaining neutral.[113] The Tribunal ultimately concluded that the 'application of the [clean hands] principle requires some form of reciprocity'[114] and specifically referred to three criteria which had been developed by the United Nations Convention on the Law of the Sea (UNCLOS) Arbitral Tribunal in *Guyana v Suriname*.[115] The reasoning of the *Niko* tribunal suggests that it viewed the doctrine as a valid ground of defence in arbitration proceedings.[116] As such, it actually applied the doctrine to the facts of the case.[117] Thus, had the Tribunal rejected the very existence of such a doctrine, it would have

108 *Plama Consortium* (n 104). This is clear from the Tribunal's conclusion at para 147.

109 *Fraport* (n 102) para 328.

110 On this point, Llamzon (n 2) 318, noted that one reason which may explain why the *Yukos* tribunal did not mention the *Niko* award is because the hearing on the merits in *Yukos* was in October-November 2012, ie almost a year before the August 2013 decision in *Niko*.

111 *Niko Resources* (n 14).

112 ibid para 477.

113 ibid para 478. Thus, on the one hand, it referred to the above-mentioned sceptical position of ILC Special Rapporteur Crawford (n 37) regarding the GPL status of the doctrine. Yet, on the other hand, it also referred to the fact that 'others are of the view that, primarily because of its recognition in the domestic orders of many States, it must be qualified as a general principle of law'.

114 ibid para 480.

115 ibid para 481.

116 See for instance ibid para 482.

117 See ibid para 480, indicating that the 'application of the principle requires some form of reciprocity'. One question addressed in Dumberry, *Guide to General Principles* (n 8) 224, is whether the Tribunal adopted a narrower test of the doctrine when compared to that used under domestic law. See Llamzon (n 2) 318, 321.

surely not wasted any time in examining its concrete application in this case.[118] Importantly, the *Niko* tribunal ultimately held that the objection raised by the Respondents did not meet the three criteria which had been identified by the UNCLOS Arbitral Tribunal for the application of the doctrine.[119]

A few words should be said about the *Niko* award's reference to this condition of 'a relationship of reciprocity between the obligations'[120] of the investor and the host State. For this 'reciprocity' requirement to be fulfilled, the investor's wrongdoing and the treaty breach committed by the host State need to arise from the same sets of facts. The *Niko* tribunal found that 'there [was] no relation of reciprocity between the relief which the Claimant' was seeking in this arbitration proceedings and the acts of corruption involving the claimant.[121] One author noted that the Tribunal's emphasis on this condition of 'reciprocity' shows that it has, in fact, adopted a narrower test of the doctrine which is 'markedly different from those in national legal systems' and 'echoing the purer form of the unclean hands doctrine seen in inter-State claims commissions dating back over a century'.[122] He also noted that this condition of reciprocity is difficult to fulfill in the context of investment arbitration.[123]

In fact, the three-part 'test' developed by the UNCLOS Arbitral Tribunal in *Guyana v Suriname* was based on the reasoning of Judge Hudson in his individual opinion in the *Diversion of Water from the Meuse* case.[124] The specific facts of the *Meuse* case explain why the question of a continuing violation was so

118 Yet, it should be added that the Tribunal when referring to the test developed by the UNCLOS Arbitral Tribunal in *Guyana v Suriname* does mention that Tribunal's important caveat: 'to the extent that such a doctrine may exist in international law' (ibid para 481).

119 ibid para 483.

120 ibid para 480, referring to *Guyana v Suriname* (n 41) para 481.

121 ibid para 484.

122 Llamzon, 'Yukos' (n 2) 318, see also ibid 321 speaking of the 'stringent requirements of unclean hands set in Niko'.

123 ibid 328: 'However, can reciprocity truly occur at the making of an investment? Instances of investor wrongdoing such as corruption or fraud at the inception of the investment usually do not concern exactly the same set of facts on which the investor relies in making its claims against the host State. Only by considering the facts that attended the securing of the investment, rather than the facts related to the claimant's strict cause of action (for example, denial of justice, expropriation, fair and equitable treatment violations) as the juridical link between investor claim and host State defence, can the legality doctrine truly be said to be of sufficient identity with the unclean hands doctrine.'

124 As the UNCLOS Arbitral Tribunal noted (*Guyana v Suriname* (n 41) para 420): 'an important aspect of Judge Hudson's expression of the doctrine is the continuing nature of the non-performance of an obligation'.

central to his analysis.[125] But why should a breach only concern a 'continuing violation' for the clean hands doctrine to apply?[126] Violations committed by an investor in the past (and which are not ongoing at the time the arbitration proceedings have started) may be very relevant to determine whether it has 'unclean' hands. Such would be the case, for instance, in the event of human rights atrocities committed by an investor against the local population of the host State in the context of a mining project. In my opinion, any such violation should not have to be necessarily 'continuing' (or on-going) for the clean hands doctrine to apply. What matters is that these violations are directly related to the subject-matter of the claim filed by the investor.[127] That would be the case in the event that an investor would allege that the host State expropriated the investor's investment in that same mining project. As further discussed below,[128] the clean hands doctrine should apply regarding post-establishment conduct. In sum, the test adopted by the *Niko* tribunal is probably too strict and may have the adverse effect of unnecessarily restricting the application of the clean hands doctrine in investment arbitration.

In any event, since the *Yukos* award was rendered, one award certainly qualifies as a 'majority decision' of an international tribunal applying the principle of clean hands as operating as a bar to a claim.[129] This is the case of *Hesham Talaat M. Al-Warraq v Indonesia* rendered in December 2014.[130] The case involved an individual from Saudi Arabia filing a claim under the OIC Agreement[131] (which contains a clause regarding the admissibility of claims, Article 9) and the UNCITRAL Arbitration Rules. The Tribunal held that: 'The

125 ibid. The Tribunal succinctly summarized the facts as follows: 'The Netherlands was seeking an order for Belgium to discontinue its violation of a treaty between the two countries while The Netherlands itself was engaging in "precisely similar action, similar in fact and similar in law" at the time its claim was brought before the PCIJ'.

126 *Niko Resources* (n 14) para 481.

127 This is indeed one of the 'variations' identified by Pomson (n 7) 723, to the 'causal link' form of the clean hands doctrine: 'According to this form of the clean hands doctrine, in circumstances where a claimant has committed an illegality related to the subject-matter of a case, the claimant is precluded from invoking the respondent's alleged illegality'.

128 See infra Section 5.

129 It should be added that the award indicates that a member of the Tribunal disagreed on this last point, without however further discussing the issue. See *Hesham Talaat M Al-Warraq v Indonesia*, Arbitration Under the Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, Final Award (15 December 2014) fn 217.

130 ibid. See analysis in Dumberry, 'State of Confusion' (n 5).

131 Agreement on the Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference (adopted June 1981, effective February 1988) (OIC Agreement).

Claimant having breached the local laws and put the public interest at risk, he has deprived himself of the protection afforded by the OIC Agreement'.[132] The Tribunal then added that the Claimant's conduct 'falls within the scope of application of the "clean hands" doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement'[133] and 'renders the Claimant's claim inadmissible'.[134] In support of this affirmation, the Tribunal stated: 'As Professor James Crawford observes, the "*clean hands*" principle has been invoked in the context of the admissibility of claims before international courts and tribunals'.[135] This is a rather unusual reference considering that Crawford is clearly not the most favourable authority in support of the existence of the clean hands principle.[136] In any event, the Tribunal held that the claim was inadmissible as a result of the application of Article 9 and the clean hands doctrine.[137] Yet, it may be that the Tribunal's observations on the clean hands doctrine was simply an *obiter*, since it had already decided that the Claimant could not benefit from the protection offered under the Agreement by virtue of the application of Article 9.[138] Nevertheless, the award is noteworthy for its endorsement of the application of the clean hands doctrine to post-investment conduct.

Importantly, since the *Al-Warraq* award, a number of other investment tribunals have not adopted the reasoning of the *Yukos* award. Thus, in the more recent cases of *Churchill Mining* and *Copper Mesa* (both rendered in 2016), the tribunals did not reject the clean hands doctrine.[139] The *Churchill Mining* tribunal noted that the doctrine 'has also found expression at the international level, although its status and exact contours are subject to debate and have been approached differently by international tribunals'.[140] In a footnote, it referred to the *Al-Warraq and Niko* awards, but, very surprisingly, did not mention the *Yukos* award at all.

For a while, the *Yukos* award was, in fact, the only award which had explicitly denied the existence of the doctrine as a GPL and its application in investment

132 *Al-Warraq* (n 129) para 645.
133 ibid para 647.
134 ibid para 646.
135 ibid (emphasis in the original).
136 Pomson (n 7) 724.
137 Andrew Newcombe and Jean-Michel Marcoux, '*Hesham Talaat M Al-Warraq v Republic of Indonesia*: Imposing International Obligations on Foreign Investors' (2015) 30(3) ICSID Rev 530.
138 See *Al-Warraq* (n 129) para 648. On this point see Le Moullec (n 6) 26–27; Tanzi (n 39) 208.
139 Le Moullec (n 6) 28.
140 *Churchill Mining* (n 15) para 493.

arbitration.[141] Very recently a new award has rejected the doctrine (it will be examined in the next section).

3.3 *The* South American Silver *Award's Flawed Analysis of the Doctrine*

The *South American Silver Limited* case involves the termination of mining concessions in Bolivia following protests and troubles with indigenous local populations.[142] Bolivia argued, inter alia, that the tribunal should decline jurisdiction over the case due to the Claimant's alleged breach of the clean hands doctrine, which it considered to be a GPL. The Tribunal came to the conclusion that 'based on the arguments and the evidence on the record' it was 'not convinced' that the doctrine was a GPL.[143] The Tribunal affirmed that 'it is undisputed that general principles of law require certain degree of recognition and consensus', adding (referring to the position of the Respondent) that 'the analysis of these principles should principally consider "the practice of the States".'[144] The Tribunal rejected that argument put forward by the Claimant on the following ground:

> Bolivia did not submit sufficient evidence to establish that the clean hands doctrine enjoys the required recognition and consensus among the States to reach the status that Bolivia attributes to it. Bolivia asserted that the clean hands doctrine is widely recognized in civil law and common law systems, and cites some decisions of the British House of Lords and the French Court of Cassation, as well as scholarly articles on the existence of the principle in the United States and Germany.[145] In the opinion of this Tribunal, these are insufficient and not determinative

141 Other authors believe, on the contrary, that the *Hesham v Indonesia* award is the only award which has dismissed an investor's claims based on the clean hands doctrine. See: Le Moullec (n 6) 724.

142 *South American Silver Limited* (n 9).

143 ibid para 443.

144 ibid para 445.

145 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* (5th edn, Bancroft-Whitney Company 1941) respondent's rejoinder, paras 303–06, citing RLA-228; RLA-230, Jones C Lenthal, House of Lords, Decision [1669] 1 Chan Cas 153; RLA-233, *Stone & Rolls Ltd (in liquidation) v Moore Stephens* (a firm), House of Lords, Decision (2009) 1 AC; RLA-234, *Safeway Stores Ltd and others v Twigger and others*, House of Lords, Decision (2010) EWCA Civ 1472; RLA-66, Richard H Kreindler, 'Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine' in Kai Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Frank* (Juris Publishing 2010); RLA-235, French Court of Cassation, 2nd Civil Chamber, Judgment (4 February 2010) No 09-11.464; RLA-236, French Court of Cassation, 2nd Civil Chamber, Judgement (24 January 2002) No 99-16.576.

> regarding the alleged status of the clean hands doctrine as a general principle of *international* law under the terms of article 38(1)(c) of the ICJ Statute.[146]

This statement is questionable on many grounds. First, the Tribunal is using in the award a confusing terminology by referring to different expressions ('principle of international law', 'general principle of international law' and 'general principle of law') as synonymous.[147] This is clear from the passage quoted above where the Tribunal is clearly examining the question from the angle of GPL *foro domestico* (i.e. grounded in domestic law) but nevertheless oddly concludes that it is not a 'general principle of international law'.

Second, the Tribunal wrongly disregarded Bolivia's unquestionable assertion that the clean hands doctrine 'is widely recognized in civil law and common law systems'. As mentioned above, all writers (except for one) have come to the same conclusion. Yet, the Tribunal concluded, without giving any explanation, that this was 'insufficient and not determinative'. What was actually 'insufficient and not determinative' is unclear. Was it the fact that the doctrine is 'only' recognized in civil law and common law systems? That would be very odd considering that both the home State of the investor (United Kingdom) and the host State of the investment belong to these two families of law. In fact, for Schill, any comparative analysis to assess the existence of a GPL should 'encompass representative legal systems of the common and civil law, as these two traditions have influenced most domestic legal systems worldwide'.[148] Pellet also noted that 'probably all contemporary municipal laws borrow part of their rules' from civil and common law.[149] According to one recent estimate,

146 *South American Silver Limited* (n 9) paras 445–46 (emphasis added).

147 ibid paras 440–44.

148 Stephan W Schill, 'General Principles of International Law and International Investment Law' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law – The Sources of Rights and Obligations* (Brill 2012) 147, fn 62, adding: 'While there are also other conceptions of law and distinct legal traditions, common law and civil law cover a broad spectrum of domestic legal systems in all continents, as these legal traditions have spread from their European roots to many other countries, partly because they were enacted in dependencies or former colonies, but also because in legal reform processes many countries around the world adopted the well-developed public law systems of one of the major civil or common law countries.'

He also added that 'nothing, in principle, prevents one from drawing on legal systems outside this classical comparative canon' and that in fact 'including other legal systems enriches and strengthens a comparative law argument' (ibid 148).

149 Alain Pellet, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012) 770.

nowadays, both common law and civil law systems represent about 80% of the World's domestic legal orders.[150] In other words, even if the doctrine was 'only' found in these two legal families (which is obviously not the case as mentioned above), such a demonstration would have been 'sufficient' to prove the existence of the GPL in the context of this case. It may be that the Tribunal considered that what was 'insufficient and not determinative' is the reference to only four domestic laws. But how many States' legal orders should have been put forward by the Respondent? To which legal families should these domestic laws belong? It is quite striking that the Tribunal is unable to cite a single domestic law of civil or common law tradition where the doctrine is not present. The Tribunal did not even bother to assess whether the concept exists under the laws of Bolivia. It may be that it was the Respondent's reference to case law or scholars' works which the Tribunal considered to be 'insufficient and not determinative'. Did the Respondent refer to enough authorities? Were these sources authoritative? Maybe the Tribunal would have preferred that the Respondent conducts its own comprehensive comparative analysis of domestic laws. The Tribunal completely failed to explain what kind of demonstration and analysis would have been considered as 'sufficient evidence' to establish that the clean hands doctrine 'enjoys the required recognition and consensus' in domestic legal orders. The Tribunal's unexplainable silence on these fundamental questions seriously undermines its conclusion.

The Tribunal then seems to change its focus to general principles of international law: 'Respondent also invoked various international court and tribunal decisions that would confirm that the clean hands doctrine is a principle of international law'.[151] The Tribunal rejected the 'various opinions by members of the PCIJ and the ICJ' on the ground that they 'do not seem even to reflect the majority position of the respective courts in connection with the application of the clean hands doctrine' and that, in any event, the doctrine was 'not applied in any of the decisions the Respondent cited as grounds to decline jurisdiction or to declare the inadmissibility of the claims'.[152]

In this context, the Tribunal examined the numerous investment decisions cited by the Respondent in favour of the recognition of the clean hands doctrine. It concluded that 'they do not support the premise that the clean hands doctrine is a general principle of international law', adding that these tribunals have 'reached their respective conclusions based on the appropriate treaty

150 Valentina Vadi, *Analogies in International Investment Law and Arbitration* (CUP 2015) 126, referring to Wayne R Barnes, 'Contemplating a Civil Law Paradigm for a Future International Commercial Code' (2004–2005) 65 La L Rev 769.

151 *South American Silver Limited* (n 9) para 447.

152 ibid.

provisions or the applicable national law without basing their decisions on the clean hands doctrine or advancing it as a general principle of international law.'[153] This affirmation is simply incorrect. As mentioned above, many investment tribunals have held that there exists an implicit legality requirement even in the absence of such a clause in the treaty. They have considered such a requirement as an expression of the clean hands doctrine and have rejected claims on that basis. The *Plama* award is a prime example.

On that point, the Tribunal stated that 'The Respondent also referred to certain authors who have stated that the clean hands doctrine constitutes a principle of international law. However, as the Claimant notes, those same authors recognize that the existence and application of this doctrine, as a matter of international law, are still controversial.'[154] Contrary to what the Tribunal seems to be suggesting, there is no contradiction between these two ideas. One can indeed be in favor of recognising the GPL status to the doctrine, while at the same time acknowledging that the issue is still controversial. In any event, the Tribunal failed to cite a single writer who rejects the claim that the doctrine is a GPL. It is troubling that the Tribunal seems to be unaware of the recent work of many investment scholars who have explicitly recognised the clean hands doctrine as a GPL.

Finally, the Tribunal referred to the *Al-Warraq* award as the 'only exception' where a 'tribunal majority considered that the clean hands doctrine made the Claimant's claims inadmissible.'[155] Yet, the Tribunal dismissed this case on this ground:

> However, in the *dispositif* of its decision, the tribunal referred expressly to Article 9 of the *OIC Agreement* as the basis to conclude that the Claimant was not entitled to any damages in respect of the breaches of the fair and equitable treatment standard, and not that its claims were inadmissible due to the clean hands doctrine.[156]

This statement is misleading. The *Al-Warraq* tribunal did state that the claim was inadmissible as a result of the clean hands doctrine (in addition to its inadmissibility based on the application of Article 9 of the OIC Agreement).[157] In this respect, it is very surprising that the Tribunal does not even mention the

153 ibid para 448.
154 ibid para 450.
155 ibid para 449.
156 ibid (italics in the original).
157 *Al-Warraq* (n 129) para 647: 'The Tribunal finds that the Claimant's conduct falls within the scope of application of the "clean hands" doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement'.

Niko case, which is also considered by writers as supporting the application of the doctrine. Rather bizarrely, the award also says nothing about the *Yukos* case. In sum, the Tribunal's analysis on the clean hands doctrine is not convincing and is likely to be discarded by future tribunals.

4 The Relevance of the Concept of 'General Principle of International Law' in Investment Arbitration

In my view, one can agree with Moloo that even if 'historical application of the clean hands doctrine has been inconsistent, and as such, inconclusive', it remains 'that recent decisions in the investment arbitration context suggest that the doctrine has a place in international law'.[158] Bjorklund and Vanhonnaeker came to the conclusion that 'the doctrine has been indeed recognized and applied in numerous instances by international tribunals',[159] and that, in the context of investor-State arbitration, 'the issue is not so much whether the doctrine should apply but rather on what basis it will be invoked'.[160] In my view, the doctrine should be recognised as a 'general principle of international law'.[161]

International law has its own structure different from municipal law.[162] As a result, it has been noted by Bassioni that 'principles deemed basic to international law can emerge in the international legal context without having a specific counterpart in national legal systems because of the differences that

158 Moloo (n 49) 10.

159 Bjorklund and Vanhonnaeker (n 26) 367. It should be noted, however, that not everyone shares this position. See Llamzon and Sinclair (n 3) 513 ('Arbitral practice in investment treaty arbitration is also mixed, with some tribunals determined to forge their own path but others firmly unpersuaded of the existence of the principle').

160 Bjorklund and Vanhonnaeker (n 26) 367–68. Against Llamzon and Sinclair (n 3) 516 ('there is significant doubt as to the status of the clean hands doctrine as a general principle of international law') and 517 ('Where the doctrine has been invoked and applied in the investment treaty context, those cases might be better explained by reference to the applicable investment treaty's legality clause').

161 The same position is adopted by Kreindler (n 1) 317–19, arguing that the doctrine can be qualified as both a GPL *foro domestico* and a general principle of international law.

162 Johan Lammers, 'General Principles of Law Recognized by Civilized Nations' in Frits Kalshoven and others (eds), *Essays in the Development of the International Legal Order: In Memory of Haro F Van Panhuys* (Springer 1980) 67.

characterize these two legal systems'.[163] For the majority of scholars,[164] a number of judges,[165] and the ILA,[166] Article 38 of the ICJ Statute refers not only to *foro domestico* principles, but also includes those principles existing under international law. In his separate opinion in the *Pulp Mills* case, Judge Cançado Trindade mentioned that looking solely at municipal law to find GPL today 'seems to amount to a static, and dogmatic position'.[167] He argued that 'given the extraordinary development of the law of nations (*droit des gens*), there is epistemologically no reason not to have recourse to general principles of law as recognized in domestic as well as international law'.[168] He also noted that the Court has indeed interpreted the expression GPL as including those existing under international law.[169] In fact, for him, GPL 'find concrete expression not only *in foro domestico*, but also at international level' because 'there can be no legal system without them'.[170]

Importantly, these general principles specifically grounded in international law should not be confused (as some investment scholars have in the past[171]) with other sources of law, such as custom (or *jus cogens* norms). The undeniable fact that 'general principles of international law' are clearly a different

163 MC Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 Mich J Intl L 772.

164 See for instance Frede Castberg, 'La méthodologie du droit international public' (1933) 43 Recueil des Cours 331, 369–70. See also analysis in Lammers (n 162) 58 et seq, 66 et seq; Cheng (n 4) 2–3, for a list of authors.

165 *South West Africa Cases* (*Ethiopia v South Africa; Liberia v South Africa*) (Judgment), Dissenting Opinion of Judge Tanaka [1966] ICJ Rep 295.

166 ILA, 'The Use of Domestic Law Principles in the Development of International Law' (Report of the Sidney Conference, 2018) 16.

167 *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Judgment), Separate Opinion of Judge Cancado Trindade [2010] ICJ Rep 156, para 27. See his long and comprehensive survey of doctrine on this question (ibid paras 29 et seq).

168 ibid para 27.

169 ibid para 21.

170 ibid para 28.

171 Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment' (2009) 10 JWIT 104 (referring to GPL having their origin in international law but indicating that they 'can be assimilated for all practical purposes to customary international rules'); Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (OUP 2008) 96 (indicating that 'the general principles of international law mostly refer to a method that uses existing sources and is not so much considered as a real source of law' and is not an autonomous source of law since 'this category of principles is difficult to distinguish' from custom. But see her comments at ibid 98 downplaying the difference with GPL).

source of law from rules of customary law[172] has been recognised by the ad hoc Annulment Committee in the *Mobil* case.[173] One important distinction to bear in mind is the way through which both sources emerge. While the creation of customary rules is regulated by strict conditions,[174] in contrast, 'general principles of international law' is a much more flexible concept. As noted by Bassiouni, these principles 'have been identified by examining State conduct, policies, practices, and pronouncements at the international level, which may be different from domestic legal principles'.[175] General principles may indeed have their foundation on treaties, case law of international courts and tribunals[176] as well as in the writings of scholars. Over time, the development of consistent awards on a specific matter has an important impact on the emergence of general principles.[177] In his First Report, ILC Special Rapporteur Vázquez-Bermúdez noted that 'the existence of a category of general principles of law that find their origin in the international legal system is corroborated by the practice of States and the decisions of international courts and tribunals'.[178]

In my opinion, the clean hands doctrine should be considered as a 'general principle of international law'. This is not as a result of the few dissenting opinions of PCIJ and ICJ judges supporting its existence, but rather because it is an implicit and inherent feature of all investment treaties. This conclusion is also supported by the fact that the doctrine has been recognised and applied frequently by arbitral investment tribunals and is also supported by large number of scholars in the context of investment arbitration. These are precisely the circumstances under which 'general principles of international law' emerge.

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172 Chester Brown, *A Common Law of International Adjudication* (OUP 2007) 54.

173 *Venezuela Holdings BV et al* (*case formerly known as Mobil Corporation, Venezuela Holdings BV et al*) *v Venezuela*, ICSID Case No ARB/07/27, Decision on Annulment (9 March 2017) paras 154, 159.

174 It should be recalled that two basic requirements (State practice and *opinio juris*) are necessary to conclude to the existence of a customary rule. The practice of States must not only be frequent, uniform and consistent, but it must also be shown that they believe that such practice is *required* by law (*opinio juris*). See Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016).

175 Bassiouni (n 163) 789.

176 Samantha Besson, 'General Principles in International Law – Whose Principles?' in Samantha Besson and Pascal Pichonnaz (eds), *Les principes en droit européen – Principles in European Law* (Schulthess 2011) 44.

177 Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Elgar 2018) 89.

178 ILC, 'First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (71st Session, ILC, Geneva, 29 April–7 June and 8 July–9 August 2019) UN Doc A/CN.4/732, para 235, referring to several cases.

It has been argued by Bjorklund that the doctrine of clean hands is also one aspect of the basic notion of 'international public policy'.[179] A number of writers (including myself)[180] have argued that the concept of 'transnational public policy' is akin to the notion of 'general principle of international law' specific to the field of investment arbitration.[181] While an examination of the elusive concept of 'transnational public policy' is beyond the scope of this article,[182] suffice it to note that they emerge in the same way as general principles of international law.[183] The *Plama*,[184] *Inceysa*,[185] and *World Duty Free*[186] awards

179 Bjorklund and Vanhonnaeker (n 26) 373 et seq. See also Llamzon (n 2) 321, 325 (who generally supports the reasoning of the *Yukos* award on the question of the clean hands doctrine) noting that the award 'does not reject, strictly speaking, the idea of unclean hands forming part of transnational public policy, which has largely been considered an independent source of rights and duties in international arbitration, irrespective of the applicability of public international law'.

180 Dumberry, *Guide to General Principles* (n 8) 230.

181 Bjorklund and Vanhonnaeker (n 26) 374: 'The outstanding question is, however, how do rules of international public policy differentiate themselves from general principles of international law? Indeed, the elements required to establish the existence of such a rule are similar to those required to ascertain the existence of a general principle of international law'.

182 In *World Duty Free v Kenya* (n 17) para 139, the Tribunal (distinguishing the term from the other notion of 'international public policy') defined it as 'signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora'. See also ILA, 'Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arb Int, Recommendation 2(b); Lamm and others (n 64) 707; Audley Sheppard, 'Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?' (2004) 1 TDM 1.

183 In this context, the Tribunal in *World Duty Free v Kenya* (n 17) noted that 'tribunals must be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in identifying it through *international conventions, comparative law and arbitral awards*' (para 141, emphasis added). The Tribunal concluded that 'in light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals', it was 'convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy' (para 157). Thus, to arrive at its conclusion, the Tribunal looked beyond the domestic legal orders of States; it also examined international conventions and arbitral awards. According to Lamm and others (n 64) 707, 'these rules of transnational public policy are developed over time by identifying international consensus on a particular issue', adding that such 'consensus', in fact, 'derives from the convergence of national laws, international conventions, arbitral case law and scholarly commentary'. General principles of international law emerge in the same way.

184 *Plama Consortium* (n 104) para 143.

185 *Inceysa* (n 100) paras 245–52, especially para 252.

186 *World Duty Free* (n 17) paras 139, 161, 192(1).

have explicitly stated that providing investment protection under a treaty to an investor who has committed violation of the domestic law would be against international public policy.[187] In this context, Le Moullec (who generally rejects the idea that investment tribunals have so far endorsed the doctrine) stated that 'regardless of its status as a general principle of law, the clean hands doctrine could come through the "back door" of international public policy'.[188] She rightly noted that this is exactly what happened in the recent *Churchill Mining* case.[189]

5 How Should Tribunals Apply the Clean Hands Doctrine?

As mentioned above, based on the presence of 'in accordance with the law' clauses, tribunals have held that the substantive protections offered under BITs cannot apply to investments made contrary to the host country's domestic law. The prevalent view amongst scholars[190] is that this is a matter of jurisdiction rather than admissibility.[191] Several tribunals have come to the same conclusion.[192] Tribunals have also concluded that the obligation for investors to

187 See however Le Moullec (n 6) 32.

188 ibid 33.

189 *Churchill Mining* (n 15). In this case, while the Tribunal did not formally use the clean hands doctrine to dismiss the claim as a result of fraud and forgery committed by the Claimant, it nevertheless applied the concept of international public policy to come to the exact same result: 'The Tribunal agrees with the Respondent that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy' (paras 508 and 528).

190 Moloo, (n 49) 7; Moloo and Khachaturian (n 64) 1482, 1488; Llamzon and Sinclair (n 3) 498. Against Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29(1) ICSID Rev 155. See also the analysis of Stephan W Schill, 'Illegal Investments in Investment Treaty Arbitration' (2012) 11(2) LPICT 288 et seq; Andrew Newcombe, 'Investor Misconduct: Jurisdiction, Admissibility, or Merits?' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 198.

191 The distinction between admissibility and jurisdiction is well explained by Keith Highet in his dissenting opinion in *Waste Management, Inc v Mexico* (*no 2*), ICSID No ARB(AF)/00/3, Award (30 April 2004) paras 57–58: 'International decisions are replete with fine distinctions between jurisdiction and admissibility. For the purpose of the present proceedings it will suffice to observe that lack of jurisdiction refers to the jurisdiction of the Tribunal and inadmissibility refers to the admissibility of the case … Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective – whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act.'

192 One example is *Inceysa* (n 100) para 335. See also *Fraport* (n 102) para 401; *Alasdair Ross Anderson et al v Costa Rica*, ICSID Case No ARB(AF)/07/3, Award (19 May 2010) paras 57,

make their investments in accordance with the host State's law 'is implicit even when not expressly stated in the relevant BIT'.[193] Such an implicit obligation should not, however, be considered as a jurisdictional prerequisite, but as a matter of admissibility.[194] This is the viewpoint which has been supported by several tribunals, including the *Plama* and the *Yukos* tribunals. In my view, the 'legality' requirement is an application of the clean hands doctrine. The 'legality' requirement has, however, a limited temporal scope of application.[195] Thus, many tribunals (including *Yukos*)[196] have held that the legality requirement only obliges an investor to *make* its investment 'in accordance with the law' of the host State.[197] In fact, many BITs explicitly limit the legality requirement to compliance with the law at the establishment phase of the investment.[198] In this context, one writer asked the following question: 'does unclean hands merit a separate existence from the legality doctrine because of certain policy objectives that the latter does not cover?'[199] He noted that the clean hands doctrine's 'moral underpinnings bear far more potential for fairness and nuance than the legality doctrine and have special resonance to investment arbitration'.[200] In his view, the legality requirement 'is a blunt substitute for

59; *Metal-Tech Ltd v Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013) para 389.

193 One example is *Phoenix Action* (n 102) para 101 (the BIT in this case included an 'in accordance with the law' provision). See also *Yaung Chi Oo Trading Trading Pte Ltd v Myanmar*, ASEAN Case No ARB/01/01, Award (31 March 2003) para 58; *SAUR International v Argentina*, ICSID Case No ARB/04/4, Décision sur la compétence et sur la responsabilité (6 June 2012) para 306.

194 Llamzon and Sinclair (n 3) 499; Le Moullec (n 6) 35–36.

195 Llamzon and Sinclair (n 3) 478, 500; Fontanelli (n 39) 133.

196 *Hulley* (n 36) paras 1354–55.

197 See, for instance, *Hamester* (n 102) para 127: 'a distinction has to be drawn between (1) legality as at [sic] the *initiation* of the investment ("made") and (2) legality *during the performance* of the investment. Article 10 [ie the clause providing that the BIT applied to investment made in accordance with host State law prior to the Treaty's entry into force] legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment … Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue' (emphasis in the original).

198 Moloo (n 49) 15. On this question see Schill (n 190) 297.

199 Llamzon (n 2) 321.

200 ibid 323–24. See also: 'Keen to show that it does not coddle the 'bad' investor, the clean hands doctrine has special resonance in international investment arbitration, where the need to maintain the integrity of a largely disaggregated and supra-national arbitral system is acutely felt'.

unclean hands' given that the former 'is only capable of binary outcomes' (i.e. accept or reject a claim on grounds of jurisdiction/admissibility).[201]

The central question is whether or not the clean hands doctrine should find application whenever an investor has breached the host State's law during the post-establishment phase of its investment. As mentioned above, the *Al-Warraq v Indonesia* tribunal answered that question in the affirmative.[202] However, the *Yukos* award clearly closed the door on such a possibility. It explained that there was 'no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment'.[203] For the Tribunal, once the investor has made the investment, the host State is in a position to police and sanction appropriately any investor's wrongdoing by applying and enforcing domestic law. It is true that, in general (with one possible exception),[204] the fact that an investor has committed a wrong in violation of the host State's laws during the post-establishment phase of its investment should not result in a tribunal concluding that the claim is inadmissible.[205] Such allegations of misconduct should be dealt with by a tribunal at the merits stage of the proceedings and may be relevant when assessing issues in relation to liability, damages, and costs.[206] It is noteworthy that while the *Yukos* tribunal rejected the application of the clean hands doctrine (because it considered it not to be a GPL), it added that it 'could have an impact on the Tribunal's assessment of liability and damages'.[207] The Tribunal ultimately held that the Claimants had 'contributed to the extent of 25 percent to the prejudice they suffered at the hands of the Russian Federation'.[208] The Tribunal therefore did take into account the post establishment conduct of the investor when assessing the quantum of damages. It did so under the legal principle of contributory fault or negligence. On this note, some writers have argued that in doing so, the *Yukos* tribunal actually took into account

201 ibid 324.

202 *Al-Warraq* (n 129) paras 158–62.

203 *Hulley* (n 36) para 1355.

204 Dumberry, *Guide to General Principles* (n 8) 215, there is one specific situation where the clean hands doctrine should apply as a matter of admissibility regarding violations committed during the post-establishment phase of an investment. This is whenever an investor has committed serious violations of the host State's laws, such as human rights violations, corruption, fraud, etc. On this question see De Alba Uribe (n 6) 326 et seq, 334.

205 Moloo and Khachaturian (n 64) 1350–51; De Alba Uribe (n 6) 327.

206 Some arbitral awards have reduced the amount of compensation based on the investor's behavior: *MTD Equity Sdn Bhd & MTD Chile SA v Chile*, ICSID Case No ARB/01/7, Award (25 May 2004) para 243.

207 *Hulley* (n 36) para 1374.

208 ibid para 1827 and s X.E.4.

the doctrine of clean hands.[209] From that perspective, for two authors the *Yukos* award may have the effect of affirming the doctrine as a GPL, rather than denying it.[210]

Another relevant case is the recent *Copper Mesa* award.[211] The Tribunal considered that the allegations raised by the Respondent about human rights violations committed by the Claimant[212] in the post-establishment phase of its investment[213] was a matter of admissibility.[214] The Tribunal asked the following question: 'After the making of an investment, what is the scope of the application of the doctrine of unclean hands?'[215] The Tribunal therefore did not deny the relevance of the clean hands doctrine to address allegations of post-establishment misconduct in terms of admissibility.[216] The Tribunal decided not to apply the clean hands doctrine for another specific reason: 'all, or almost all' of the alleged acts of conduct by the Claimant 'took place in Ecuador, openly and in view of the Respondent's governmental authorities' and that 'as regards international law, international public policy and human rights, not a single complaint was made by the Respondent against the Claimant at the time'.[217] In this sense, it can be argued that the Tribunal dismissed the allegations regarding the Claimant's misconduct based on the application of the different principles of estoppel and acquiescence.[218] In fact, the Tribunal decided that it would take into account the Claimant's argument 'not in the form of the doctrine of unclean hands as such, but rather under analogous doctrines of causation and contributory fault applying to the

209 Bjorklund and Vanhonnaeker (n 26) 382–83, 384 ('As for the investor's conduct during the time it held and operated its investment, the clean hands idea manifested itself in the concept of contributory negligence'). See detailed analysis in Ancelin (n 6) 851 et seq.

210 Bjorklund and Vanhonnaeker (n 26) 384–85. See, however, Ancelin (n 6) 851 et seq.

211 *Copper Mesa Mining Corp v Ecuador*, Award, PCA Case No 2012-2 (14 March 2016).

212 ibid paras 6.99, 6.100.

213 ibid para 5.63.

214 ibid para 5.62: 'Tribunal considers that the Respondent's case on unclean hands is not a jurisdictional objection, but rather an objection to the admissibility of the Claimant's claims based upon its alleged post-acquisition misconduct'.

215 ibid para 2.10.

216 Fontanelli (n 39) 135; Le Moullec (n 6) 28.

217 *Copper Mesa* (n 211) para 5.63. The Tribunal added (ibid paras 5.63, 5.64) that 'such a complaint surfaced for the first time after the commencement of this arbitration' and that it was 'far too late for the Respondent to raise such objections' in this arbitration.

218 See also ibid para 2.7, where the Tribunal asked the following question: 'Is the Respondent estopped or otherwise precluded from alleging any breach of Ecuadorian law or any breaches of the doctrines of international public policy and unclean hands?' On this point, see the comments by De Alba Uribe (n 6) 324.

merits of the Claimant's claims arising from events subsequent to the acquisition of its investment'.[219] The Tribunal explained that '[t]hat result, based on the Respondent's case on the merits, strikes the tribunal as more legally appropriate to this case than an outright dismissal of the Claimant's claims … on the ground of inadmissibility'.[220] The Tribunal assessed the Claimant's contribution to its own injury at 30%.[221]

The *Cooper Mesa* case (and to some extent the *Yukos* case as well) support the proposition that the question of an investor's unclean hands may be taken into account at the merits stage of the dispute in the context of determining the quantum of damage. Writers have recently supported this position.[222] Indeed, this is the position which ILC Special Rapporteur Dugard took some years ago in the specific (and different) context of diplomatic protection.[223] In my view, what really matters is that an investor's 'unclean' hands be taken into account one way or the other by a tribunal. Whether this is done through the application of the principle of contributory fault or negligence by reducing the amount of compensation awarded to the claimant is not significant in itself. As noted by the *Mesa Cooper* tribunal, these are after all 'analogous doctrines'.[224] While it is true that the clean hands doctrine is 'traditionally understood as one of admissibility', there is no inherent reason why its role should only be limited to that.[225] Thus, it has been highlighted that the doctrine of clean hands, based on equity, 'is far more nuanced – its policy goals are not only to protect court or arbitral integrity but also to bring principles of proportionality and reciprocity to bear in an area where, too often, all parties have engaged in illicit conduct'.[226] It may sometimes be more appropriate to

219 ibid para 5.65. The Tribunal also noted that: 'this is not a case where an essential part of the Claimant's claim is necessarily founded upon its own illegal acts or omissions, regardless of any defence by the Respondent. In other words, this case is materially different from cases such as *World Duty Free v Kenya* or (more recently) *Al-Warraq v Indonesia* where the claim, as a cause of action, was directly based from the beginning upon the claimant's own illegal act' (para 5.66).

220 ibid para 5.65.

221 ibid para 6.102.

222 Kotuby and Sobota (n 30) 134; Ancelin (n 6) 851 et seq, 855.

223 See Dugard (n 44) para 16: 'On occasion, an argument premised on the clean hands doctrine has been raised as a preliminary point in direct inter-State cases before ICJ. It is not clear, however, whether the intention has been to raise the matter as a plea to admissibility. If the doctrine is applicable to claims relating to diplomatic protection, it would seem that the doctrine would more appropriately be raised at the merits stage, as it relates to attenuation or exoneration of responsibility rather than to admissibility.'

224 *Copper Mesa* (n 211) para 5.65.

225 Kotuby and Sobota (n 30) 134.

226 Llamzon (n 2) 324.

take into account the conduct of the investor in the context of a broader proportionality analysis rather than to simply flatly reject its claims on grounds of inadmissibility. This could be the case whenever violations have been committed by both the investors and the host State. The rejection of an investor's claim on the basis of its 'unclean' hands could result in not addressing at all BIT breaches committed by the host State (for instance, acts of expropriation).[227] Violations committed by the host State should not go unpunished.[228] In such circumstances, it would seem more appropriate to take into account all violations committed by all sides as part of a global proportionality analysis. In fact, more recent cases have shown that even an explicit legality requirement contained in a BIT can be applied in a flexible manner taking into account matters of proportionality.[229]

6 Conclusion

In my view, several concepts (including estoppel, *res judicata*, abuse of rights, unjust enrichment) should be considered as general principles of international law based on the available material (treaties, State practice, awards and decisions, works of scholars, etc.) showing that they have been frequently and consistently recognised and applied by States and tribunals.[230] The important point is that these principles can be recognized as general principles of international law even if they may not be systematically found in States' domestic laws. Thus, tribunals should not be been somewhat 'intimidated' by what scholars often describe as the complicated and burdensome requirement to conduct a comprehensive comparative analysis of the most representative

227 ibid.

228 ibid.

229 *Vladislav Kim and others v Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction (8 March 2017) paras 20–21. The case involved a dispute under the Kazakhstan–Uzbekistan BIT, which contains an explicit legality requirement clause. The Tribunal stated that the interpretation of this clause must be 'guided by the principle of proportionality': 'The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State. The Tribunal, by majority, finds that Respondent either has failed to establish that Claimants were not in compliance with various laws or that such acts of noncompliance do not result in a compromise of an interest that justifies, as a proportionate response, the harshness of denying application of the BIT.'

230 Dumberry, *Guide to General Principles* (n 8).

domestic legal systems of the world.[231] They can use a different and perfectly legitimate and reasonable path to arrive at the conclusion that a given concept is a general principle. The existence of such a flexible methodology is clearly one reason why the concept of 'general principle of international law' is particularly relevant and useful in the specific context of international investment law.

In fact, in my opinion, tribunals should use GPL in a manner that goes beyond the traditional functions that are typically identified in doctrine. Thus, GPL should not just be used as 'gap-filling' whenever treaty provisions or rules of customary international law do not provide a solution to a particular issue. They should also not be simply used to provide guidance for the interpretation and application of vague or uncertain terms contained in treaties. Schill has long argued that GPL 'should play an increasingly important role in international investment law'.[232] He believes in the potential of GPL 'to reshape investor – State arbitration and international investment law'.[233] Kotuby and Sobota also speak of the 'corrective' function of GPL.[234] In their opinion, GPL could indeed be used by tribunals to improve the outcome of decision-making by achieving a better balance between investors' rights and States' public interests that is acceptable to all different stakeholders in the process (including civil society). General principles of international law are perfectly suited for that task. One reason is because they (just like the concept of transnational public policy) impose obligations on all parties, both investors and States.[235] It should be recalled that investment treaties are, at least in their present form, asymmetrical. Thus, foreign investors (overwhelmingly being corporations, but sometimes individuals) are being accorded substantive rights under these treaties without being subject to any specific obligations. This is, at least, the situation prevailing at the moment, with very rare exceptions.[236] General principles can be used by tribunals to impose

231 See analysis in Dumberry, *Guide to General Principles* (n 8). See also on this question: Anthea Roberts and others, 'Comparative International Law: Framing the Field' (2015) 109(3) AJIL 467–74; Vadi (n 150); Michael D Nolan and Frédéric Gilles Sourgens, 'Issues of Proof of General Principles of Law in International Arbitration' (2009) 3(4–5) World Arb & Med Rev 506.

232 Schill (n 148) 138.

233 ibid 136.

234 Kotuby and Sobota (n 30) 31.

235 Bjorklund and Vanhonnaeker (n 26) 373–74.

236 One such exception is the Nigeria–Morocco BIT signed in 2016, which explicitly imposes some human rights obligations upon investors. See art 18(2): 'Investors and investments shall uphold human rights in the host state'; art 18(3): requiring investors

some obligations on investors. In my view, this is a perfect example of the 'transformative potential' of GPL and how they can be used by tribunals to adapt international investment law 'without modifying substance or procedure of the existing international law framework'.[237] Tribunals should use general principles of international law in the future to better balance the rights and obligations of varying actors involved in international investment law. The clean hands doctrine (whether used as a matter of admissibility or as part of a proportionality analysis at the merits) is a very useful tool to recalibrate international investment law in reaction to the current backlash against the legitimacy of the system perceived by some as inherently favorable to the interests of foreign corporations.

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to 'act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998'.

237 Schill (n 148) 181.

Annex 288

ANNEX 289

BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW

Ninth Edition

BY

JAMES CRAWFORD, SC, FBA

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Lands, the International Court rejected a preliminary objection based on delay in submission of the claim. The Court nevertheless recognized that delay might, in particular circumstances, render a claim inadmissible.[58] Conceivably, a claim by a state could be denied because of the difficulty the respondent has in establishing the facts but, where there is no irreparable disadvantage to the respondent, tribunals will be reluctant to allow mere lapse of time to bar claims, given the conditions under which interstate relations are conducted. Thus, in the *Cayuga Indians Claim* the respondent was held not to be prejudiced by significant delay on the part of the UK, which claimed on behalf of a protected minority.[59]

Indeed, Article 45 of the ILC Articles on State Responsibility, which refers only to waiver or acquiescence in the loss of a claim, may be read as denying the preclusive effect of delay as such. According to the commentary, Article 45:

> emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.[60]

A number of cases which are cited as instances of prescription are actually based on lapse of time as evidence of acquiescence or waiver.[61]

(E) WAIVER

Abandonment of claims may occur by unilateral acts of waiver or acquiescence implied from conduct, or by agreement. Given that in cases of diplomatic protection the state is asserting its own rights, it may compromise or release the claim, leaving the individual or corporation concerned without an international remedy.[62] Conversely, the waiver of a claim by a national does not bind the state. Hence the Calvo clause, by which aliens are called on to waive diplomatic protection at the time of entry, is considered legally ineffective.[63] The application of these principles to the field of investment arbitration is an open question.[64]

[58] ICJ Reports 1992 p 240, 247–50. Certain aspects of the question were reserved to the Merits phase: ibid. 255. Also: *LaGrand (Germany v US)*, ICJ Reports 2001 p 466, 486–7.

[59] (1926) 6 RIAA 173; (1926) 20 *AJIL* 574.

[60] Witenberg (1932) 41 Hague *Recueil* 1, 31–3; García-Amador, ILC *Ybk* 1958/II, 57; Suy, *Les Actes juridiques unilatéraux en droit international public* (1962) 154–7; Rousseau, 5 *Droit International Public* (1974) 182–6. Also: *Wollemborg* (1956) 24 ILR 654; *Haas v Humphrey*, 246 F2d 682 (DC Cir, 1957).

[61] E.g. *Sarropoulos v Bulgarian State* (1927) 4 ILR 245. Cf Tams in Crawford, Pellet, & Olleson (2010) 1035.

[62] Cf *Inao Horimoto v The State* (1954) 32 ILR 161; *Public Trustee v Chartered Bank of India, Australia and China* (1956) 23 ILR 687, 698–9; *Austrian Citizen's Compensation* (1960) 32 ILR 153; *Togen Akiyama v The State* (1963) 32 ILR 233; *Restitution of Household Effects Belonging to Jews Deported from Hungary* (1965) 44 ILR 301; *Rudolf Hess* (1980) 90 ILR 386; *Kaunda v President of the Republic of South Africa* (2004) 136 ILR 452; *R (Al Rawi) v Foreign Secretary* (2006) 136 ILR 624.

[63] On the Calvo clause: Manning-Cabrol (1995) 26 *LPIB* 1169; Dalrymple (1996) 29 *Cornell ILJ* 161; Paulsson, *Denial of Justice in International Law* (2005) 20–4; Juillard, 'Calvo Doctrine/Calvo Clause' (2007) *MPEPIL*; Amerasinghe, *Diplomatic Protection* (2008) ch 12.

[64] Cf *Loewen Group v United States of America* (2003) 7 ICSID Reports 421; (2004) 128 ILR 334; *Eureko BV v Republic of Poland* (2005) 12 ICSID Reports 331; and see chapter 28.

(F) OTHER GROUNDS OF INADMISSIBILITY

Other grounds exist which deserve brief notice.

(1) Conceivably a failure to comply with the rules of court of the tribunal in making an application may provide a ground for an objection as to admissibility, although tribunals are reluctant to give much significance to matters of form.[65]

(2) Analogously to the local remedies rule, it may happen that a respondent can establish that adequate remedies have been or ought to be obtained in another tribunal, whether national or international. Whether there is any international equivalent to the national law doctrines of *lis alibi pendens* and *forum non conveniens* is doubtful.[66]

(3) There may be a residue of instances in which questions of inadmissibility and 'substantive' issues are difficult to distinguish. This is the case with the so-called 'clean hands' doctrine, according to which a claimant's involvement in activity unlawful under either municipal or international law may bar the claim. It has often been invoked, rarely applied.[67]

4. DIPLOMATIC PROTECTION

The heads of inadmissibility dealt with above are applicable to international claims, whatever their character. By contrast, the nationality of claims and exhaustion of local remedies rules were specifically developed in the context of diplomatic protection. In 2006, they were restated by the International Law Commission (ILC) in a text some aspects of which reflect progressive development.[68]

[65] Witenberg (1932) 41 Hague *Recueil* 1, 90–4; *Northern Cameroons*, ICJ Reports 1963 p 15, 27–8; 42–3 (Judge Wellington Koo); 173–4 (Judge Bustamante). Also on procedural inadmissibility: ibid, 172–3 (Judge Bustamante).

[66] Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) esp chs 4–6; Shany, *Regulating Jurisdictional Relations between National and International Courts* (2007); McLachlan (2009) 336 Hague *Recueil* 199, 441–500; Brand, 'Forum Non Conveniens' (2013) *MPEPIL*; Salles (2014) 220–5; Lock, *The European Court of Justice and International Courts* (2015) 63–70. Also: Hobér (2014) 366 Hague *Recueil* 99, 324–31, 342–76. For a review of national law rules for declining or restraining the exercise of jurisdiction: Fentiman, *International Commercial Litigation* (2nd edn, 2015) chs 10–16.

[67] The clean hands doctrine is to the effect that an action may not be maintained by someone who has misbehaved in relation to the subject matter of the claim: Cheng (1953, repr 2006) 155–8. The ICJ has never applied the doctrine, even in cases where it might have done so: see *Oil Platforms*, ICJ Reports 2003 p 161; *Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004 p 136, 149–50, 163. Cf *Nicaragua*, ICJ Reports 1986 p 14, 392 (Judge Schwebel, diss); *Arrest Warrant of 11 April 2000*, ICJ Reports 2002 p 3, 160–1 (Judge ad hoc van den Wyngaert, diss). The only investment tribunal award to apply the clean hands doctrine did so on the basis of applicable national law: *Inceysa Vallisoletana v Republic of El Salvador*, 2 August 2006, paras 231–42. Generic claims of wrongdoing have not succeeded: e.g. *Gustaf FW Hamester GmbH & Co KG v Republic of Ghana*, 18 June 2010, paras 127–8. For ILC consideration, see Crawford, ILC *Ybk* 1999/II(1), 82–3; Dugard, ILC *Ybk* 2005/II(1), 2 (concluding that 'the evidence in favour of the clean hands doctrine is inconclusive'). Also: Salmon (1964) 10 *AFDI* 225; Schwebel, 'Clean Hands, Principle' (2013) *MPEPIL*; Llamzon (2015) 30 *ICSID Rev-FILJ* 315.

[68] ILC Draft Articles on Diplomatic Protection, ILC *Ybk* 2006/II(2), 24–55.

ANNEX 290

Date of decision:
May 24, 1999

INTERNATIONAL CENTRE FOR THE SETTLEMENT
OF INVESTMENT DISPUTES
Washington, D.C.

CASE No. ARB/97/4

CESKOSLOVENSKA OBCHODNI BANKA, A.S.
(Claimant)

versus

THE SLOVAK REPUBLIC
(Respondent)

Decision of the Tribunal on Objections to Jurisdiction

Members of the Tribunal

Professor Thomas Buergenthal, President
Professor Piero Bernardini
Professor Andreas Bucher

Secretary of the Tribunal

Ms. Margrete Stevens

Representing the Claimant

Mr. Charles Brower
Ms. Abby Cohen Smutny
White & Case
Washington, D.C.

Representing Respondent

Mr. Henry Weisburg
Shearman & Sterling
New York, New York

Professor Emmanuel Gaillard
Shearman & Sterling
Paris, France

and, as co-counsel

Mr. Igor Palka
Cernejova & Hrbek
Bratislava, Slovak Republic

14. Although the January 5–7, 1999 hearing was originally intended to address only the issue of jurisdiction, the Tribunal granted Claimant's motion to permit the parties also briefly to address Claimant's request for provisional measures.[3] By agreement of the parties, no witnesses were heard during this entire hearing. Instead, both parties submitted and relied on witness affidavits and expert opinions.

II. IS CLAIMANT A NATIONAL OF A CONTRACTING STATE?

15. The first ground on which Respondent challenges the jurisdiction of the Centre and the competence of the Tribunal is that Claimant does not meet that requirement of Article 25(1), which provides that the dispute must be between a Contracting State and a national of another Contracting State. According to Respondent, the instant dispute is between two Contracting States because: a) Claimant is a state agency of the Czech Republic rather than an independent commercial entity; and b) the real party in interest to this dispute is the Czech Republic.

A. National of Another Contracting State

16. The language of Article 25(1) of the Convention makes clear that the Centre does not have jurisdiction over disputes between two or more Contracting States. Instead, the dispute settlement mechanism set up by the Convention is designed to deal with disputes between Contracting States and nationals of other Contracting States. Although the concept of "national", as that term is used in Article 25(1), is in Article 25(2) declared to include both natural and juridical persons, neither term is defined as such in the Convention. The legislative history of the Convention does provide some answers, however, that bear on the issues presented in this case. It indicates that the term "juridical persons" as employed in Article 25 and, hence, the concept of "national," was not intended to be limited to privately-owned companies, but to embrace also wholly or partially government-owned companies. This interpretation has found general acceptance.

17. It follows that the question whether a company qualifies as a "national of another Contracting State" within the meaning of Article

[3] For the outcome of the Tribunal's deliberations relating to this request for provisional measures, see para. 9, *supra*.

25(1) does not depend upon whether or not the company is partially or wholly owned by the government. Instead, the accepted test for making this determination has been formulated as follows: "... for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function."[4] Both parties to this dispute accept this test as determinative.

18. The soundness of Respondent's contention that Claimant is not "a national of another Contracting State" must therefore be judged by reference to this test. Standing alone, Respondent's submission that more than 65% of CSOB's shares are owned in one form or another by the Czech Republic and that some 24% are owned by the Slovak Republic demonstrate that CSOB is a public sector rather than a private sector entity, does not address the here crucial issue. Neither does the submission that the Czech Republic's 65% stock ownership gives it absolute control over CSOB. For, as has been shown above, such ownership or control alone will not disqualify a company under the here relevant test from filing a claim with the Centre as "a national of a another Contracting State."

19. Respondent does not, however, rest this aspect of its case solely on the above arguments. It contends further that CSOB is a government agency which has been discharging essentially governmental functions throughout its existence and, more specifically, with regard to all events pertinent to this dispute. In this regard, Respondent seeks to show that since its inception CSOB has served as agent or representative of the State to the international banking and trading community, that its subsequent reorganization has not changed its status, and that, moreover, the instant dispute arises out of the functions CSOB performed in that capacity.

20. It cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard. But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on

[4] A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 135 Hague Rec. d. Cours 331, at 354–5 (1972).

the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature.

21. It also appears that beginning in the early 1990's and following the 1989 "Velvet Revolution," as the State began to transform its command economy into a market economy, CSOB took various steps to gradually throw off its exclusive economic dependence on the State and to adopt measures to enable it to function in this new economic environment as an independent commercial bank. By 1993, CSOB seemed to have basically achieved that purpose, although its competitive position continued to be adversely affected by the existence on its books of non-performing receivables. These receivables, which became the subject of the Consolidation Agreement and play a role in the instant dispute, grew out of CSOB's earlier lending activities during the State's non-market economy period. Although these activities were driven by State policies, as was true generally of economic activities during the country's command economy, the banking transactions themselves that implemented these policies did not thereby lose their commercial nature. They cannot therefore be characterized as governmental in nature. Moreover, even if one were to conclude that the non-performing assets derived from activities conducted by CSOB as an agent of the State, the measures taken by CSOB to remove them from its books in order to improve its balance and consolidate its financial position in accordance with the provisions of the Consolidation Agreement, must be deemed to be commercial in character.

22. In support of its contention that the dispute is between two Contracting States, Respondent also submits that the ultimate goal of the Consolidation Agreement was the privatization of CSOB. Characterizing privatization as a State function, Respondent argues that in concluding the Consolidation Agreement, CSOB was performing State functions and could therefore not claim to be a private investor. In this connection, Respondent submits that

> The principal ingredient in the Consolidation Agreement preparing CSOB for privatization was the proposed removal of the poor-quality assets resulting from CSOB's role in financing the Czechoslovak State's foreign trade .... The

> whole structure of Consolidated Agreement, Loan Agreement and Collection Companies, which is central to this arbitration, was thus conceived and implemented with the express purpose of facilitating CSOB's privatization. (Respondent's Reply Memorial, at 34.)

23. It cannot be denied that a State's decision to transform itself from a command economy to a free market economy involves the exercise of governmental functions. The same is no doubt true of legislative and administrative measures adopted by the State that are designed to enable or facilitate the privatization of State-owned enterprises. It does not follow, however, that a State-owned enterprise is performing State functions when it takes advantage of these State policies and proceeds to restructure itself, with or without governmental cooperation, in order to be in a position to compete in a free market economy. Nor does it follow that the measures taken by such an enterprise to achieve this objective involve the performance of State or governmental functions. In both instances, the test as to whether or not the acts are governmental or private turn on their nature.

24. There appears to be some disagreement between the parties to this case as to whether the conclusion of the Consolidation Agreement and the Loan Agreement was driven by or was part of the privatization process instituted by the Government or whether it was the result largely of CSOB's unrelated business decision to strengthen its financial position. The Tribunal does not believe that it matters which of these views is accepted, for whether CSOB's actions were or were not driven by the privatization process set in motion or facilitated by the State is not determinative of the issue to be decided. What is determinative is the nature of these acts.

25. In the instant case, the steps taken by CSOB to solidify its financial position in order to attract private capital for its restructured banking enterprise do not differ in their nature from measures a private bank might take to strengthen its financial position. It is no doubt true that CSOB's ability to negotiate the Consolidation Agreement and Loan Agreements on favorable conditions can be attributed to the interest both the Czech and Slovak Governments had in seeing CSOB survive in a free market environment and continue to provide needed banking services. But that fact does not transform the otherwise commercial or private transactions here at issue into governmental acts.

26. Finally, in support of its submission that the instant dispute is between two States Parties, Respondent contends that all the parties to the Consolidation Agreement are State entities and that they include, in addition to CSOB and the Czech and Slovak Republics, the Czech National Bank, the Czech National Property Fund and the National Bank of Slovakia. Even assuming, without deciding, that these other entities had also become parties to the Consolidation Agreement, this fact would not weaken or overcome the Tribunal's conclusions, set out in the preceding paragraphs, about the commercial character of the Consolidation Agreement or the functions CSOB performed.

27. The Tribunal concludes, accordingly, that Respondent has failed to sustain its contention that the Centre lacks jurisdiction and the Tribunal competence to hear this case on the ground that Claimant was acting as an agent of the State or discharging essentially governmental activities as far as this dispute is concerned. This is so whether or not this determination is made by reference to the date of the conclusion of the Consolidation Agreement (December 19, 1993) or the date when the Request for Arbitration was registered by the Centre (April 25, 1997).

B. Real Party in Interest

28. Respondent next points to two assignments, dated April 24, 1998 and June 25, 1998, respectively, which CSOB concluded with the Czech Ministry of Finance. These assignments, according to Respondent, have transformed the Czech Republic—the assignee—into the real party in interest to the instant arbitration by relieving CSOB of the economic risk arising from the claims relating to the Slovak Collection Company receivables. Respondent argues that the assignments require the Tribunal to dismiss the case for lack of jurisdiction because Claimant no longer has the requisite standing under Article 25(1) and because the Czech Republic is disqualified under the same provision from stepping into CSOB's shoes.

29. In view of the fact that the first assignment has been fully superseded by the second, the Tribunal needs to focus here only on the latter. In that instrument CSOB agrees to assign to the Czech Republic on a so-called "effective date" all claims CSOB has against the Slovak Collection Company relating to the receivables transferred to the latter under the Loan Agreement as well as the claims CSOB has against the Slovak Republic under the Consolidation Agreement. The "effective date" is three days

ANNEX 291

UNDER THE ARBITRATION RULES OF THE UNITED NATIONS

COMMISSION ON INTERNATIONAL TRADE

IN THE PROCEEDING BETWEEN

SERGEI PAUSHOK

CJSC GOLDEN EAST COMPANY

CJSC VOSTOKNEFTEGAZ COMPANY

Claimants

-AND-

THE GOVERNMENT OF MONGOLIA

Respondent

AWARD ON JURISDICTION AND LIABILITY
APRIL 28, 2011

Members of the Tribunal
The Honorable Marc Lalonde, P.C., O.C., Q.C. (President)
Dr. Horacio A. Grigera Naón (Arbitrator)
Professor Brigitte Stern (Arbitrator)

Secretary of the Tribunal
Me Lev Alexeev

For Claimants:

Mr. George M. von Mehren
Mr. Stephen P. Anway
Mr. Rostislav Pekař
Mr. Stephen Fazio
Mr. Ivan Trifonov
Ms. Irina Golovanova
Mr. Sergey Treshchev *et al.*
Squire, Sanders & Dempsey L.L.P.

For Respondent:

Mr. Michael D. Nolan
Mr. Edward G. Baldwin
Mr. Frédéric G. Sourgens
Milbank Tweed Hadley & McCloy L.L.P.
Ms. Tainvankhuu Altangerel
Ministry of Justice and Home Affairs,
Mongolia

MFN clause to introduce into the Treaty completely new substantive rights, such as those granted under an umbrella clause.

571. This being said, a clause in a BIT whereby the definition of fair and equitable treatment would be written in broader terms than in the case of the Treaty would clearly be covered by the MFN clause contained in it. In that regard, the Tribunal notes that the Denmark-Mongolia BIT[548] quoted by Claimants is of particular relevance. It provides in its Article 3 (2) as follows:

> "Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state, whichever of these standards is the more favourable."

572. This puts to rest Respondent's argument about the restrictive interpretation it wishes to apply to the words "fair and equitable treatment excluding the application of measures that might impair the operation of or disposal of investment" in Article 3(1) of the Treaty. That Article cannot have a more limited meaning than that found in Article 3(2) of the Denmark-Mongolia BIT.

573. The next step for the Tribunal is therefore to determine whether Mongolia has breached any article of the Treaty, including the broad application of the fair and equal treatment provision imported through the MFN clause, but not through the application of an umbrella clause which Claimants cannot invoke.

5.6.2.2.2 Mongolia's liability for the acts of MongolBank

574. In order to determine whether Mongolia bears any liability for MongolBank's actions, one must first consider its status under Mongolian law. The issue here is not about the nature of the SCSA itself but whether the disputed actions of MongolBank in the implementation of the SCSA were actions attributable to Mongolia and thereby might constitute breaches of the Treaty.

575. MongolBank has been established as the Central Bank (Bank of Mongolia) under a law of September 3, 1996. Under Article 3 of that law, MongolBank is to be "the competent organization authorized to implement State monetary policy" and it is defined as "a legal entity established by the State". Under Article 4, its main objective is described as "(to) promote balanced and sustained development of the national economy, through maintaining the stability of money, financial markets and the banking system." Its President is appointed by the State Khural (Article 26) to which he reports but the State Khural cannot interfere with the activities relating to the implementation of State monetary policy by MongolBank (Article 30). Article 31(2) provides specifically that "the Bank of Mongolia shall be independent from the Government."

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[548] CE-78.

576. It is in that legal context that the Tribunal must find whether MongolBank's actions are attributable to Respondent under the international law rules of attribution. For the purpose of this case, those rules are reflected particularly in Articles 4, 5 and 9 of the International Law Commission Articles on Responsibility of States for internationally wrongful acts ("ILC Articles"), which are generally considered as representing current customary international law.

577. Article 4 reads as:

> "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

578. Article 5 reads as:

> "The conduct of a person entity which not an organ of the State under article 4 but which is empowered by the law of that Sate to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

579. And Article 9 reads as:

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

580. The distinction between organs of the State and other entities is of particular relevance in the determination of potential liability of the State. As stated in the Commentary to the ILC Articles, "It is irrelevant for the purposes of attribution that the conduct of a state organ may be classified as "commercial" or as *acta jure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law. [...] But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act."[549] That situation is different from the case of other entities exercising elements of governmental authority as described in Article 5 of the ILC

[549] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary, 2001, Report of the ILC on the work of its fifty-third session, p. 41.

Articles, where the liability of the State is engaged only if they act *jure imperii* and not *jure gestionis*.

581. The ILC Articles do not contain a definition of what constitutes an organ of the State and the Mongolian law is not very helpful in that regard either. The mention in Article 2 of the MongolBank Act that it is "a legal entity established by the State" and that it is "the competent authority authorized to implement monetary policy" is not sufficient to support a conclusion that it is not an organ but an entity of the type mentioned in Article 5 of the ILC. If this were the case, one would be left with a very narrow definition of organs of the State since most of the executive and judiciary functions of the State are fulfilled by legal entities established by the State and adopting and/or implementing public policy. The Tribunal has long debated whether MongolBank is an organ of the State of Mongolia.

582. According to one view, the fact that the Mongolian Parliament has created it as an institution independent of the Government does not *per se* make it lose its status as an organ of the State. In fact, it fulfills a major State function and the list of its responsibilities clearly demonstrates that it fulfills a role that only a State can fulfill: exclusive right to issue currency, formulation and implementation of monetary policy, acting as the Government's financial intermediary; supervising activities of other banks; holding and managing the State's reserves of foreign currencies.[550] As stated in the Commentary to the ILC Articles: "The reference to a "State organ" covers all the individual or collective activities which make up the organization of the State and act on its behalf."[551] Like other central banks in the world, MongolBank assumes part of the executive responsibility of the State; and, if one were to argue for a more limited definition of the executive power of the State, Mongolbank would still qualify as an organ of the State under the words "any other functions" mentioned in Article 4 of the ILC Articles.

583. Such role differentiates MongolBank from other institutions found, in other cases, not to be organs of the State. Thus, in *Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt*,[552] the Tribunal concluded that the Suez Canal Authority ("SCA") was not an organ of the State. Noting that the SCA was created to take over the management and utilization of the Suez Canal after its nationalization and recognizing that it could be said to carry out public activities, it relied on Articles 4, 5 and 6 of its constitutive law to conclude that it was not part of the Egyptian State. Article 4 states that the SCA is to be managed like" business enterprises without any commitment by the governmental systems and conditions". Article 5 provides that the SCA "shall have an independent budget that shall be in accordance with the rules adopted in business enterprises" and Article 6 states that the "SCA's funds are considered private funds". Another relevant case is that of *Bayindir Insaat Turizim Ticaret Ve Sanayi A.S. v. Islamic Republic of*

[550] Article 5 of the Law on Central Bank.

[551] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary, 2001, Report of the ILC on the work of its fifty-third session, p. 40.

[552] *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/04/13 ICSID Case No. ARB/04/13, Award November 6, 2008, ¶162.

Pakistan.[553] In that case, the Tribunal had to decide whether the acts of the National Highway Authority of Pakistan ("NHA") allegedly in breach of a BIT were attributable to Pakistan. Having noted that the NHA had a distinct legal personality under the laws of Pakistan, it decided that "(b)ecause of its separate legal status, the Tribunal discards the possibility of treating NHA as a State organ under Article 4 of the ILC Articles." The simple fact that an institution has separate legal status does not allow one to conclude automatically that that institution is not an organ of the State; in order to reach such a conclusion, a tribunal has to engage in a broader analysis which includes the functions assigned to that entity. There is a huge difference to be found between public authorities established to operate and maintain a navigational canal or to construct and maintain highways and a central bank charged with the issuance of the currency and running the State's monetary policy.

584. According to that analysis, MongolBank being recognized as an organ of the State, the question whether MongolBank in entering into and implementing the SCSA acted *jure imperii* or *jure gestionis* would therefore become irrelevant in terms of the liability of the State.

585. According to another interpretation, MongolBank is not an organ of the State since Article 2 of the MongolBank Act specifies that it is established as "a legal entity" and, as such, it is exercising elements of governmental authority, as described in Article 5 of the ILC Articles. In support of that view, one can mention the *Genin* case[554] where the Bank of Estonia is described as "an agency of a Contracting State". The Tribunal concluded that Estonia was the appropriate respondent because the related BIT provided that the State was to be responsible for the activities of any state enterprise when it was exercising delegated governmental authority. However, that case does not definitely answer the question whether such a state enterprise was an organ of the State or a State entity; the legal notion of "agent" does not exist in the international law of State responsibility. The choice has to be between being an organ under Article 4 of the ILC Articles or an "entity empowered to use governmental authority" under Article 5. Another case more to the point however is an English court case involving the Bank of Nigeria, the charter of which was modeled on that of the Bank of England, and where the Court of Appeal, under the leadership of Lord Denning, reversing the decision of the judge of first instance, denied the Bank of Nigeria its plea of sovereign immunity in connection with an irrevocable letter of credit issued by the Bank in favor of the claimant for a sale of cement to an English company, for the purpose of building army barracks in Nigeria. The Court ruled that "the bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status, was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore

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[553]. *Bayindir Insaat Turizim Ticaret Ve Sanayi A.S.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶119.

[554] *Alex Genin, Eastern Credit Limited, Inc. et A.S. Baltoil* v. *Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶327.

not entitled to immunity from suit."[555] The difficulty of making the distinction was pointed out by Lord Denning (and shared by his two colleagues) when he wrote:

> "In these circumstances, I have found it difficult to decide whether or no the Central Bank of Nigeria should be considered in international law a department of the Federation of Nigeria, even though it is a separate legal entity. But, on the whole, I do not think it should be.
>
> This conclusion would be enough to decide the case, but I find it so difficult that I prefer to rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department."

586. The Tribunal however does not need to decide the question whether MongolBank is or is not an organ of the State, since as will be shown below, even if it were merely an entity exercising governmental authority, at least some of the disputed actions in connection with GEM's gold were in any event actions de *jure imperii.*

587. While claiming that the SCSA is a purely commercial transaction, Respondent also argues that MongolBank entered into the SCSA within the exercise of its functions related to the management of Mongolia's foreign reserves.[556] Moreover, by proceeding to export and refine the gold deposited by GEM, and depositing it or its value in an unallocated account, MongolBank was clearly exercising specific powers granted to it under the Law on Central Bank and the Treasury Law. In that regard, a press release of MongolBank of August 24, 2007 states:[557]

> "MongolBank implementing the Law on Central Bank (MongolBank) and the Law on Precious Metals and StoneFund and with the purposes of increasing the country's currency reserves purchases from gold producing business entities and individuals unrefined gold at the market price, published as of a certain date. [...] This gold, which according to the agreement made with KOO Golden East-Mongolia, will be definitely purchased by MongolBank, has been refined and placed abroad."

588. That press release was issued in answer to a statement by GEM that three tons of gold held in custody in MongolBank had disappeared. Such a view was repeated by MongolBank when, on November 19, 2007, it answered a previous letter of GEM of November 16, in the following terms:[558]

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[555] *Trendtex Trading Corporation* v. *Central Bank of Nigeria*, (1977) 2 W.L.R. 356.

[556] R. Rejoinder, ¶194 and fn. 374.

[557] Paushok Ex-81.

[558] CE-85.

> "With the purpose of increasing state currency reserves MongolBank when purchasing business entities purified gold produced by them would calculate its pure weight according to common practice of the international financial markets and would make settlements for the value of the gold based on the markets price of the gold as of a particular day.
>
> Given that MongolBank has an obligation to refine the purified gold purchased into the state currency reserves and place the same in the international financial markets pursuant to the most favourable arrangements, MongolBank refined 3.1 tons of your gold, being in possession of MongolBank in accordance with the law."

589. Furthermore, in its Statement of Defense, Respondent argued that the sale/purchase of the gold deposited by GEM "served a public purpose, i.e the increase of Mongolia's gold reserves."

590. A related decision by the Court of Appeal (England) involving GEM and the Bank of Nova Scotia and others [559] further supports the conclusion that MongolBank was in part acting *de jure imperii* in connection with the SCSA. That decision was referred to by each side.[560] In that case MongolBank was the third defendant, the second defendant being Scotia Capital (Europe) Limited. The appeal was only concerned with GEM's attempt to obtain information and documents from the Bank of Nova Scotia. Without entering into the details of the case, suffice to say that it was established that GEM's gold deposited with MongolBank was refined by a gold refiner outside Mongolia but that it was not clear where the refined gold was held physically after refining and by whom; pursuant to a contract with MongolBank, the Bank of Nova Scotia simply had an unallocated account in which a certain quantity of gold was credited to MongolBank's account, the bank not physically holding any gold for MongolBank. The Bank of Nova Scotia, in the English proceedings, refused to authorize the release of any information concerning its contract with MongolBank or who had refined and who had physical possession of the gold concerned, by invoking state immunity, in favor of MongolBank.

591. The Court first stated: "[...] the question is whether MongolBank entered into the contract (with the Bank of Nova Scotia) in the exercise of sovereign authority"[561] and it answered: "Th(e) evidence shows that the purpose of the transactions including the refining of the gold and the placing of a quantity of refined gold on the unallocated account of the bank was for the purposes of increasing Mongolia's currency reserves. In my judgment that was an exercise of sovereign authority within the meaning of the 1978 Act (State Immunity)"[562] It may be that, under English Law, the definition of State

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[559] *KOO Golden East Mongolia and Bank of Nova Scotia and others,* (2007) EWCA Civ 1443.

[560] Paushok-II, ¶102; R. Defense, ¶374; C. Reply, ¶¶646-647; CE-152; RIM, ¶31.

[561] *KOO Golden East Mongolia and Bank of Nova Scotia and others,* (2007) EWCA Civ 1443, ¶40.

[562] *Ibid.*, ¶42.

immunity has a different scope than under international law. But what is interesting for our purpose is that evidence upon which the Court of Appeal bases its decision is constituted of the 19 November 2007 letter of MongolBank to GEM and the press release of 24 August 2007, both quoted above. In addition, the refining of the gold abroad and the placing of it or its value in an unallocated account in the Bank of Nova Scotia are exactly the breaches alleged by Claimants in the present case.

592. The Tribunal therefore has no hesitation in concluding that MongolBank acted *de jure imperii*, if not in entering into the SCSA, at least when it exported GEM's gold for refining and deposited it or its value in an unallocated account in England "with the purposes of increasing the country's reserves." Those actions were de *jure imperii* and went beyond a mere contractual relationship. Therefore, even if MongolBank were not to be considered an organ of the State but merely an entity exercising elements of governmental authority, Claimants would be entitled to pursue their claim against Respondent in connection with the actions mentioned above.

593. The question which then remains is whether such actions by MongolBank constituted breaches of the Treaty. In the opinion of the Tribunal, they did so.

594. First, it is important to note that, in the first half of 2007, MongolBank recorded the gold deposited by GEM as sold and owned by Mongolia, exported it, and provided for its refinement without GEM's knowledge and permission, the whole in violation of Article 4 of the SCSA. It thereby, without any justification, seized ownership of GEM's gold when it had absolutely no right to do so.

595. Secondly, on the basis of the evidence before the Tribunal, MongolBank first tried to hide that fact and, for a significant period of time, misled Claimants who had legitimate expectations that they would retain full ownership of their gold until the issuance of Sale Letters or the termination of the SCSA.

596. In the opinion of the Tribunal, GEM was prematurely and without any right deprived of the continuing ownership of its deposited gold in breach of Article 3.1 of the Treaty which provides for "fair and equitable treatment excluding the application of measures that might impair the operation or disposal with investments", expanded through the MFN clause to include the text of the Denmark-Mongolia BIT.

597. It will be up to Claimants to prove what damages, if any, they suffered from such actions.

5.6.2.2.3 Lack of standing

598. Respondent contends that Claimants do not have standing to bring claims in connection with the SCSA because GEM did not exhaust the contractual remedies provided by the Agreement. But the right of an investor to claim under a BIT is a separate right from that of a company it controls to sue under the dispute resolution of a particular commercial contract and there is no obligation for such an investor to require that company to resort first to the dispute resolution procedure of its contract, before the investor can exercise its own rights available to it under the provisions of a BIT.

ANNEX 292

Neutral Citation Number: [2005] EWHC 2239 (Comm)

Case No: 2004/536

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2005

Before :

MR JUSTICE AIKENS

- -

Between :

	(1) AIG Capital Partners, Inc **(2) CJSC Tema Real Estate Company Limited**	**Claimants**
	- and -	
	The Republic of Kazakhstan	**Defendant**
	(1) ABN AMRO Mellon Global Securities Services B.V. **(2) ABN AMRO Bank N.V.**	**Third Parties**
	The National Bank of Kazakhstan	**Intervener**

- -
- -

Mr R Salter QC, Mr D Lloyd Jones QC and Mr Paul Key (instructed by **Holman Fenwick Willan, Solicitors, London**) for the **Claimants**
Mr A Malek QC and Mr D Quest (instructed by **Richards Butler, Solicitors, London**) for the **Defendants**

Hearing dates: 26th and 27th July 2005

- -

Judgment)

Mr Justice Aikens :

A. The Main Issue

1. This case concerns a claim for state immunity by the Republic of Kazakhstan (“***the RoK”***) and its central bank, the National Bank of Kazakhstan (“the NBK”). The Claimants have obtained an arbitration award from the International Centre for the Settlement of Investment Disputes (“***ICSID”)*** *in* Washington, DC, against the RoK. The Award

88. **Conclusions on the ECHR points.**

For the reasons I have given, I have concluded that the proper construction of ***section 14(4)*** on common law principles is consistent with the Claimants' ECHR rights under Article 6(1) and Article 1 of the Protocol. Therefore there is no need to "read down" ***section 14(4).***

I. Issue Five: What are the characteristics of the Cash Accounts and the Securities Accounts held in London by AAMGS for the NBK; in particular are they (a) "*property of a State's central bank*" within section 14(4) of the SIA; (b) if not, are they "*property [of a State] which is for the time being in use or intended for use for commercial purposes*" within section 13(4) of the SIA?

89. Given the conclusions I have reached on Issues One to Four, I can deal with this issue briefly. AAMGS holds the cash and securities that constitute the London Assets to the order of NBK. NBK has the contractual right to payment of the debt that is constituted by the Cash Accounts: clause 16(j) of the GCA. AAMGS records the NBK as being the owner of the securities it

holds in the Securities Accounts: clause 5(b) of the GCA. On my construction of ***section 14(4)*** of the SIA, in particular the word "*property*", that makes the London Assets the "*property*" of the NBK, which, everyone agrees, is the central bank of the RoK. Therefore all the London Assets are within ***section 14(4)*** and so cannot be the subject of enforcement processes by the UK courts at all.

90. In my view that conclusion is not affected by the fact that, as the experts on Kazakhstan law agree, the NBK holds those assets as part of the National Fund of Kazakhstan under the Trust Management Agreement with the RoK, by which the government of the RoK is the beneficiary: clause 7.1. Professor Didenko appears to contemplate (at para 60 of his report) that there can be "*property held by the trust manager*", ie. the NBK, which "*remains under the full ownership of the trust founder*", ie. the RoK. Professor Suleimenov does not dissent from this view. Therefore, as a matter of Kazakhstan law, the RoK remains the owner, but gives the trust manager the power to deal with the relevant property. That is enough, in my view, to bring the London Assets within ***section 14(4).***

91. The conclusion that the London Assets are within ***section 14(4)*** means that they are immune from enforcement proceedings in the UK courts. So I think I do not need to decide whether, for the purposes of ***section 13(4)*** of the SIA, the London Assets were, at the time the enforcement processes were started, (a) also the property of the RoK and, if so, (b) "*in use or intended for use for commercial purposes*". However, on the first of these points it is agreed that the RoK is the beneficial owner of the London Assets. Therefore they must, on my reading of the word "*property*", constitute "*the property of a State*" within ***section 13(2)(b) and section 13(4).***

92. On the second point, my firm view is that the London Assets were not in use or intended for use for commercial purposes at any stage. My reasons, briefly, are as follows:

(1) The London Assets formed part of the National Fund. That Fund was, in my opinion, created to assist in the management of the economy and government revenues of the RoK, both in the short and long term. Management of a State's economy and revenue must constitute a sovereign activity.

(2) The National Fund had to be managed by the NBK in accordance with the law set out in the Budget Code, in particular Article 24. That demanded that the National Fund be invested: Article 24 para 2. I accept that this required that investment had to be placed in authorised financial assets in order to secure, amongst other things, "*high profitability levels of the [National Fund] in the long term outlook at reasonable risk levels*". I also accept the uncontroverted evidence that the Securities Accounts held by AAMGS on behalf of the NBK were actively traded at all times and that the NBK obtained from the RoK a commission on good results and paid a penalty for poor ones. But I cannot accept that this activity is inconsistent with the Stability and Savings Funds of the National Fund being used or intended for use for sovereign purposes. The aim of the exercise, at all times, was and is to enhance the National Fund. To do that the assets have to be put to use to obtain returns which are reinvested in the National Fund, ie. to assist the sovereign actions.

(3) Mr Salter relies on the definition of "*commercial purposes*" set out in ***section 17(1)*** of the SIA and points to the fact that "*commercial purposes*" means transactions and activities mentioned in ***section 3(3)*** of the Act. Those include "*any transaction or activity (whether of a commercial…financial…or similar character) into which a State enters or in which it engages otherwise in the exercise of sovereign authority*". He says that the trading activities of the Securities Accounts by AAMGS are clearly financial transactions and their aim is to make profits. Therefore they could not be transactions "*in the exercise of sovereign authority*" within ***section 3(3).*** So, for the purposes of ***13(4),*** at least the Securities Accounts of the London Assets constitute "*property in use or intended for use for commercial purposes*". Again, I must disagree. The dealings of the Securities Accounts must, in my view, be set against the background of the purpose of the GCA. That was established to assist in running the National Fund. The Securities Accounts contain assets which are part of the National Fund. In my view the dealings are all part of the overall exercise of sovereign authority by the Republic of Kazakhstan.

(4) Last, but not least, there is the certificate of the Ambassador. That is clear and unambiguous. I have seen no evidence to contradict it other than the fact that the Securities Accounts are traded. For the reasons I have given, the trading of those accounts does not mean they were being used or were intended for use for commercial purposes.

93. **Conclusion on Issue Five**

My conclusion is that all the London Assets were, at all times, in use for sovereign purposes and pursuant to the exercise of sovereign authority of the RoK, acting through the National Bank and AAMGS as the Global Custodian of the National Fund. Therefore even if I had concluded that ***section 14(4)*** should be construed more narrowly and in the Claimants' favour, I could not have avoided a conclusion that the London Assets constituted property held by the NBK in its capacity as such and it does not matter that it

held them simply as trust manager for the RoK and had only a limited interest in those assets.

94. Further, even if I were wrong about the construction of the word "*property*" in ***section 14(4),*** and I should conclude (on the facts of this case) that the London Assets cannot be regarded as property of the NBK at all, my conclusion would be that the London Assets were at all times the "property" of the Republic of Kazakhstan (within S.13(2)(b)) and were the subject of transactions that were (through the NBK and AAMGS) the exercise of sovereign authority. Accordingly, the London Assets do not fall within ***section 13(4),*** so are immune from the enforcement process of the UK courts.

J. Overall Conclusions

95. In summary, my conclusions are:

(1) As to the Third Party Debt Order, the cash accounts held by AAMGS in London are in the name of the NBK. The cash accounts constitute a debt owed by AAMGS to the NBK, which is the account holder. The RoK has no contractual rights to that debt against AAMGS. Therefore there is no "*debt due or accruing due*" from AAMGS (the third party) to the judgment debtor. So the court has no power under CPR Pt 72.2(1)(a) to make a Third Party Debt Order in respect of the cash accounts. The Third Party Debt Order must be discharged on this ground.

(2) The meaning of ***section 14(4)*** of the ***SIA,*** using "common law" rules of construction, is clear. In particular:

(a) the word "*property*" must have the same meaning in ***section 14(4)*** as it does in ***section 13(2)(b) and 13(4).***

(b) "*Property*" has a wide meaning. It will include all real and personal property and will embrace any right or interest, legal or equitable, or contractual, in assets that are held by or on behalf of a State or any "emanation of the State" or a central bank or other monetary authority that comes within ***sections 13*** and ***14*** of the ***SIA.***

(c) The words "*property of a State's central bank or other monetary authority*" mean any asset in which the central bank has some kind of property interest as described above, which asset is allocated to or held in the name of the central bank, irrespective of the capacity in which the central bank holds the asset or the purpose for which the asset is held.

(3) The immunity created by ***section 14(4)*** does concern the rights of access to the court of a claimant who wishes to enforce against the assets of a central bank. In this case ***section 14(4)*** does affect the right of the Claimants to enforce an ICSID arbitration award that has been legitimately registered as a judgment under ***section 1*** of the ***Arbitration (International Investment Disputes) Act 1966.*** Therefore ***section 14(4)*** does concern the right of a claimant to a civil right to have access to the courts, in accordance with Article 6(1) of the European Convention on Human Rights.

(4) However, that right is not absolute. The immunity granted to assets of central

banks, as set out in ***section 14(4),*** is both legitimate and proportionate and is in accordance with the expectations of States. Therefore there is no violation of the Claimants' rights under Article 6(1).

(5) ***Section 14(4)*** does not deprive the Claimants of their possession, ie. the ICSID Award or the judgment that has been registered. The Award was always subject to the restrictions on enforcement that existed at the time it was made. Those restrictions are clear from Article 55 of the Washington Convention which set up the ICSID arbitration procedure. Therefore there is no infringement of ***Article 1*** to the ***Protocol*** to the European Convention on Human Rights.

(6) Accordingly, there is no requirement to modify the "common law" construction of ***section 14(4)*** of the ***SIA*** in order to give it effect in a way which is compatible with Convention Rights, because it is compatible anyway.

(7) On the facts of this case, the London Assets, held by AAMGS on behalf of the NBK are "*property of a central bank*", **ie.** the property of NBK, within the meaning of ***section 14(4).*** This is because NBK has an interest in that property within the definition of "*property*" that I have set out above. Therefore all the London Assets are immune from the enforcement jurisdiction of the UK courts.

(8) If, contrary to my view, the London Assets are not the property of NBK within the meaning of ***section 14(4),*** then, on the facts of this case, they constitute "*the property of a State*" within the meaning of ***section 13(2)(b) and 13(4)*** of the ***SIA.*** The London Assets were not at any time either in use or intended for use for "*commercial purposes*" within the meaning of ***section 13(4)*** of the ***SIA.*** Therefore they are immune from the enforcement jurisdiction of the UK court by virtue of ***section 13(2)(b)*** of the ***SIA.***

(9) Accordingly, the court must discharge the Interim Charging Order. As the same reasoning applies to both the cash and securities accounts within the London Assets, even if the court had otherwise had jurisdiction to make the Third Party Debt Order, it would have to discharge it because the cash accounts are immune from enforcement proceedings for the reasons set out above.

96. Therefore I must discharge both Interim Orders.

ANNEX 293

The NETHERLANDS[1]

Sovereign immunity — Foreign States and agencies — Central bank— Requirement for deposit of gold with bank under foreign exchange control procedures — Claim for compensation for loss of gold — Whether bank entitled to jurisdictional immunity — Acts iure imperii and iure gestionis — Whether bank acting on behalf of foreign State — Whether monetary policy a sovereign function — The law of Italy

NV EXPLOITATIE-MAATSCHAPPIJ BENGKALIS *v.* BANK INDONESIA

Netherlands, Court of Appeal of Amsterdam. 23 October 1963

SUMMARY: *The facts*:—In 1958 gold belonging to the plaintiff, a Dutch company, was deposited at a branch office of Bank Indonesia in Sumatra pursuant to Indonesian foreign exchange control regulations. The gold was alleged to have been forcibly taken by revolutionary forces during a local insurrection. The plaintiff brought an action against the Bank claiming that it was obligated to pay compensation for the loss of the gold under Indonesian law. The District Court of Amsterdam held that the Bank was entitled to jurisdictional immunity since the obligation in question was of a public law character. The plaintiff appealed.

Held:—The appeal was dismissed.

(1) It was possible for private individuals and legal entities under private law to have public law obligations. Obligations imposed by a State in accordance with its exchange control legislation were to be regarded as obligations under public law of those individuals or legal entities upon which they were imposed. The acceptance of the deposit of gold by the defendant Bank therefore constituted the performance of an obligation under public law.

(2) Though there might be a generally recognised rule of international law according to which a sovereign State, at least with respect to its specifically sovereign acts, was immune from the jurisdiction of other States this did not involve a rule exempting private individuals from the jurisdiction of the courts of another State in the case of obligations under public law. The public law character of the obligation did not therefore constitute a valid criterion for deciding on the jurisdiction of Dutch courts and the relevant question was rather whether or not the acts were performed by a private individual or private legal entity or on behalf of a foreign State.

(3) Any obligation upon the defendant Bank to pay compensation in one of its public capacities was only conceivable if the payment of this compensation

[1] All the reports of Dutch cases printed here, with the exception of the first, are English translations extracted with permission from the *Netherlands Yearbook of International Law*. Concise statements entitled "The facts" appear in the *Netherlands Yearbook* before the text of the relevant part of each judgment and these statements have been reproduced, with some exceptions, in the summaries prepared for this volume and introduced at the head of each case. The texts of the judgments printed in this volume are normally the complete extracts published in the *Netherlands Yearbook*. In some cases short additional passages have been added from the original reports.

was in fact an obligation of the State which it undertook within the orbit of its monetary policy and whose performance it had entrusted to the Bank. The refusal of the Bank to pay compensation to the plaintiff was therefore a refusal of the Indonesian State in the exercise of a specifically sovereign function, namely the maintenance of the monetary position of the country. The Bank had acted not as a private bank but as a bank of issue and/or administrator of the foreign exchange reserves of the State. In these circumstances the Dutch courts had no jurisdiction over the claim.

The following is a statement of the facts as reported in the *Netherlands International Law Review:*

Until 12 June 1958, the *NV Exploitatie-Maatschappij Bengkalis* (hereinafter: Bengkalis), a Netherlands legal entity having its seat at The Hague, exploited a gold-mining plant near Pakan Baru, Sumatra. Pursuant to Indonesian Foreign Exchange Control legislation Bengkalis deposited some parcels of gold produced by the plant with the branch office of the Bank Indonesia (hereinafter: the Bank) at Padang, Sumatra, which should have paid due compensation to Bangkalis. During a local insurrection against the Republic of Indonesia around the beginning of 1958, officials of the Bank were allegedly forced to hand over the branch office's assets, the parcels of gold included, to commanders of revolutionary forces. The gold was not restored to Bengkalis, nor was the said compensation ever paid to it.

Bengkalis sued the Amsterdam branch office of the Bank before the District Court of Amsterdam to pay a sum of 119,097.32 Netherlands guilders which was said to represent either compensation for failure to pay the sum due under Indonesian law or damages at civil law for loss suffered by Bengkalis and caused by failure of performance by the Bank with regard to a contract of deposit which, according to Bengkalis, was in force between the parties.

The District Court of Amsterdam held that it had no jurisdiction to hear the case on the primary ground, but that it could decide on the alternative ground. It admitted Bengkalis to give evidence as to the existence of a contract of deposit. Bengkalis appealed to the Court of Appeal of Amsterdam.

The following is the text of the judgment of the Court of Appeal:

The District Court in the first place observed in its judgment that Bengkalis based its claim on two grounds, a primary one and an alternative one which it summarised as follows: *the primary ground:* damage caused by the fact that whereas the Bank was obliged to pay a sum of money under the Foreign Exchange Control Ordinance of Indonesia as a consequence of the deposit of parcels of gold at its Padang branch office, the said amount was never paid; *the alternative ground:* damage

caused by failure to return the gold deposited with the Padang office.—The District Court went on to recall that the Bank alleged that no Netherlands court had jurisdiction, this would mean that the Amsterdam District Court had no competence to hear the case on either of the two grounds. With regard to its jurisdiction to adjudicate upon the primary ground, the District Court said:

> In the first place it must be observed that the parties in this case drew a sharp distinction between "taking possession" (by the Bank) which might be compatible with retention of title in the gold by Bengkalis and "take over" which might entail either a transfer of title to the Bank or merely a loss of title by Bengkalis.—Bengkalis, while formulating the primary ground of its claim, explicitly selected the second notion as being relevant adding that the take over was based upon Article 8 of the said Ordinance in connection with a decision taken by the Indonesian Foreign Exchange Control Agency with respect to Bengkalis on 17 May 1952, partially exempting Bengkalis from an obligation, laid down in Article 6 of this Ordinance, to notify all stocks of gold. Bengkalis based its allegation that the Bank was obliged to pay compensation—the non-payment of which constituted the first ground of the claim—on the second section of Article 8 of the said Ordinance.—In this connection the Bank motivated its challenge of the Court's jurisdiction firstly, by arguing that the Bank by acting as it did exercised a function under public law and, further, that legal relations between the parties were of a public law character.—Bengkalis contested this argument by stating that, apart from its functions under public law, the Bank also acts as a private bank and that in the present case it acted in the latter capacity and that, besides the Bank Indonesia, other banks could be and have been designated by the Indonesian Foreign Exchange Control Agency to receive gold against payment of compensation. It may be conceded to Bengkalis that the Bank did not in the present case exercise a function strictly reserved to it as a State bank or as a bank of issue.—The District Court need not go into the question as to whether or not the function performed by the Bank shall be regarded as an official act, since in either case the obligation to pay compensation on which Bengkalis primarily based its claim partakes of the character of public law.—Bengkalis' obligation to deposit the gold which it produced was—as it did not deny—of a public law character, but this also applies to the obligation of the banks designated by virtue of the said Article 8, the Bank Indonesia included, to pay compensation on the occasion of their receiving gold, the amount of which compensation must be settled in consultation with the Foreign Exchange Control Agency and which payment certainly is a public law duty.—Since the obligation of the Bank, invoked by Bengkalis, is of a public law character under Indonesian law, the Bank rightly argued that this District Court lacks jurisdiction to hear the claim on its primary ground.

Against this decision Bengkalis advanced its first grievance:

The District Court wrongly accepted the Bank's plea with respect to its jurisdiction, on the following grounds:

(a) The obligation of the Bank to pay compensation upon which Bengkalis primarily based its claim, has no character of public law.

The same applies to Bengkalis' obligation to offer the gold produced. In this regard the Bank neither acted in a function reserved for it as a State Bank or as a bank of issue, nor did it perform an act of State, or yet exercise a public law function.

(b) Even if the said obligation of the Bank can be regarded as having a public law character, this is no bar to the jurisdiction of a Netherlands court in general or of the District Court of Amsterdam in particular, since Netherlands courts are competent and obliged to apply the public law of a foreign State and to order payment on the basis of such law. This is particularly so, if the legal relations involved in the action are governed by the foreign law concerned as a whole, as is the case here, at least if the relevant provisions of public law are intended to protect the interests of private individuals and/or of private legal intercourse. There might be an exception, if Netherlands public policy were to be involved. The latter was not even alleged, There is no need to examine the question as to what law would apply, if an obligation under Indonesian public law *vis-à-vis* the Indonesian State were concerned, the enforcement of which was sought in the Netherlands either by that State or the Bank.

(c) In no case can the grounds advanced by the District Court lead to a rebuttal of jurisdiction, but at most to an irreceivability or a rejection of Bengkalis' action for which, having regard to what is said above *sub* (a) and (b), there is no ground.

With regard to this grievance the Court of Appeal in the first place observes that it is apparently the opinion of Bengkalis that the question of obligations under public law can only arise in relation to legal entities underpublic law. This explains why, in its view, Bengkalis' obligation to notify gold and the obligation of the banks designated to take over this gold against payment of a compensation, have a private law character. However, this Court of Appeal is of the opinion that it is possible for private individuals and legal entities under private law to have public law obligations and that, in particular, obligations imposed by a State in accordance with its foreign exchange control legislation are obligations under public law of individuals or legal entities upon whom they are imposed. The obligations of Bengkalis involved here are therefore not obligations under private law but obligations under public law. Consequently, even had the Bank not been designated in its quality as a bank of issue for the reception of gold, by accepting the deposit of the gold it performed an obligation under public law. The thesis of Bengkalis in *sub* (a) of its grievance that this obligation is in the nature of private law, is therefore incorrect.—It may be conceded to Bengkalis that, with regard to the question as to whether a Netherlands court has jurisdiction to adjudicate upon the primary ground of the action, it rightly deemed it to be of importance whether the Bank, while receiving the gold against

compensation, acted as a bank of issue or as a private bank or whether it acted as a private or public law agency. The question to be answered is whether restrictions of jurisdiction pursuant to exceptions recognised by international law prohibit a Netherlands court from taking cognizance of the primary ground of Bengkalis' action. It may be true that there is a generally recognised rule of international law, according to which a sovereign state at least with respect to its specifically sovereign acts is immune from jurisdiction of other States, but this does not involve a rule exempting private individuals from the jurisdiction of the courts of another state in the case of obligations under public law. This means that the public law character of the obligation does not constitute a valid criterion for deciding on the jurisdiction of Netherlands courts, but that the question whether the acts were performed by a private individual or private legal entity or on behalf of a foreign. State is very relevant.—It is the task of this Court of Appeal to enter into this matter.—In this connection the Bank advanced that the adjudication of the present dispute is so closely related to official duties imposed upon it, *i.e.* its function as a bank of issue and as administrator of the Indonesian gold and foreign exchange reserves and, generally, to the sovereign power and official policy of the Republic of Indonesia, that a Netherlands court cannot decide in this case without judging such relations as it may not and cannot review. In addition it invoked its immunity from Netherlands jurisdiction.—Against this argument Bengkalis argued that the Bank cannot invoke immunity since Bengkalis' primary claim is directed against it as one of the banks in the sense of Article of the Foreign Exchange Control Ordinance. This claim is exclusively a matter of private law and has no connection with any public legal function entrusted to the Bank or with any official duty, official care or sovereign rights of the Republic of Indonesia itself.—The Court of Appeal is of the opinion that the Bank does not deny, that—if compensation had been paid to Bengkalis—not another bank, but the Bank Indonesia should have done so, but that it merely contends that in that case such an obligation would not devolve upon it as a private bank instead of in its function as a bank of issue and as an administrator of the State's foreign exchange and gold reserves.—Bengkalis did not give an opinion as to whether—in the event of the Bank's being obliged to fulfil this duty to pay compensation in one of its official capacities—a Netherlands court might not rule on the point whether the Bank should have accorded this compensation to Bengkalis. In so far as Bengkalis is not willing to recognise this and this Court must pronounce itself on the dispute in this connection, this Court of Appeal shares the opinion of the Bank that, having regard to the above-mentioned rule of international law according to which a sovereign State with regard to its specifically sovereign acts is not subject to the

jurisdiction of the courts of another State, a Netherlands court shall In that case abstain from ruling on the question as to whether the Bank should have paid compensation to Bengkalis and likewise also from ordering payment of damages for failure to pay such compensation. An obligation of the Bank to pay such compensation in one of its public capacities is only conceivable if the payment of this compensation was in fact an obligation of the State which it undertook within the orbit of its monetary policy and the performance of which obligation it entrusted to the Bank Indonesia. In this light the refusal of the Bank to pay a compensation to Bengkalis has been a refusal of the Indonesian State, in the exercise of a specifically sovereign function (the maintenance of the monetary position of the country). For this reason a Netherlands court shall on the basis of the said rule of international law abstain from ruling on this question.—The question must now be examined as to whether the Bank acted as a private bank or as a bank of issue and/or administrator of the foreign exchange reserves of the State.—Bengkalis admitted that the gold to be handed over was destined for the Foreign Exchange Fund. Since this was a fund created by the State and since that State could make use of the assets of that Fund in the case of executing its monetary policy, the gold was in fact placed at the State's disposal. It stands to reason that, since the gold ultimately came into the hands of the State, it was the State which ultimately paid the compensation and not a private bank which derived no profit at all from the gold. With regard to this aspect Bengkalis advanced nothing more than that not only the Bank Indonesia but also the other banks were bound, according to the Foreign Exchange Control Ordinance, to take over the gold offered against payment of due compensation as fixed by a State organ. This does not mean that the compensation was ultimately for the account of those banks, since this was not the case when via the Bank Indonesia the State reimbursed those other banks for the sums paid by them in compensation, a practice which, according to the Bank, was frequently adopted. For these reasons, it must be accepted that the Bank Indonesia had to pay the compensation in its capacity as a bank of issue and/or administrator of the foreign exchange reserves and that, consequently, a Netherlands court is not allowed to adjudicate upon the question as to whether the Bank should in this case have paid the compensation to Bengkalis.—In part (b) of its grievance Bengkalis alleged that a foreign court shall eventually apply the public law of another State, but there can be no question of application of foreign public law when the dispute is withdrawn from the jurisdiction of the foreign court which will therefore never reach the stage at which it can review and apply any rule of law.—The parts (a) and (b) of the grievance cannot lead to reversal of the decision of the lower Court against which the appeal is directed.

[The remainder of the judgment is omitted since it is not of interest to international law.]

[Reports: Nederlandse Jurisprudentie, 1965, No. 357 (in Dutch); 13 Netherlands International Law Review (1966), p. 318. (English translation)]

NOTE.—In its judgment of 26 June 1958, in *Krol v. Bank Indonesia* (26 *I.L.R.* 180) the Court of Appeal of Amsterdam decided that Bank Indonesia could not invoke immunity for its acts done *iure gestionis*.

ANNEX 294

Sovereign immunity — Foreign States and agencies — Bank of Japan — Foreign exchange control procedures — Subjection of international film distribution agreement to authorisation — Non-execution of agreement — Liability of Bank of Japan — Whether Bank of Japan entitled to jurisdictional immunity — Acts iure imperii and iure gestionis — The law of France

BLAGOJEVIC *v.* BANK OF JAPAN

France, Court of Cassation (First Civil Chamber). 19 *May* 1976

(Bellet, *President*; Ponsard, *Rapporteur*; Boucly, *Advocate-General*)

SUMMARY: *The facts*:—The appellant entered into a 10-year exclusive distribution agreement with a Japanese film company. Shortly afterwards the company notified the appellant of difficulties raised by the Bank of Japan, allegedly in the exercise of its responsibility for foreign exchange control, and the company later repudiated the agreement on the ground that it violated Japanese rules of public policy. The appellant brought an action against the company and the Court of Appeal of Paris, in a judgment of 14 May 1970 which became final, held that the contract was not void but could not be executed since it had not been authorised by the Japanese authorities. The company was therefore held liable to pay compensation but went into liquidation before doing so. The appellant then brought an action for damages against the Bank of Japan[1] claiming that it had connived with the company

[1] The appellant subsequently also brought an action for damages against the Japanese Minister of Finance and those proceedings are reported below at p. 86.

to obtain the repudiation of the agreement when the company got into difficulties, under the guise of operating exchange control procedures which did not apply to the agreement in question. The Bank claimed jurisdictional immunity. The *Tribunal de Commerce* of Paris held on 19 September 1972 that the Bank was only entitled to immunity in respect of acts carried out in the normal exercise of the responsibilities delegated to it by the State for exchange control but that such immunity did not apply to acts alleged to have been committed outside the normal exercise of those responsibilities. The claim of the appellant was nevertheless rejected on the merits. He appealed and the Court of Appeal of Paris held on 16 March 1974 that the Bank of Japan was entitled to absolute immunity from jurisdiction. The appellant again appealed.

Held:—The appeal was dismissed.

The Bank of Japan when carrying out its responsibilities for foreign exchange control did so upon the instructions and on behalf of the Japanese State and as such acted in the interests of the public service so that it was entitled to the benefit of jurisdictional immunity. The Court of Appeal had properly justified its granting of jurisdictional immunity in this ease by its finding that the bank had not acted pursuant to any object other than the interest of the public service.

The following is the text of the judgment of the Court:

On the two parts of the first ground of appeal—The facts, as stated by the judges in the lower courts, are that Zavicha Blagojevic entered into a contract on 1 September 1966 with the Japanese company Daiei Motion Picture Company Limited under the terms of which he was made sole distributor in Europe of films produced by Daiei and sole agent for the purchase of European films for showing in the cinemas which Daiei owned in Japan. In June 1967 Daiei informed Zavicha Blagojevic that since the agreement violated Japanese laws of public policy it considered itself to be discharged from its obligations. It appeared, from an affidavit made by the Bank of Japan and an oral statement by the Ministry of Foreign Affairs passing on information given by the bank that, according to the director of the bank, a request for authorization of the contract entered into with Zavicha Blagojevic could only be granted if following further communications with the latter it was specified firstly whether the contract was for services or for the establishment of an overseas office of the company and secondly what was the basis of the payment of a bonus provided for in Article 7 of the contract. On the basis of these statements it was held, in a judgment of the Court of Appeal of Parts of 14 May 1970 which became final, that the contract was not void but that since it had not been authorized by the Japanese authorities it could not be executed. Daiei was ordered to repair the damage which it had caused Zavicha Blagojevic by not applying for the required authorization.

Having failed to receive these damages from Daiei, which had gone into liquidation, Zavicha Blagojevic brought an action against the Bank of Japan for damages of 20,500,000 francs, alleging various wrongful dealings, namely:
—the refusal, contrary to the Articles of Agreement of the International Monetary Fund, to approve the contract of 1 September 1966 despite the fact that it was a current international transaction which was not subject to authorization as a result of exchange regulations;
—a praetorian practice of preliminary verbal communications which was irreconcilable with the normal role of the Bank of Japan and was used to exercise illegal control over current international transactions;
—the deliberate refusal to reply to requests from Zavicha Blagojevic in order to hide from him the reasons for the illegal refusal to approve the contract;
—affidavits made by the Bank of Japan so as to deceive the French courts and containing false allegations to the effect that authorization was necessary for contracts of the nature of the agreement in question;
—the presentation of an application for approval to the bank by means of preliminary verbal communications;
—the withholding of approval because of the form of the contract and its doubts both as to its object and as to the basis of the bonus;
—and the attested fact that it made its approval subject to fuller particulars being adduced on these points.

The Bank of Japan, claiming to have acted in the circumstances pursuant to instructions and on behalf of the Japanese State, in execution of its responsibilities for exchange control, denied that the French courts were competent.

The judgment under appeal granted the benefit of immunity from jurisdiction to the Bank of Japan. It is argued Firstly that this bank, a body governed entirely by private law, subject to Japanese commercial law and having a separate legal personality, cannot be considered to be an emanation of the Japanese state. Secondly, it is contended that whilst Japanese legislation authorises the bank to act in certain circumstances in liaison with the Minister of Finance in the field of foreign exchange control and therefore on the instructions and on behalf of the Japanese state, it is amply shown by the submissions of the parties, in particular by those of the bank, that it did not intervene in any way in the present case in its capacity as an "exchange control office" since it did not give a refusal to approve the disputed contract but merely replied to unofficial requests for clarification from the Daiei Company in the context of a quite extraordinary procedure which has no basis in any Japanese legal provision.

[This Court] considers, however, that the Court of Appeal correctly remarked that immunity from jurisdiction can be pleaded by foreign States and bodies acting pursuant to their instructions or on their behalf in respect of acts of public power or acts performed in the interest of a public service. It then stated that according to the Japanese legal texts which it had analysed the Bank of Japan in exercising its responsibility for exchange control acts pursuant to the instructions and on behalf of the Japanese state. Making a sovereign interpretation of the same texts the Court of Appeal considered that the attitude of the Bank of Japan, whether it consisted, as the bank claims, in asking for clarifications of the clauses of the contract or rather involved, as is alleged by Zavicha Blagojevic, a refusal at a certain moment to approve the contract, as well as its practice of "preliminary verbal communications" or unofficial consultations, corresponded to the very object of the power delegated to it by the State. The Court of Appeal properly concluded from these facts that this attitude and this practice were covered by immunity from jurisdiction and could not give rise to an action before the French courts. This ground of appeal is therefore unfounded.

On the three parts of the second ground of appeal—It is further alleged that the Court of Appeal departed from the distinction made by the judges in the lower courts between the various acts carried out by the bank and the false affidavits made by it and wrongly granted the benefit of immunity from jurisdiction with regard to both. It is argued firstly that the benefit of immunity should have been refused *en bloc* to the bank which only intervened after the Daiei Company had met with its initial difficulties in order to assist it in discharging itself from its contractual obligations and thus for a private interest disguised under the appearance of acts of public authority. Secondly it is claimed that in behaving in this way the Bank of Japan became an accomplice or collaborator in the violation of contractual obligations and that immunity from jurisdiction cannot allow it to escape from the consequences of its wrongful acts. Finally it is argued that the "improper and incoherent" transposition of the distinction in municipal administrative law between a wrong committed outside the performance of a public duty (*faute personnelle*) and a wrong committed in the performance of a public duty (*faute de service*) rests on the unproven and even false assumption that the bank acted in the interests of the public service.

[This Court] considers, however, that the Court of Appeal did not find that the Bank of Japan had acted so as to enable the Daiei Company to discharge itself from its obligations. The first two parts of this ground of appeal based on the existence of such an intention must therefore be rejected. Furthermore in stating expressly that the affidavit of 9 March 1968 was made in the interests of the public service the

Court gave a justification for its decision to grant immunity from jurisdiction to the Bank of Japan, even disregarding the superfluous reason based on the fact that Zavicha Blagojevic had not sued any natural person who could have committed a wrong outside the performance of a public duty (*faute personnelle*). It follows that this ground of appeal must also be rejected in all its parts.

For these reasons the Court dismisses the appeal against the judgment of the Court of Appeal of Paris of 16 March 1974.

[Reports: Bull. Civ., I, No. 181, p. 145; Clunet, 1976, p. 687; Revue critique, 1977, p. 359; R.G.D.I.P., 1977, p. 1208. (In French)]

ANNEX 295

A/CN.4/SER.A/2006/Add.1 (Part 2)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2006

Volume II
Part Two

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

UNITED NATIONS
New York and Geneva, 2013

NOTE

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

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

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

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

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

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

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

A/CN.4/SER.A/2006/Add.1 (Part 2)

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

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

(12) Other "tests" invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official,[195] diplomatic official[196] or State property[197] the claim will normally be direct, and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect.

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

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

Article 15. Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

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

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

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

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

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

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[191] See footnote 170 above.

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

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

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

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

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

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

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

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

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

Commentary

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

Paragraph (*a*)

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

(i) the local remedies are obviously futile;

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

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

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

(3) The "obvious futility" test, expounded by Arbitrator Bagge in the *Finnish Ships Arbitration*,[201] sets too high a threshold. On the other hand, the test of "no reasonable prospect of success", accepted by the European Commission of Human Rights in several decisions,[202] is too generous to the claimant. This leaves the third option, which avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Certain Norwegian Loans* case[203] and is supported by the writings of jurists.[204] The test, however, fails to include the element of availability of local remedies which was endorsed by the Commission in its articles on responsibility of States for internationally wrongful acts[205] and is sometimes considered as a component of this rule by courts[206] and writers.[207] For this reason the test in paragraph (*a*) is expanded to require that there are no "reasonably available local remedies" to provide effective redress or that the local remedies provide no reasonable possibility of such redress. In this form, the test is supported by judicial decisions which have held that local remedies need not be exhausted where: the local court has no jurisdiction over the dispute in question;[208] the national legislation justifying the acts of which the alien complains will not be reviewed by local courts;[209] the local courts are notoriously lacking in independence;[210] there is a consistent and well-established line of precedents adverse to the alien;[211] the local courts do not have the competence to grant an appropriate and adequate remedy to the alien;[212] or the respondent State does not have an adequate system of judicial protection.[213]

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[201] *Finnish Ships Arbitration* (see footnote 178 above), p. 1504.

[202] See *Retimag S.A.* v. *Federal Republic of Germany, Application No. 712/60, Decision of 16 December 1961,* European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1961*, pp. 385 *et seq.*, at p. 400; *X, Y and Z* v. *the United Kingdom, Application Nos. 8022/77 and 8027/77, Decision of 8 December 1979, European Commission of Human Rights, Decisions and Reports*, vol. 18, pp. 66 *et seq.*, at p. 74. See also the commentary to article 22 of the draft articles on State responsibility adopted by the Commission at its twenty-ninth session (footnote 173 above), p. 50, para. (60).

[203] *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 9, at p. 39.

[204] See G. Fitzmaurice, "Hersch Lauterpacht—the scholar as judge", BYBIL, vol. 37 (1961), pp. 1 *et seq.*, at pp. 60–61; and M. Herdegen, "Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen", in G. Ress and T. Stein (eds.), *Der diplomatische Schutz im Völker- und Europarecht: Aktuelle Probleme und Entwicklungstendenzen* (1996), pp. 63 *et seq.*, at p. 70.

[205] Article 44 requires local remedies to be "available and effective" (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 120).

[206] In *Loewen* (see footnote 59 above), the tribunal stated that the exhaustion of local remedies rule obliges the injured person "to exhaust remedies which are effective and adequate and are reasonably available" to him (para. 168).

[207] See C. F. Amerasinghe, *Local Remedies in International Law* (footnote 174 above), pp. 181–182, 203–204.

[208] See *Panevezys-Saldutiskis Railway* (footnote 26 above), at p. 18; *Arbitration under Article 181 of the Treaty of Neuilly*, AJIL, vol. 28 (1934), p. 760, at p. 789; *Claim of Rosa Gelbtrunk, Award of 2 May 1902*, and the *"El Triunfo Company"* (footnote 136 above), at pp. 463–466 and pp. 467–479 respectively; *The Lottie May Incident* (arbitration between Honduras and the United Kingdom), *Arbitral Award of 18 April 1899*, UNRIAA, vol. XV, p. 23, at p. 31; Judge Lauterpacht's separate opinion in the *Certain Norwegian Loans* case (footnote 203 above), pp. 39–40; and the *Finnish Ships Arbitration* (see footnote 178 above), p. 1535.

[209] See *Arbitration under Article 181 of the Treaty of Neuilly* (footnote above). See also *Affaire des Forêts du Rhodope central (fond), Decision of 29 March 1933*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405; the *Ambatielos Claim* (footnote 174 above), p. 119; and the *Interhandel* case (footnote 170 above), p. 28.

[210] See *Robert E. Brown (United States)* v. *Great Britain, Arbitral Award of 23 November 1923*, *UNRIAA*, vol. VI (Sales No. 1955.V.3), p. 120; and *Velásquez Rodríguez* v. *Honduras, Judgement of 29 July 1988,* Inter-American Court of Human Rights, *Series C, No. 4* (see also ILM, vol. 28 (1989), pp. 291 *et seq.*, at pp. 304–309).

[211] See *Panevezys-Saldutiskis Railway* case (footnote 26 above); *S.S. "Lisman", Award of 5 October 1937*, UNRIAA, vol. III, p. 1767, at p. 1773; *S.S. "Seguranca", Award of 27 September 1939, ibid.*, p. 1861, at p. 1868; *Finnish Ships Arbitration* (see footnote 178 above), p. 1495; *X.* v. *Federal Republic of Germany, Application No. 27/55, Decision of 31 May 1956, European Commission of Human Rights, Documents and Decisions, 1955–1956–1957*, p. 138; *X* v. *Federal Republic of Germany, Application No. 352/58, Decision of 4 September 1958,* European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 342, at p. 344; and *X.* v. *Austria, Application No. 514/59, Decision of 5 January 1960, Yearbook of the European Convention on Human Rights,1960*, p. 196, at p. 202.

[212] See *Finnish Ships Arbitration* (see footnote 178 above), pp. 1496–1497; *Velásquez Rodríguez* (see footnote 210 above); *Yağci and Sargin* v. *Turkey, Judgment of 8 June 1995, European Court of Human Rights, Series A: Judgments and Decisions*, vol. 319, p. 3, at p. 17, para. 42; and *Hornsby* v. *Greece, Judgment of 19 March 1997, ibid., Reports of Judgments and Decisions, 1997-II*, No. 33, p. 495, at p. 509, para. 37.

[213] See *Mushikiwabo and Others* v. *Barayagwiza, Decision of 9 April 1996, ILR*, vol. 107 (1997), pp. 457 *et seq.*, at p. 460. During the military dictatorship in Chile, the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies (see resolution No. 01a/88 of 12 September 1988, case 9755: Chile, *Annual Report of the Inter-American Commission on Human Rights, 1987–1988*, OEA/Ser.L/V/II.74 document 10 rev.1, p. 136).

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

Paragraph (*b*)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts,[215] human rights instruments and practice,[216] judicial decisions[217] and scholarly opinion. It is difficult to give an objective content or meaning to "undue delay", or to attempt to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British–Mexican Claims Commission stated in the *El Oro Mining* case: "The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter."[218]

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

Paragraph (*c*)

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

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required, there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State.[219] Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine in 1986, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State's airspace (as illustrated by the *Aerial Incident of 27 July 1955* case, in which Bulgaria shot down an El Al flight that had accidentally entered its airspace).[220] The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he would be expected to exhaust local remedies.

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[214] See *Finnish Ships Arbitration* (footnote 178 above), at p. 1504; and the *Ambatielos Claim* (footnote 174 above), at pp. 119–120.

[215] See the discussion of early codification attempts by F. V. García Amador, Special Rapporteur, in his preliminary report on State responsibility, *Yearbook ... 1956*, vol. II , document A/CN.4/96, pp. 173–231, at pp. 223–225; and article 19, paragraph 2, of the draft convention on the international responsibility of States for injuries to aliens, prepared in 1960 by the Harvard Law School, in Sohn and Baxter, *loc. cit.* (see footnote 71 above), at p. 577.

[216] International Covenant on Civil and Political Rights (art. 41, para. 1 (*c*)); American Convention on Human Rights: "Pact of San José, Costa Rica" (art. 46, para. 2 (c)); *Weinberger* v. *Uruguay, Communication No. 28/1978*, Human Rights Committee, *Selected Decisions under the Optional Protocol* (second to sixteenth sessions) (United Nations publication, Sales No. E.84.XIV.2), vol. 1, p. 57, at p. 59; *Las Palmeras*, *Preliminary Objections, Judgment of 4 February 2000*, Inter-American Court of Human Rights, *Series C: Decisions and Judgments*, No. 67, p. 64, para. 38; and *Erdoğan* v. *Turkey, Application No. 19807/92, Decision of 16 January 1996*, European Commission of Human Rights, *Decisions and Reports*, vol. 84–A, pp. 5 *et seq.*, at p. 15.

[217] See *El Oro Mining and Railway Company (Litd.) (Great Britain)* v. *United Mexican States, Decision No. 55 of 18 June 1931*, UNRIAA, vol. V (Sales No. 1952.V.3), p. 191, at p. 198; and the *Case concerning the Administration of the Prince von Pless, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 11, at p. 16.

[218] See footnote 217 above.

[219] See C. F. Amerasinghe, *Local Remedies in International Law* (footnote 174 above), at p. 169; and T. Meron, "The incidence of the rule of exhaustion of local remedies", BYBIL, *1959*, vol. 35, pp. 83 *et seq.*, at p. 94.

[220] *Case Concerning the Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Preliminary Objections, Judgment of 26 May 1959, I.C.J. Reports 1959*, p. 127.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in support of the existence of such an exception in the *Interhandel*[221] and *Salem*[222] cases, in other cases[223] tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case[224] and the *Aerial Incident of 27 July 1955* case,[225] arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the ICJ make a decision on this matter. In *Trail Smelter*,[226] involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others[227], in which local remedies were dispensed with where there was no voluntary link, have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can be explained, however, on the basis that they provide examples of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) Paragraph (*c*) does not use the term "voluntary link" to describe this exception, as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. In practice, it would be difficult to prove such a subjective criterion. Hence paragraph (*c*) requires the existence of a "relevant connection" between the injured alien and the host State and not a voluntary link. This connection must be "relevant" in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the question whether the injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual, by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word "relevant" best allows a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien. There must be no "relevant connection" between the injured individual and the respondent State at the date of the injury.

Paragraph (*d*)

(11) Paragraph (*d*) is designed to give a tribunal the power to dispense with the requirement of exhaustion of local remedies where, in all the circumstances of the case, it would be manifestly unreasonable to expect compliance with the rule. This paragraph, which is an exercise in progressive development, must be narrowly construed, with the burden of proof on the injured person to show not merely that there are serious obstacles and difficulties in the way of exhausting local remedies, but that he is "manifestly" precluded from pursuing such remedies. No attempt is made to provide a comprehensive list of factors that might qualify for this exception. Circumstances that may manifestly preclude the exhaustion of local remedies possibly include the situation in which the injured person is prevented by the respondent State from entering its territory, either by law or by threats to his or her personal safety, and thereby denying him or her the opportunity to bring proceedings in local courts, or where criminal syndicates in the respondent State obstruct him or her from bringing such proceedings. Although the injured person is expected to bear the costs of legal proceedings before the courts of the respondent State, there may be circumstances in which such costs are prohibitively high and "manifestly preclude" compliance with the exhaustion of local remedies rule.[228]

Paragraph (*e*)

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

> In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly.[229]

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

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[221] Here the ICJ stated: "it has been considered necessary that the *State where the violation occurred** should have an opportunity to redress it by its own means" (see footnote 170 above), at p. 27.

[222] In the *Salem* case, an arbitral tribunal declared that "[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence" (see footnote 72 above), at p. 1202.

[223] *Finnish Ships Arbitration* (see footnote 178 above) and the *Ambatielos Claim* (see footnote 174 above).

[224] *Case of Certain Norwegian Loans (France* v. *Norway), Oral Pleadings of France, I.C.J. Pleadings 1957*, vol. I, p. 408.

[225] *Case concerning the Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Preliminary Objections, Oral Pleadings of Israel, I.C.J. Pleadings 1959*, pp. 531–532.

[226] *Trail Smelter,* UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

[227] *Case of the "Virginius"* , reported in J. B. Moore, *A Digest of International Law,* vol. 2, Washington D.C., United States Government Printing Office, 1906, p. 895, at p. 903; and the *Jessie* case, reported in AJIL, vol. 16 (1922), pp. 114–116.

[228] On the implications of costs for the exhaustion of local remedies, see *Loewen* (footnote 59 above), at para. 166.

[229] *Viviana Gallardo* et al., *Decision of 13 November 1981, No. G 101/81*, Inter-American Court of Human Rights, *Series A: Judgments and Opinions*, para. 26 (see also *ILR*, vol. 67 (1984), p. 587). See also *ELSI* (footnote 149 above), p. 42, para. 50; and the *De Wilde*, *Ooms* and *Versyp* cases (*"Vagrancy Cases"*), *Judgment of 18 June 1971*, European Court of Human Rights, *Series A: Judgments and Decisions*, p. 12 (see also *ILR*, vol. 56 (1980), p. 337, at p. 370, para. 55).

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

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

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien, are irrevocable, even if the contract is governed by the law of the host State.[230]

(15) Waiver of local remedies must not be readily implied. In the *ELSI* case, a Chamber of the ICJ stated in this connection that it was "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".[231]

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions[232] and the writings of jurists[233]support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement "does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national".[234] That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the ICJ in the *ELSI* case.[235] A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case, it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,[236] paragraph (*e*) does not refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. It is wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

Part Four

MISCELLANEOUS PROVISIONS

Article 16. Actions or procedures other than diplomatic protection

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

Commentary

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

(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights (art. 41), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 11), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21), the European Convention on Human Rights (art. 24), the American Convention on Human Rights: "Pact of San

[230] See *Viviana Gallardo* et al. (footnote 229 above) and the *De Wilde, Ooms* and *Versyp* cases (*"Vagrancy Cases"*) (*ibid.*).

[231] *ELSI* (see footnote 149 above), at p. 42, para. 50.

[232] See, for example, *Steiner and Gross* v. *Polish State, Case No. 322 (30 March 1928)*, *Annual Digest of Public International Law Cases: Years 1927 and 1928,* A. D. McNair and H. Lauterpacht (eds.), London, Longmans, Green and Co., 1931, p. 472; and *American International Group, Inc.* v. *The Islamic Republic of Iran, Award No. 93-2-3 of 19 December 1983, Iran–United States Claims Tribunal Reports*, vol. 4, Cambridge, Grotius, 1985, p. 96.

[233] See, for example, S. M. Schwebel, *International Arbitration: Three Salient Problems*, Cambridge, Grotius Publishers, 1987, pp. 117–121.

[234] F. A. Mann, "State contracts and international arbitration", BYBIL, *1967*, vol. 42, p. 32.

[235] See footnote 149 above. In the *Panevezys-Saldutiskis Railway* case (see footnote 26 above), the PCIJ held that acceptance of the optional clause under Article 36, paragraph 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule (as had been argued by Judge van Eysinga in his dissenting opinion, *ibid*., pp. 35–36).

[236] See the *ELSI* case (footnote 149 above), p. 44, para. 54; *United States–United Kingdom Arbitration concerning Heathrow Airport User Charges, Award of 30 November 1992, ILR*, vol. 102 (1996), pp. 216 *et seq.*, at p. 285, para. 6.33; and the *Foti and Others Case, Merits, Judgement of 10 December 1982, ibid.*, vol. 71 (1986), pp. 366 *et seq.*, at p. 380, para. 46.

ANNEX 296

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

AMBIENTE UFFICIO S.P.A. AND OTHERS
(Case formerly known as **GIORDANO ALPI AND OTHERS**[1])
(CLAIMANTS)

and

THE ARGENTINE REPUBLIC
(RESPONDENT)

(ICSID Case No. ARB/08/9)

DECISION ON JURISDICTION AND ADMISSIBILITY

ARBITRAL TRIBUNAL
Judge Bruno Simma, President
Professor Karl-Heinz Böckstiegel, Arbitrator
Dr. Santiago Torres Bernárdez, Arbitrator

Secretary of the Tribunal:
Mrs. Anneliese Fleckenstein

Assistant to the President of the Tribunal
Dr. Andreas Th. Müller

Representing the Claimants:
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Avv. Luca G. Radicati di Brozolo and
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Representing the Respondent:
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Date: February 8, 2013

[1] For the change of name, see *infra* para. 354.

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VI. COMPLIANCE WITH ARTICLE 8 OF THE ARGENTINA-ITALY BIT – THE PREREQUISITES OF AMICABLE CONSULTATIONS AND RECOURSE TO ARGENTINE COURTS

A. Positions of the Parties

1. Contentions by Respondent

552. Respondent argues that Art. 8 of the Argentina-Italy BIT provides for a multi-layered, sequential dispute resolution system (*R I § 269; R II § 429; R III § 88*). It gives rise to mandatory jurisdictional requirements; failure to respect them implies a bar to the jurisdiction of the Tribunal (*Tr p. 22/3*). As the prerequisites of Art. 8 of the BIT must be satisfied before Argentina can be considered to have consented to arbitration through the BIT and as Claimants have improperly skipped the first two steps (i.e. amicable consultations and recourse to the Argentine courts), it follows that Argentina has not consented and that the Centre has no jurisdiction (*R I § 273; R II § 431; R III § 84*).

553. As to the *amicable consultations* requirement of Art. 8(1), Respondent points out that Claimants have acknowledged their failure to make any attempt to resolve their purported claims against Argentina (*R I § 271*). Furthermore, Respondent submits that it conducted good-faith consultations with innumerable purchasers and creditor groups since its default in 2001 and that the 2005 Exchange Offer was a product of these substantial discussions and reflected the contributions of many creditor groups (*R I §§ 278, 279; R II §§ 459, 460; Tr p. 418/6*). Moreover, Law No. 26.017 did not make settlement with Argentina impossible or futile. It only required legislative consent to any settlement which is corroborated by the reopening of the Exchange Offer in 2010 (*R I § 280; R II § 462*). Argentina further contends that Claimants could have attempted to negotiate with Respondent before Law No. 26.017 was enacted (*R II § 461; Tr p. 34/15*).

554. Moreover, Respondent considers the prerequisite to have *recourse to domestic courts* for 18 months to be mandatory. It is a precondition to avail oneself of international arbitration according to Art. 8(3) of the Argentina-Italy BIT (*R I §§ 283, 286, 287*). Respondent points out in that regard that Claimants do not dispute their failure to submit their claims to the Argentine courts (*R I § 282*).

555. In addition, Respondent contests that the Claimants can rely on "the so-called futility exception" (*R I § 288*). Respondent submits in that regard that Claimants err when claiming futility because it would be impossible for Argentine courts to resolve the dispute within 18 months. For one, it is far from impossible for Argentine courts to decide a case similar to the present one in 18 months (*R I §§ 289, 293*). More importantly, Art. 8(3) of the BIT does not require the dispute to be *resolved* within the timeframe stipulated therein, but only that the dispute is *submitted* to domestic courts (*R I §§ 291, 294; R II § 466; R III § 94*).

556. In Respondent's opinion, there are at least two reasons to include a requirement to have recourse to domestic courts in the Argentina-Italy BIT: On the one hand, the Contracting Parties intended to give local courts an opportunity to decide a dispute before it could be submitted to international arbitration so that judicial authorities would be afforded the opportunity to review – and, if appropriate, to correct – government acts before setting in motion the intricacies and consequences associated with international investment arbitration. The provision gives the host State the opportunity to address the allegedly wrongful act within the framework of its domestic legal system, thus avoiding potential international responsibility therefor. On the other hand, the Contracting Parties could have the chance to resolve the dispute in their territories in a shorter period of time than international arbitration (*R I §§ 292, 293; R II §§ 467, 468*).

557. As regards Claimants' reference to Law No. 26.017, Argentina contends that the law in no way inhibits Claimants from submitting the dispute to local courts (*R I § 297*). Furthermore, Respondent deems Claimants' reference to the 2005 *Galli* Judgment of the Supreme Court of Argentina[282] and its progeny unavailing since this was a purely domestic case. By virtue of Art. 75 para. 22 of the Argentine Constitution, international treaties such as the Argentina-Italy BIT rank above domestic legislation in the legal

[282] Corte Suprema de Justicia de la Nación, *Galli, Hugo G. y otro/Poder Ejecutivo Nacional* s/ amparo, Final decision, 5 April 2005 (Fallos: 328:690), Case No. G. 2181 XXXIX; see Annex CLA 37.

hierarchy.[283] Accordingly, Claimants could have relied on the BIT before the Argentine courts in order to have Law No. 26.017 (assuming that it was not in compliance with the international obligations of Argentina, which is disputed by Respondent) set aside by the domestic courts as unconstitutional (*R I § 296; R II § 473; Tr pp. 36/21, 431/6, 433/15*).

558. In regard to Claimants' submissions regarding futility due to the high costs of commencing proceedings in local courts, Argentina contends that the mere fact that such recourse might be burdensome or would cause the investor to incur costs does not defeat the requirement for Claimants to meet the conditions of Art. 8 of the BIT. High costs do not render the local recourse option futile, just expensive (*R II §§ 470, 471*). Furthermore, Respondent submits that remedies before Argentine courts are inexpensive (*Tr p. 434/9*). Should any investor consider that the costs incurred by him to satisfy the BIT requirements are unreasonable, he may attempt to recover such costs by resorting to the international arbitral tribunal (*R III § 114*).

559. Concerning the most-favoured nation clause (hereinafter "MFN clause") argument made by the Claimants, Respondent contends, first, that the MFN clause does not apply to dispute resolution mechanisms (*R I § 272; R II § 477*). Secondly, the MFN clause only applies to investments in the territory of Argentina (*R II § 491*). Thirdly, even if the clause applied to dispute resolution provisions, Claimants have not shown that the dispute settlement provisions contained in the Argentina-US BIT[284], notably its Art. VII para. 3, are more favourable than those of the Argentina-Italy BIT. In particular, it does not amount to less favourable treatment for Claimants to be first required to resolve the dispute in domestic courts (*R II §§ 494, 495*).

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[283] Constitution of Argentina, as sanctioned by the Constituent General Congress on 1st May 1853, reformed by the National Convention "ad hoc" on 25 September of 1860 and with the Reforms of the Conventions of 1866, 1898, 1957 and 1994, Art. 75 para. 22: "Corresponde al Congreso […] Aprobar o desechar tratados concluidos con las demás naciones y con las organizaciones internacionales y los concordatos con la Santa Sede. Los tratados y concordatos tienen jerarquía superior a las leyes."; Translation: "Congress is empowered […] To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws."

[284] Treaty between the USA and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of 14 November 1991; see Annex CA 39 (hereinafter "Argentina-US BIT").

2. Contentions by Claimants

560. Claimants accept that there exists an obligation for the Parties, under Art. 8 of the Argentina-Italy BIT, to resort to amicable consultations and to have recourse to domestic courts prior to taking a dispute to international arbitration (*Tr p. 226/10*). However, in their opinion, this provision does not lay down mandatory jurisdictional requirements but merely provides for procedural prerequisites which do not need to be strictly followed. Thus, non-compliance is not a bar to ICSID jurisdiction (*C I § 382; C II § 164*). According to the Claimants, these procedural prerequisites constitute reasonable prior steps to avoid an international arbitration which could prove useless if other simpler or less costly solutions to the dispute could be found. In contrast, recourse to international arbitration should not be unduly jeopardized or procrastinated where there are no realistic prospects that the other means for the settlement of the dispute will prove workable or successful (*C I § 379*). The Claimants submit that, in the case at hand, any effort to resort to the mechanisms indicated in arts. 8(1) and (2) of the BIT would have proved futile since there was no realistic prospect for the Parties to reach an agreement on the present dispute or to obtain justice at the hands of the courts of Argentina (*C I § 388*).

561. As regards more specifically the prerequisite of *amicable consultations* pursuant to Art. 8(1) of the BIT, the Claimants submit that the Respondent has always displayed a hostile and uncooperative attitude towards them (*Request § 87*). They refute the argument that the 2005 Exchange Offer showed Argentina's willingness to consult the bondholders since the terms of the offer were elaborated unilaterally by Argentina and then imposed on bondholders who were not involved in the negotiations (*C I §§ 391 et seq.; C II § 170; Tr p. 227/21*).

562. According to the Claimants, the possibility of reaching an amicable settlement was finally precluded by Art. 3 of Law No. 26.017 which forbids Respondent from entering into any judicial, out-of-court or private settlement with bondholders who did not participate in the 2005 Exchange Offer (*Request § 87; C I §§ 393 et seq.; C II § 178; Tr p. 229/18; C III § 174*). The Claimants consider the absence of consultations before the enactment of Law No. 26.017 to be irrelevant since consultations were only required before the request for international arbitration was submitted, so that Claimants were

certainly not under an obligation to consult before 2005 (*Tr pp. 229/7, 464/21; C III § 173*). Given the fact that Art. 8 para. 1 of the Argentina-Italy BIT merely requires amicable consultations to be pursued "insofar as possible", Claimants cannot be blamed for not having had recourse to consultations since these were impossible (*C I § 387; C II § 180*).

563. Concerning the prerequisite to have *recourse to the domestic courts* of the host State for a period of 18 months prior to resorting to international arbitration according to Art. 8(2) of the BIT, Claimants have contended that this is not a mandatory requirement, but merely an option for the investor (*C I § 398*). To this effect, they rely on the language of the provision according to which disputes "may" be submitted to the courts. Claimants contrast this wording with that of Art. 10 of the Argentina-Germany BIT ("shall") which was pertinent in the *Wintershall* case and seek to distinguish that case on this basis (*C I §§ 385, 387*).

564. Furthermore, even if recourse to domestic courts were considered mandatory, Claimants submit that any legal action before Argentine courts on their part would have been entirely futile, and this for several reasons: First, it is clearly impossible for the local courts to decide a case of such magnitude in only 18 months (*Request § 89; C I § 419; C II §§ 208, 211; Tr p. 234/10*).

565. Secondly, Law No. 26.017, notably its arts. 3[285] and 6[286], is considered by Claimants to have been absolutely categorical in shutting the door to any possibility to obtain redress

[285] Law No. 26.017, Art. 3: "Prohíbese al Estado nacional efectuar cualquier tipo de transacción judicial, extrajudicial o privada, respecto de los bonos a que refiere el articulo 1° de la presente ley." (as to the Spanish original see Annex RA 72). See also the translation provided by the Respondent: "The national Government is precluded from entering into in *[sic]* any type of judicial, extra-judicial or private settlement with respect to the bonds to which Article 1 of the present law refers." (Annex RA 72). The translations as provided by the Claimants read: "It is prohibited to the National Government to make any kind of [*C II:* The national Government is precluded from entering into in *(sic)* any type of] judicial, out-of-court or private settlement, in respect of the bonds referred to in article 1 of this Act [i.e. the bonds that were not tendered for exchange in the 2005 Exchange Offer]." (*C I § 393, n. 326*; *C II § 174 n. 76*).

[286] Law No. 26.017, Art. 6: "Sin perjuicio de lo establecido precedentemente, los bonos del Estado nacional elegibles de acuerdo a lo dispuesto por el Decreto N° 1735/04, depositados por cualquier causa o título a la orden de tribunales de cualquier instancia, competencia y jurisdicción […] quedarán reemplazados, de pleno derecho, por los 'BONOS DE LA REPUBLICA ARGENTINA A LA PAR EN PESOS STEP UP 2038', en las condiciones establecidas para la asignación, liquidación y emisión de tales bonos por el Decreto N° 1735/04 y sus normas complementarias." The English translation provided by the Respondent reads: "Notwithstanding the above

before Argentine courts (*Request § 88; C I § 411; C II § 201*). This is corroborated by the legal stance taken by the Supreme Court of Argentina in the afore-mentioned judgment in the *Galli* case[287] which demonstrated that any bondholder attempting to obtain payment by resorting to the courts of Argentina will face a rejection of its claims so that any such attempt would have proven a totally useless and frustrating exercise (*C I §§ 415, 418; C II § 203; Tr p. 231/7*). Furthermore, Claimants refute Respondent's argument that *Galli* only related to domestic cases and that the Claimants could have relied before the Argentine courts on the supremacy of the Argentina-Italy BIT over Law No. 26.017 according to Art. 75 para. 22 of the Constitution of Argentina (*C II § 204; Tr p. 233/16; C III § 179*). In *Galli*, the Supreme Court declared the restructuring legislation to be a non-justiciable political question and recognized in this and subsequent decisions the constitutionality of Law No. 26.017 (*C II § 205; C III § 180*). Moreover, the position taken by the Argentine Government in the present proceedings squarely contradicts the one which the same Government vigorously defended in domestic litigation (*C I §§ 416-418; C II § 206; Tr p. 234/3*).

566. Thirdly, Claimants contend that to bring proceedings before the Argentine courts they would have to pay a judicial tax (*tasa de justicia*) in an amount of 3 % of the amount claimed. In addition, since they are not domiciled and do not possess real estate in Argentina, they would also have to submit a guarantee (*garantía de arraigo*) which can be very costly. Moreover, if the Claimants abandoned the proceedings after the elapse of the 18 months, they would be required to pay the costs of the proceedings and would not be entitled to recover their own costs (*C I § 422; Tr p. 235/6; C III § 182*).

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established, the bonds of the national Government eligible under the terms of Decree No. 1735/04, deposited pursuant to any cause or title on the order of any court of any venue, competence, and jurisdiction […] shall be replaced, by operation of law, with the 'BONDS OF THE ARGENTINE REPUBLIC AT PAR IN PESOS STEP UP 2038,' according to the terms established for the assignment, liquidation and issue of such bonds by Decree No. 1735/04 and its complementary norms." (see Annex RA 72). As to the Claimants' translation see *C II § 174, n. 76*: "Notwithstanding the above provisions, the bonds of the national Government eligible under the terms of Decree No. 1735/04, deposited pursuant to any cause or title to the order of any court or any instance, competence, and jurisdiction […] shall be replaced, by operation of law, with the 'BONDS OF THE ARGENTINE REPUBLIC AT PAR IN PESOS STEP UP 2038', according to the terms established by Decree No. 1735/04 and its complementary norms for the assignment, liquidation and issue of such bonds."

[287] See *supra* note 282.

567. In any event, the Claimants contend that they are not required to have recourse to domestic courts on account of the MFN clause contained in Art. 3 of the Argentina-Italy BIT. In the eyes of the Claimants, this clause applies to all matters covered by the BIT (*C I § 406*). According to the Claimants, both the wording of the provision and ICSID case law admit that MFN clauses extend to dispute resolution mechanisms (*C I §§ 404, 406*). Hence, Art. 3 of the Argentina-Italy BIT allows Claimants to rely on Art. VII para. 3 of the Argentina-US BIT and thus to refer the dispute to ICSID arbitration with no need to satisfy the 18-month period before the domestic courts (*C I § 400; C II § 189*).

B. Findings of the Tribunal

568. According to Art. 8(1)-(3) of the Argentina-Italy BIT,

> (1) Any dispute relating to investments that arises between an investor from one of the Contracting Parties and the other Party, with respect to matters regulated by this Agreement, shall be, insofar as possible, resolved through amicable consultations between the parties to the dispute.
>
> (2) If such consultations do not provide a solution, the dispute may be submitted to a competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment is located.
>
> (3) If a dispute still exists between investors and a Contracting Party, after a period of 18 months has elapsed since notification of the commencement of the proceeding before the national jurisdictions indicated in paragraph 2, the dispute may be submitted to international arbitration.

569. Respondent has contended, and Claimants have agreed (*Tr p. 226/10*), that these provisions give rise to obligations for a party who wants to avail itself of the dispute resolution mechanism offered by the Argentina-Italy BIT. The Parties disagree, however, on the precise legal nature of these obligations (1.) as well as on the scope of the prerequisites of amicable consultations (2.) and of recourse to the domestic courts (3.).

1. Nature of the obligations enshrined in Art. 8(1)-(3) of the Argentina-Italy BIT

570. Respondent has insisted throughout the proceedings that Art. 8(1)-(3) of the Argentina-Italy BIT create a "multi-layered, sequential dispute resolution system" constituting "mandatory jurisdictional requirements". In contrast, in Claimants' view, these only give rise to "procedural prerequisites". Both Parties have drawn the Tribunal's attention to

numerous authorities and cases in which legal issues which they deemed comparable to those in the present dispute were at stake. In particular, the International Court of Justice, relying on its case-law on the matter, recently qualified negotiation requirements stemming from Art. 29 of the *Convention on the Elimination of all Forms of Discrimination against Women* as affecting its jurisdiction.[288] In contrast, the Tribunal in the *Abaclat* case – which had the same BIT before it as the present Tribunal – concluded that Art. 8(1)-(3) of the Argentina-Italy BIT were requirements of admissibility rather than jurisdiction.[289]

571. Further examples could be added at will. The major conclusion to be drawn for them, however, is that there has not been a consistent approach on these matters by investment treaty tribunals[290], let alone in international law more generally. This does not come as a surprise since each international arbitral tribunal or judicial body must craft its decision on the basis of the applicable substantial provisions of international law and within the specific institutional and procedural framework in which it is embedded. This limits the extent to which a tribunal such as the present one can rely on distinctions made by other tribunals which may perfectly make sense from their respective viewpoint.

572. The present Tribunal is called to interpret and apply the Argentina-Italy BIT which does not differentiate between "mandatory" and "non-mandatory" requirements as well as "jurisdictional", "admissibility" or "procedural" prerequisites. Nor is such distinction contained in the ICSID Convention or the Arbitration Rules. Hence, as far as the

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[288] See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda*), *Jurisdiction and Admissibility, Judgment,* ICJ Reports 2006, 6, para. 88; as to Art. 75 of the WHO Constitution, Art. XIV para. 2 of the Unesco Constitution, and Art. 14 para. 1 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation see, in a similar vein, *ibid.,* paras. 99 *et seq.*, 107 e*t seq.* as well as 117 *et seq.* Furthermore, in *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russia*), *Preliminary Objections, Judgment, 1 April 2011*, para. 141, the negotiation requirement in Art. 22 of the Convention was considered a precondition to be fulfilled before the seisin of the Court, i.e. a precondition to the exercise of the Court's jurisdiction (*ibid.*, para. 183). See, however, the *jurisprudence constante* of the International Court of Justice which treats the requirement of exhaustion of local remedies (in the context of diplomatic protection) as an admissibility issue; see e.g. *Interhandel Case (Switzerland* v. *USA), Preliminary Objections Judgment*, ICJ Reports 1959, 6, 23 *et seq.*; see also *I. Brownlie*, Principles of Public International Law, 7th ed., 2008, 492 *et seq.*

[289] *Abaclat* Decision, para. 496.

[290] See *Williams*, Jurisdiction and Admissibility (note 202) 919.

applicable law is concerned, there is no *a priori* reason for the Tribunal to enter into the doctrinal intricacies of these distinctions and the related academic and judicial discourse.

573. That being said, the mandate given to the Tribunal by the Parties states that there should first be "a preliminary phase in the proceedings covering *jurisdiction and admissibility*".[291] For this reason, these concepts are relevant to the Tribunal and this becomes manifest in the very title of its present Decision, i.e. "Decision on Jurisdiction and Admissibility". At the same time, this does not force the Tribunal to draw a neat dividing line between these two concepts and to endorse one of the many controversial views articulated as to where the exact difference lies between them. The Tribunal would like to note in this context that the terminology applied by the Parties themselves does not seem to be free from ambiguities.[292]

574. The Tribunal would consider that the mission with which it has been entrusted by the Parties does not call it, in the first place, to give an answer as to whether the legal issues at stake are to be classified as questions of jurisdiction or admissibility. The Tribunal's mandate – and it is to this mandate that the title of the present Decision refers – rather requires it to take note of and thoroughly examine all legal claims made by the Parties under the labels of both jurisdiction and admissibility and to decide whether these are justified in law or not.

575. What is thus crucial, in the Tribunal's opinion, is that all claims of lack of jurisdiction and admissibility filed by Respondent in its Memorial and elaborated upon in its further written and oral submissions will have to be perused and, if considered as not justified, rejected before the dispute could proceed to the merits phase. In no way would the distinction between jurisdictional and admissibility issues suggest a different degree of "bindingness". Hence, irrespective of whether others may identify a different degree of "bindingness" with regard to the two notions, in this Tribunal's view and at least with regard to the requirements set forth by Art. 8(1)-(3) of the Argentina-Italy BIT, if any of

[291] See Minutes of the First Session, point 14 (emphasis added); *supra* para. 5.

[292] For instance, while some of Respondent's submissions qualify violations of obligations under Art. 8 of the Argentina-Italy BIT as obstacles to the admissibility of the claims at stake (*R I § 282*), other passages suggest the opposite, i.e. that such violations would give rise to jurisdictional obstacles (*R I §§ 273, 287, 298*).

these requirements in their interpretation by the Tribunal and applied to the facts of the case, has not been met by Claimants, the Tribunal would have to dismiss the case irrespective of whether the requirement would qualify as one of jurisdiction or admissibility.

576. In order to answer these questions, the Tribunal will now turn to the submissions of the Parties as to whether the Claimants have complied with the requirements of prior amicable consultations and recourse to the domestic courts of Argentina, respectively.

2. The prerequisite of amicable consultations

577. Art. 8(1) of the Argentina-Italy BIT states the requirement that any dispute relating to investments falling into its scope of application "shall be, insofar as possible, resolved through amicable consultations". In the Tribunal's opinion, the language of the provision clearly suggests that it creates a duty for the Parties to enter into consultations. This becomes manifest in the authentic versions of Art. 8(1) of the BIT where the use of "será […] solucionada" in Spanish and "sarà […] risolta" in Italian indicates the existence of a legal obligation.[293] This result is corroborated by the conditional clause in para. 2 which authorizes the Parties to proceed to subsequent dispute resolution mechanisms (only) "if such consultations do not provide a solution".

578. The present Tribunal is aware that the Tribunal in the *Abaclat* case came to a different result in view of the very same provision of the Argentina-Italy BIT. It notably concluded that "the consultation requirement set forth in Article 8(1) BIT is not to be considered of a mandatory nature but as the expression of the good will of the Parties to try firstly to settle any dispute in an amicable way."[294] The Tribunal justified this conclusion chiefly by relying on the use of the phrase "insofar as possible" (in Spanish: "en la medida de lo posible"; in Italian: "per quanto possibile") in Art. 8 para. 1 of the Argentina-Italy BIT.

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[293] See the analogous situation in *Wintershall AG v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 where Art. 10 para. 2 of the Argentina-Germany BIT similarly provided for that a "dispute […] shall […] be submitted" ("la controversia […] será sometida" in Spanish and "Meinungsverschiedenheit […] ist […] zu unterbreiten" in German) and where the deciding arbitral tribunal correctly identified this wording as being "indicative of an 'obligation' – not simply a choice or option" and "legally binding" (*ibid.*, para. 119).

[294] *Abaclat*, Decision, para. 564.

579. In contrast, the present Tribunal would rather follow the reasoning in the Dissenting Opinion of Professor Abi-Saab who has rightly pointed out that the addition of this phrase does not eliminate the binding character of the provision, but characterizes it as a certain type of binding provision, namely an "obligation of means" or of "best efforts".[295] As also the International Court of Justice has emphasized on several occasions, provisions directing the parties to consult or negotiate may well constitute legally binding obligations, non-compliance with them having legal effects, including the dismissal of the case. Whether and to which extent they set forth binding obligations, is a matter of interpretation of the relevant provisions.[296]

580. A party defying a duty to engage, as far as possible, in amicable consultations would therefore have to be prepared to see its claim denied to be admitted to the merits phase. However, before reaching such conclusion, the Tribunal must clarify the exact nature of the "duty to consult insofar as possible". Two remarks are in place in this regard:

581. First, from its very character as an obligation of means and not of result follows that "an obligation to negotiate does not imply an obligation to reach an agreement."[297] Some tribunals go even so far as to qualify consultation or negotiation clauses as mere procedural requirements whose violation would have no effect on jurisdiction or the admissibility of the claim.[298] Yet, this is not the view taken by this Tribunal. At the same time, one must take note of the fact that in the few cases where investment tribunals

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[295] Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 26.

[296] See, e.g., *Railway Traffic between Lithuania and Poland*, *Advisory Opinion, 15 October 1931*, PCIJ Series A/B, No. 42, 116; *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands), Judgment*, ICJ Reports 1969, 3, para. 85; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay*), *Judgment*, ICJ Reports 2010, 14, paras. 149, 150; see also *supra* note 288.

[297] *Railway Traffic between Lithuania and Poland, Advisory Opinion, 15 October 1931,* PCIJ Series A/B, No. 42, 116.

[298] See, e.g., UNCITRAL (NAFTA), *Ethyl Corp. v. Canada*, Award on Jurisdiction, 24 June 1998, para. 85; *Salini Costruttori S.p.A. and Italstrate S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, paras. 74-88 and 187; UNCITRAL, *Ronald S. Lauder v. Czech Republic*, Final Award, 3 September 2001, para. 187; *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 184; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 100; see, however, the approach in *Antoine Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, paras. 90-93; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004; see furthermore *Schreuer*, Consent to Arbitration (note 100) 844 *et seq*.

struck out cases for a violation of a consultation or negotiation requirement, this was mostly for the reason that the respective clauses contained minimum periods of time for consultations which were not respected by the claimants.[299] This is not the case here, however, where we have a *simple* consultation clause which does not reserve any minimum requirement of time for consultations.

582. Secondly, the qualifying phrase "insofar as possible" which is commonly found in international investment treaties,[300] indicates that if the Claimants can show that consultations were *not possible*, they cannot be held to have breached the duty incumbent upon them. This does not mean reading a futility exception into Art. 8(1) of the Argentina-Italy BIT, but it is a direct and independent consequence of the very wording of the provision in question. Furthermore, there is considerable authority for the proposition that mandatory waiting periods for consultations (let alone a *simple* duty to consult, as in the present case) do not pose an obstacle for a claim to proceed to the merits phase if there is no realistic chance for meaningful consultations because they have become futile or deadlocked.[301] In this regard and particularly taking note of the fact that Art. 8(1) of the Argentina-Italy BIT envisages consultations with a view of "resolving" the dispute at stake, the Tribunal would endorse the *Abaclat* Tribunal's

[299] *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 315; *Murphy Exploration and Production Company International v. Ecuador*, ICSID Case No. ARB/08/4, Award, 15 December 2010, paras. 90 *et seq.*, in particular paras. 131 and 132.

[300] See, e.g., Art. 26 para. 1 of the Energy Charter Treaty; Art. XIII para. 1 of the Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments; Art. X para. 1 of the Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Hungary on the Promotion and Reciprocal Protection of Investments; Art. 8 para. 1 of the Agreement between the Republic of Austria and Romania on the Promotion and Reciprocal Protection of Investments.

[301] As to the pertinent case-law of the International Court of Justice see the references in *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russia)*, *Preliminary Objections, Judgment*, *1 April 2011*, para. 159. In the field of arbitration see, for instance, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, para. 92: "attempts at a negotiation solution [prove] futile"; *Biwater Gauff (Tanzania), Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 343: "settlement obviously impossible" and "negotiations obviously futile"; UNCITRAL, *Ronald S. Lauder v. Czech Republic*, Final Award, 3 September 2001, paras. 188-191; *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 184. See also *Schreuer*, Consent to Arbitration (note 100) 846 stating in relation to mandatory waiting periods: "What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiation table if these negotiations are obviously futile."

conclusion that consultation "is to be reasonably understood as referring not only to the technical possibility of settlement talks, but also to the possibility, i.e. the likelihood, of a positive result" and that "it would be futile to force the Parties to enter into a consultation exercise which is deemed to fail from the outset. Willingness to settle is the *sine qua non* condition for the success of any amicable settlement talk."[302]

583. Hence, while a *consultation as far as possible* requirement of the type enshrined in Art. 8(1) of the Argentina-Italy BIT creates a legal obligation, this obligation is not violated if it is established that (a) the sufficient minimum amount of consultations was actually conducted, or at least offered, or that (b) amicable consultations in order to resolve the case at stake were not possible in the first place.

584. Applying these considerations to the facts of the present case, no consultations between the Parties have taken place. To be sure, Claimants submit that after 2001 "there were several attempts by groups of holders of Argentine bonds to enter into negotiations with Argentina for a reasonable proposal" (*C II § 167*). However, Respondent contends (*R I § 271*; *R IV § 16*), and Claimants concede, that they "did not personally attempt consultations with Argentina before the commencement of these proceedings" (*C IV § 19*). In this respect, the Tribunal concludes that Claimants could not establish that a minimum amount of consultations between them and the Respondent were conducted.

585. The Tribunals thus turns to the second alternative, i.e. that meaningful consultations with a view of resolving the dispute at stake were not possible. In 2005, during the time the Exchange Offer was open for acceptance by Argentina's creditors, the Argentine Congress adopted Law No. 26.017 which forbade the country's government from entering into any judicial, non-judicial or private settlement with the non-participating bondholders as well as from reopening the Exchange Offer.[303] In fact, this law prevented the Argentine Government from "enter[ing] into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of

[302] *Abaclat* Decision, para. 564.

[303] As to Art. 3 of Law No. 26.017 see *supra* note 285.

prior condition".[304] The Government could have discharged its duty "so to conduct [itself] that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it"[305] only at the cost of violating Law No. 26.017. Hence, at least since the adoption of this law it was clear that no realistic possibility of meaningful consultations to settle the dispute with the Argentine Government existed.

586. This result is not affected by the fact that the Argentine Congress could have at any time suspended or eliminated the ban on consultations and negotiations and that it actually did so in 2010 in order to open the way for the new Exchange Offer (*R I § 280; R II § 462*). What is crucial in this regard is that, first, the potential partner for negotiations, i.e. the Argentine Government, was not in a position to act accordingly while the law was in force, i.e. from 2005 onwards, and, second, that the very reason for the non-availability of a venue for meaningful consultations was above all Congress' adoption of Law No. 26.017.

587. As far as Respondent argues that Claimants were free to initiate consultations *before* the adoption of Law No. 26.017, the Tribunal would consider that there existed no duty for the Claimants to do so in order to comply with Art. 8(1) of the Argentina-Italy BIT. The provision is entirely silent regarding the time when consultations have to take place. The only temporal requirement to be drawn from the provision is that this must be done before the party in question has recourse to the domestic courts and proceeds to international arbitration. As the Request was filed on 23 June 2008, the Tribunal cannot therefore see why the Claimants would have fallen short of complying with Art. 8(1) of the BIT by not having had initiated consultations before 2005 (i.e. the year of adoption of Law No. 26.017).

[304] *North Sea Continental Shelf Cases (Germany/Denmark; Germany/ Netherlands), Judgment*, ICJ Reports 1969, 48, para. 85.

[305] *Ibid*., para. 85.

588. Accordingly, the Tribunal concludes that Claimants did not violate the requirement to engage in amicable consultations incumbent upon them by virtue of Art. 8(1) of the Argentina-Italy BIT.

3. The prerequisite of having recourse to domestic courts

a) Binding character of the requirement

589. As regards the second element in the three-step dispute resolution system, i.e. the requirement to have recourse to domestic courts, the Tribunal is of the opinion that the clear wording of Art. 8 paras. 2 and 3 of the Argentina-Italy BIT permits of no other conclusion than that the provision sets forth a binding precondition for access to international arbitration.

590. This follows first from the unqualified "if" at the beginning of para. 3 – "if such consultations do not provide a solution" (in Spanish: "Si esas consultas no aportaran una solución"; in Italian: "Se tali consultazioni non consentissero una soluzione") – which makes the very right to start an arbitration dependent on prior submission of the dispute to the local courts of the Respondent and the lapse of a period of 18 months since the notification of the commencement of national proceedings.

591. Secondly, this holds true in spite of the use of the word "may" (in Spanish: "podrá"; in Italian: "potrà") in Art. 8 para. 2 of the BIT. This paragraph speaks of the possibility to submit a dispute to the domestic courts of the host State in case of the continuing existence of a dispute subsequent to (or for lack of) consultations. If an investor does not want to abandon his claims at this point, he "may" proceed in the order envisaged by the BIT's dispute settlement system by approaching the host State's courts. Far from characterizing the recourse to domestic courts as a voluntary exercise on the way to international arbitration, para. 2 must be read in context with para. 3. There, the further possibility (in Spanish: "podrá"; in Italian: "potrà"; in English: "may") to submit the dispute to international arbitration is conditioned by the twofold obligation (a) to previously have recourse to the host State's courts and (b) to notify the commencement of these national proceedings. As a consequence, the *possibility* to proceed to international

arbitration is at the disposal of the investor only when not having failed to satisfy the *obligation* of having recourse to domestic courts.

592. Thirdly, the reference to the *Wintershall* case where in Art. 10(2) of the pertinent Argentina-Germany BIT the wording "shall […] be submitted" ("será sometida" in Spanish; "ist […] zu unterbreiten" in German) is used in relation to the recourse to domestic tribunals[306], as opposed to the phrase "may be submitted" in Art. 8(2) of the Argentina-Italy BIT, is of no avail to the Claimants. As has been pointed out, the term "may" refers to the possibility for the investor to further proceed with the claim, but does not dispose of the need to make use of this possibility in the manner prescribed by the BIT, i.e. his obligation to have recourse to domestic courts before submitting an arbitration request. To suggest an *argumentum e contrario* here would be tantamount to ignoring the logic structure, and interdependence of the different steps, of Art. 8 paras. 1-3 of the Argentina-Italy BIT.

593. This Tribunal is not called upon to interpret similar provisions in other treaties. But at least in application to the specific rulings regarding Art. 8 of the BIT, the Tribunal is for the above reasons not convinced by the concerns and criticism raised vis-à-vis clauses "provid[ing] for a mandatory attempt at settling the dispute in the host State's domestic courts for a certain period of time"[307] inasmuch as this has prompted investment arbitral tribunals or distinguished scholars in the field to challenge the binding character of such clauses.[308] The Tribunal cannot ignore the fact that such clauses are commonly found in investment treaties[309] and that they are typically drafted in a manner that manifests their

[306] *Wintershall AG v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, paras. 119 *et seq*.

[307] *Schreuer*, Consent to Arbitration (note 100) 847; see also *L. Markert*, Streitschlichtungsklauseln in Investitionsschutzabkommen (2010) 210 referring to such clauses as "temporary limited local remedies clauses" ("*befristete local remedies-Klauseln*").

[308] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 224 which speaks in respect of an analogous clause in the applicable BIT of a "curious requirement" and "sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view". See also *C. Schreuer,* Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, 4 The Law and Practice of International Courts and Tribunals (2005) 1, at 4, 5; see similarly *id.*, ICSID Convention Commentary, Art. 26, para. 204; *P. Peters*, Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties, 44 Netherlands International Law Review (1997) 233, at 245.

[309] See *Schreuer*, Calvo's Grandchildren (note 308) 16.

binding nature. These characteristics are clear indications that the Contracting Parties of the respective BIT intended to give such clauses some effect. Treaty provisions should not be construed in a way that takes away from them all useful effect (*ut res magis valeat quam pereat*). It is thus necessary for a tribunal called to interpret such a clause to duly acknowledge its binding character and to identify which purposes it may serve in the context of the applicable BIT. This also holds true in the present case.

b) Legal consequences of disregarding the requisite of having recourse to Respondent's courts

594. Given the fact that Art. 8(2) and (3) of the Argentina-Italy BIT give rise to a legally binding requirement of prior recourse to the Respondent's courts and that it is undisputed between the Parties that Claimants did not submit the dispute to Argentine courts before initiating the present arbitration proceedings on 23 June 2008[310], the Respondent contends that the Tribunal should reject to hear the case.

595. The *Abaclat* Tribunal which had to deal with a similar situation and the very same BIT reached the following conclusion in this regard: "[T]he wording of Article 8 BIT itself does not suffice to draw specific conclusions with regard to the consequence of non-compliance with the order established in Article 8. […] Claimants' disregard of the 18 months requirement is in itself not yet sufficient to preclude Claimants from resorting to arbitration."[311] These statements were harshly criticized in Professor Abi-Saab's Dissenting Opinion, where they were qualified as "very odd indeed", since they ignored that

> no instrument, laying down jurisdictional limits or admissibility conditions, specifies the legal consequences of non observance of these limits or non fulfilment of these conditions. These consequences are embedded in the very legal classification of these as jurisdictional limits or admissibility conditions. According to the general rules of law and rules of general international law, non

[310] See *R I § 282* referring to Claimants' Reply to Respondent's First Set of Documents Requests, para. 25 (Annex RA 113, para. 25): "There are no documents relating to any attempt of NASAM's or of any of the Claimants to resolve any of the claims at issue in this arbitration through resort to local courts or tribunals [...]."

[311] *Abaclat* Decision, paras. 579, 580.

> compliance begets the inevitable legal sanction of dismissing the case, as falling outside the jurisdiction of the tribunal or as inadmissible.[312]

596. This Tribunal would be inclined to endorse the latter position. If a requirement set forth by Art. 8 of the Argentina-Italy BIT were not complied with, the venue to international arbitration would not be open. However, at this stage the Tribunal would consider it premature to come to such conclusion. Claimants argue that the prerequisite of having recourse to the domestic courts of Argentina has not been violated by, or does not apply to, Claimants, and this for two reasons: First, they argue that paras. 2 and 3 of Art. 8 of the BIT are inapplicable in the present case because recourse to Respondent's courts would have been futile. Secondly, the Claimants seek to take refuge to the MFN clause in Art. 3 para. 1 of the Argentina-Italy BIT in combination with Art. VII(3) of the Argentina-US BIT. The Tribunal will now examine the futility argument (c) and the MFN clause argument (d) in turn.

c) The futility exception

(1) Existence of the futility exception

597. Claimants submit that there exists an exception to the duty to have recourse to Respondent's courts in case such recourse would be futile. Respondent implicitly accepts the existence of a futility exception, but argues that the relevant threshold is very high and that the facts of the case do not lend themselves to give rise to a situation of futility (*R I §§ 290, 291*).

598. Even though the Parties do therefore not disagree as to the *existence* of a futility exception with regard to prerequisite of having recourse to domestic courts, as laid down in Art. 8(2) and (3) of the Argentina-Italy BIT, the Tribunal must assure itself that this view of the Parties constitutes a sound interpretation of these provisions. The question of the applicable *threshold* can only be addressed once it is clear that the exception exists in the first place.[313]

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[312] Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 28.

[313] See *infra* paras. 608 *et seq.*

599. It appears to be generally accepted in international law that obligations requiring an individual to approach a State's local courts before a claim may be taken to the international plane do not apply unconditionally. Under certain circumstances, the lack of a claim's prior submission to domestic courts does not lead to the dismissal of the claim, notably in the law of diplomatic protection. Indeed, for a State to bring a claim on behalf of one of its nationals under the title of diplomatic protection, the individual concerned must, as a matter of principle, exhaust the legal remedies available to him in the State where the alleged injury took place.[314] However, only those remedies must be used which are available "as a matter of reasonable possibility."[315] This exception to the local remedies rule, the so-called *futility* rule, is now universally recognized in the law of diplomatic protection. It is set out in Art. 15(a) of the Draft Articles of the International Law Commission on Diplomatic Protection of 2006 (hereinafter "2006 ILC Draft Articles on Diplomatic Protection") in the following manner: "Local remedies do not need to be exhausted where […] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress."[316]

600. That being said, Art. 8(3) of the Argentina-Italy BIT does not mention or refer to such exception. This is not the end of the matter, however. According to the general rules of treaty interpretation as codified in Art. 31 of the VCLT, it is required that when interpreting a treaty provision "any relevant rules of international law applicable in the relations between the parties" shall be "taken into account, together with the context" (Art. 31 para. 3 lit. c of the VCLT).[317] The term "relevant rules of international law" also includes pertinent customary international law.[318]

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[314] See *Elettronica Sicula S.p.A. (ELSI) (USA* v. *Italy), Judgment*, ICJ Reports 1989, 15, para. 50; see further Art. 14 of the 2006 ILC Draft Articles on Diplomatic Protection; *Brownlie*, Principles of Public International Law (note 288) 492.

[315] See *Certain Norwegian Loans (France* v. *Norway), Judgment*, ICJ Reports 1957, 9, Separate Opinion of Judge Lauterpacht, 34, at 39; *Barcelona Traction, Light and Power Company, Limited (Second Phase), Judgment*, ICJ Reports 1970, 3, Separate Opinions of Judge Tanaka, 114, at 144, 145 and of Judge Gros, 267, at 284; see *Brownlie*, Principles of Public International Law (note 288) 495 with further references.

[316] Art. 15 lit. a of the 2006 ILC Draft Articles on Diplomatic Protection.

[317] As to the relevance of this provision in treaty interpretation see notably the *Oil Platforms Case (Iran* v. *USA)*, *Judgment,* ICJ Reports 2003, 161, paras. 41 *et seq.* as well as *Certain Questions of Mutual Assistance in Criminal*

601. Thus, in order to determine whether the futility exception also applies in the context of a provision such as Art. 8 (3) of the Argentina-Italy BIT, it is necessary for the Tribunal to assess whether the customary law exception of futility regarding the rule of exhaustion of local remedies in diplomatic protection is sufficiently comparable to the requirement of recourse to the domestic courts of Art. 8 (3) of the Argentina-Italy BIT to identify the former as a rule of international law "relevant" to the latter.

602. In that regard, the Tribunal would consider that exhaustion of local remedies clauses and the prerequisite to have recourse to domestic courts for a certain amount of time are similar inasmuch as they both require to turn to the local judicial authorities before the claim can be successfully brought to the international plane. Both serve the purpose of honoring the host State's sovereignty by providing the latter the opportunity to settle a dispute in its own fora before moving on to the international level. In a similar vein, Respondent has submitted that clauses of the type of Art. 8 (3) of the Argentina-Italy BIT intend to give local courts an opportunity to decide a dispute before turning to international arbitration so that judicial authorities would be afforded the opportunity to review – and, if appropriate, to correct – government acts before setting in motion the intricacies and consequences associated with international investment arbitration. Indeed, the provision gives the host State the opportunity to address the allegedly wrongful act within the framework of its own domestic legal system, thus avoiding potential international responsibility therefor (*R I § 292; R II § 467*). Furthermore, the Contracting

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Matters (Djibouti v. *France), Judgment*, ICJ Reports 2008, 177, paras. 112 *et seq.*; in particular regarding investment law see *A. van Aaken*, Fragmentation of International Law: The Case of International Investment Law, 17 Finnish Yearbook of International Law (2008), 91, at 103 and 108; see *Markert*, Streitschlichtungsklauseln in Investitionsschutzabkommen (note 307) 167, 168 and 213 *et seq*. It is worth noting that also Professor Abi-Saab's Dissenting Opinion in the *Abaclat* case, para. 28 refers to the relevance of "general rules of law and rules of general international law".

[318] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 208; *C. McLachlan*, The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention, 54 International and Comparative Law Quarterly (2005) 279, at 310 *et seq.* with further references to the pertinent case-law; International Law Commission, Report on Fragmentation of International Law (2006), 7; *A. van Aaken*, Defragmentation of Public International Law Through Interpretation: A Methodological Proposal, 16 Indiana Journal of Global Legal Studies (2009), 483, at 497, 498.

Parties could have the chance to resolve the dispute in their territories in a shorter period of time than international arbitration (*R I § 293; R II § 468*).[319]

603. Accordingly, in view of the strong structural parallels between these two types of clauses, the Tribunal does not consider it a far-fetched conclusion to assume that the futility exception to the exhaustion of local remedies rule in the field of diplomatic protection is, in the light of Art. 31(3)(c) of the VCLT, also applicable to clauses requiring recourse to domestic courts in international investment law. The conclusion that the futility of local remedies constitutes an exception to the duty of having recourse to local courts is also affirmed in the case-law and in legal academia.[320]

604. Yet, there is a major difference between these two types of clauses. While in the field of diplomatic protection the affected individual is generally required to "exhaust" local remedies, in the case of requirements of recourse to domestic courts the investor typically has to submit the dispute to the local courts for a certain amount of time. Given the realities of settlement of complex disputes and the multi-stage character of domestic judicial proceedings, of which the Contracting States of BITs are certainly well aware, it is hardly plausible (and insofar everyone seems to agree) to impute to such clauses the purpose of resolving an investment dispute by passing through the domestic legal system and obtaining a final judgment within that amount of time. The consequence of the

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[319] For further reasons see UNCITRAL (PCA), *ICS Inspection and Control Services Limited v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 269, n. 298.

[320] *Biwater Gauff (Tanzania), Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 343; *Saipem S.p.A. v. Bangladesh,* ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 153. See, however, for the opposite view (regarding the UK-Argentina BIT) UNCITRAL, *BG Group Plc. v. Argentina*, Final Award, 24 December 2007, para. 146 (but accepting a variation of the futility argument on the basis of Art. 32 of the VCLT; see *ibid.*, para. 147) as well as the subsequent decision of the US Court of Appeals for the District of Columbia Circuit, *Argentina v. BG Group Plc.*, 665 F.3d 1353 (D.C. Circuit, 17 January 2012), 2 and 17; on which 106 AJIL (2012) 393 *et seq*. See further – again regarding the US-Argentina BIT – *ICS Inspection and Control Services Limited v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 263, citing the *Abaclat* Decision as the only decision brought to the Tribunal's attention where an element of futility had been used successfully to allow derogation from the prerequisite of recourse to domestic courts, and concluding that futility had not been demonstrated to the Tribunal's satisfaction (see *ibid.*, paras. 269 and 273); see, in a similar vein, (regarding the Germany-Argentina BIT) *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 198, where the Tribunal appears to affirm, in principle, the existence of a futility exception, but concludes that futility was not demonstrated by the Claimant in the case in question (see *ibid.*, para. 191); see, however, the Dissenting Opinion of Judge Brower, para. 15. See in general *C. Schreuer*, Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road, Journal of World Investment and Trade (2004), 231, at 238.

recognition of the limited purpose of such clauses is not, however, to challenge the soundness and relevance of the latter at all[321], but to direct the attention on these very purposes and enquire about the functions which such clauses may actually serve in the limited time foreseen, in the present case 18 months.[322]

605. Such amount of time may indeed be sufficient for the commencement of formal court proceedings to prompt the Parties to the dispute to agree on a court or out-of-court settlement or for the national courts to render a first-instance judgment in the investor's favour which the host State does not appeal. Since the domestic judicial system may precisely serve such purposes where and inasmuch as there exist "reasonably available local remedies to provide effective redress", the futility exception appears to be the appropriate standard also in regard to recourse to domestic courts clauses.

606. What is more, since the futility exception is even capable of disposing of a duty to exhaust local remedies – i.e. the use of (virtually) all means offered by the domestic dispute settlement system for a (virtually) unlimited amount of time –, this must hold true *a fortiori* for a duty to have recourse to local remedies for a limited amount of time. Accordingly, the only aspect where there exists a major difference between the two types of clauses, i.e. the time aspect, does not prevent the drawing of a parallel between them regarding the futility exception; it rather militates in favour of drawing this parallel.

607. Hence, the Tribunal concludes that an interpretation of BIT clauses such as Art. 8(3) of the Argentina-Italy BIT, in the light of Art. 31(3)(c) of the VCLT, results in admitting a futility exception also in respect to such clauses, on the model of the futility exception to the exhaustion of local remedies rule in the field of diplomatic protection.

(2) Threshold of the futility exception

608. Given the widely analogous structure and purposes of clauses on the exhaustion of local remedies in the law of diplomatic protection and clauses providing for recourse to

[321] See, however, *P. Juillard*, Chronique de droit international économique – Investissements, 41 Annuaire Français de Droit International (1995) 604, at 608; *A. Crivellaro*, Consolidation of Arbitral and Court Proceedings in Investment Disputes, 4 Law and Practice of International Courts and Tribunals (2005) 371, at 399.

[322] See *supra* para. 593.

domestic courts such as Art. 8(3) of the Argentina-Italy BIT, the Tribunal considers it appropriate to also draw on the International Law Commission's work on diplomatic protection as regards the *threshold* for the futility exception. The standard was articulated in the afore-cited Art. 15(a) of the 2006 ILC Draft Articles on Diplomatic Protection in the following manner: "Local remedies do not need to be exhausted where […] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress […]".[323]

609. This standard was carefully drafted and documented by the International Law Commission, as becomes manifest in the Commentary to the Draft Articles.

> (3) The "obvious futility" test, expounded by Arbitrator Bagge in the *Finnish Ships Arbitration*, sets too high a threshold. On the other hand, the test of "no reasonable prospect of success", accepted by the European Commission of Human Rights in several decisions, is too generous to the claimant. This leaves the third option which avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies.
>
> This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case and is supported by the writings of jurists. […]
>
> In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question; the national legislation justifying the acts of which the alien complains will not be reviewed by local courts; the local courts are notoriously lacking in independence; there is a consistent and well-established line of precedents adverse to the alien; the local courts do not have the competence to grant an appropriate and adequate remedy to the alien; or the respondent State does not have an adequate system of judicial protection.
>
> (4) In order to meet the requirements of paragraph (a) it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted. The

[323] See *supra* para. 599.

> decision on this matter must be made on the assumption that the claim is meritorious.[324]

610. In the light of the International Law Commission's well-reasoned and well-balanced restatement of the threshold applicable to the futility exception, the Tribunal does not consider it necessary to rely on alternative standards proposed by the Parties. In that regard, it will not follow Claimants' submission that recourse to international arbitration "should not be unduly jeopardized or procrastinated where there are no realistic prospects that other means for the settlement of the dispute will prove workable or successful" (*C I § 379*). Likewise, in view of what has been stated above, the Tribunal is not convinced that "according to international arbitration panels, the test of futility is 'obvious futility' or 'manifest ineffectiveness' – in other words, more than alleged probability of failure is required", as argued by the Respondent (*R I §§ 290, 296, n. 402f.; R II §§ 465, 473*).[325]

611. Furthermore, the Tribunal would wish to point out that since the present case only regards a requirement to have temporary recourse to domestic courts, as opposed to a fully-fledged exhaustion of local remedies requirement, the threshold to be met for the futility exception to be realized in the present case cannot possibly be considered higher than in the context of diplomatic protection; on the contrary, it is arguably rather lower.

(3) Application of the futility exception to the present case

612. Claimants marshal three separate arguments in favour of the futility exception being fulfilled in the present case, with the Respondent opposing all of these. The Tribunal will now examine them in turn.

613. (a) Claimants submit that any legal action on their part before Argentine courts would have been an entirely futile exercise since it is clearly impossible for the local courts to decide a case of such magnitude in only 18 months (*Request § 89; C I § 419; C II §§ 208, 211; Tr p. 234/10*). However, as has been already pointed out above[326], Respondent (*R I*

[324] ILC Draft Articles on Diplomatic Protection, Commentary, Art. 15, nr. 3 (footnotes omitted).

[325] Respondent notably refers to the United States Restatement (Third) of Foreign Relations Law according to which the futility exception applies only when local remedies are "clearly sham or inadequate, or their application is unreasonably prolonged", § 713 cmt. f (1986).

[326] See *supra* para. 604.

§§ 291, 294; R II § 466; R III § 94) is right to submit that Art. 8(3) of the BIT may not be construed to require the dispute to be *resolved* by a final judgment in the domestic court system within 18 months, but only that the dispute is *submitted* to the domestic courts.

614. To begin with, the provision solely calls for the dispute not to be submitted to international arbitration before "a period of 18 months has elapsed since notification of the *commencement* of the proceeding before the national jurisdictions" (emphasis added). Furthermore, the very existence of Art. 8(4) of the Argentina-Italy BIT[327] confirms that the Parties to the BIT considered it not to be a rare case that domestic proceedings would still be pending when the arbitration is initiated. In addition, by expressly recognizing that a case with a certain complexity in the factual and legal realm could hardly be dealt with in a period of 18 months in any legal system (notably further taking into account the multi-level nature of national court systems) (*Tr p. 468/12*), Claimants themselves suggest that construing the provision as setting forth a time standard for the final disposal of the dispute cannot be a sound interpretation of the provision in question. Otherwise, the 18 months period which was expressly agreed upon by the Parties would be rendered nugatory in most real-life investment disputes.

615. (b) In Claimants' view, Law No. 26.017 was absolutely categorical in shutting the door to any possibility to obtain redress before Argentine courts (*Request § 88; C I § 411; C II § 201*). They consider this to notably hold true for Art. 6 of the Law[328] since it prevented the domestic courts from fulfilling the very functions the *recourse to domestic courts* prerequisite was said to serve. Respondent counters that Claimants could have set aside Law No. 26.017 (assuming that it was not in compliance with the international obligations of Argentina) by arguing before the domestic courts that, by virtue of Art. 75 para. 22 of the Argentine Constitution, international treaties to which Argentina is a party rank higher in the hierarchy of the Argentine legal system than laws adopted by Congress (*R I § 296; R II § 473; Tr pp. 36/21; 431/6; 433/15*).

[327] "From the moment an arbitral proceeding is commenced, each of the parties to the dispute will adopt all the necessary measures in order to desist from the ongoing judicial proceeding."

[328] See *supra* note 286.

616. Claimants contend, however, that such a course of action was not to be expected from the Argentine courts, since the legal stance taken by the Supreme Court of Argentina in its 2005 *Galli* Judgment[329] demonstrated that any bondholder attempting to obtain payment by resorting to the domestic courts of Argentina would face a rejection of his claims, so that any such attempt would have constituted a totally useless and frustrating exercise (*C I §§ 415, 418; C II § 203; Tr p. 231/7*). Respondent counters this argument by emphasizing that *Galli* was a purely domestic case including exclusively domestic bondholders so that it cannot be taken as guidance for how the Argentine judicial system would have treated non-domestic bondholders, notably in view of Art. 75 para. 22 of the Constitution.

617. In *Galli*, the Supreme Court remanded an appellate court decision which had ordered Respondent to pay certain amounts due to certain Argentine nationals under bonds which the latter had not tendered for exchange, and upheld the compatibility of the debt restructuring legislation with the Argentine Constitution. As regards the reasons for this decision, they are laid out in quite some detail in the Opinion of the Procurator-General of the Nation (pp. 1-29) which the seven Justices of the Supreme Court expressly endorsed (p. 30). Against this background, the *Galli* judgment can be said to be based on the following findings:

- Both the Procurator-General and the Justices emphasize the powers of Congress, under arts. 75 paras. 7 and 8 of the Argentine Constitution, to settle the payment of the domestic and foreign debt of the Nation and to fix the general budget, and refer to the "monetary sovereignty" (*soberanía monetaria*) of Congress (p. 23; per Justices Zaffaroni and Lorenzetti, § 10, p. 55).
- Against this background, the debt restructuring process is qualified as belonging to the political sphere and thus generally not being subject to judicial review, notwithstanding a rather generic test of "reasonability" (*carácter razonable*) and non-discrimination of the measures in question, but which does not change the general picture of judicial deference vis-à-vis the political echelons (p. 26; per

[329] See *supra* para. 557.

Justices Maqueda and Highton de Nolasco, § 12, p. 42; per Justices Zaffaroni and Lorenzetti, § 9, p. 54; per Justice Argibay, § 4, p. 64).

- Furthermore, it is pointed out that participation in the Exchange Offer was an option for the bondholders and that those who did not participate acted voluntarily and thus exposed themselves to the consequences of their behaviour (per Justices Maqueda and Highton de Nolasco, §§ 18, 19, pp. 46, 47). The investors were aware that the laws adopted by Congress forbade the executive power to reopen the exchange process as well as the possibility of entering into any kind of judicial, out-of-court or private transaction with regard to the bonds that were not exchanged (per Justice Argibay, § 7, pp. 65, 66).
- The Procurator-General and the Justices of the Supreme Court strongly draw upon the Supreme Court's *Brunicardi* case[330] which dealt with the foreign sovereign debt of Argentina and measures taken in this regard by the Argentine Government in 1983. Accordingly, if a Government decided to suspend the payment of debt for reasons of financial necessity or public interest, this was generally accepted by the international community (p. 20). According to the Supreme Court in *Brunicardi*, there exists a principle of international law that precludes a State's international responsibility in case of suspension or modification, in whole or in part, of the payment of the external debt, in the event the State is forced to do so due to reasons of financial necessity (p. 22; per Justices Maqueda and Highton de Nolasco, § 10, p. 39; per Justices Zaffaroni and Lorenzetti, §§ 13, 14, pp. 59, 60).

618. The Tribunal would consider that these arguments apply, in principle, with equal force to non-domestic bondholders. In particular given the Supreme Court's stance on international law, it is very doubtful whether a reference to Art. 75 para. 22 of the Argentine Constitution and to Argentina's international obligations under the BIT would have changed the picture. It may well be that the Constitution endows international treaties which a higher normative rank than laws, but a BIT would still be inferior to the provisions of the Constitution itself. The Supreme Court in *Galli* emphasizes the powers

[330] Fallos 319:2886.

of Congress to settle domestic and foreign debt, notably in emergency situations, and accepts the debt restructuring process as emanating from this constitutional power. The fact that the Supreme Court qualifies the restructuring legislation to be generally non-justiciable by the courts and confirms its reasonable character suggests that the Supreme Court was not prepared to interfere with the exercise of powers by Congress which, in the Supreme Court's view, were reserved to Congress by the Constitution itself.

619. Furthermore, *Galli* was followed by two later decisions of the Argentine Supreme Court in 2008 in which it expressly upheld the approach taken in *Galli*.[331] Hence, when Claimants submitted the Request in 2008 – and this is the perspective from which the futility *vel non* of having recourse to Argentine courts must be assessed – they were confronted with a line of Supreme Court cases manifesting that the latter was not willing to let the judiciary interfere with the debt restructuring decisions of Congress regarding the emergency situation of the early 2000s.

620. Given the jurisprudence of the Supreme Court of Argentina and in the light of the circumstances prevailing in the present case, the Tribunal concludes that having recourse to the Argentine domestic courts and eventually to the Supreme Court would not have offered Claimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile. Hence, Claimants did not violate the duty to have recourse to Argentine courts under Art. 8(2) and (3) of the Argentina-Italy BIT when they submitted the Request for Arbitration on 23 June 2008.

621. The Tribunal would like to add, to its knowledge, since 1994, i.e. the introduction of the new Art. 75 para. 22 into the Argentine Constitution, no domestic law was struck down for being incompatible with a BIT.

622. (c) As regards the cost argument, there can be no doubt that approaching the local courts will create additional costs for the investor. However, as the International Law Commission has rightly pointed out in the context of the duty to exhaust local remedies

[331] *Lucesoli, Daniel Bernard c/ Poder Ejecutivo Nacional s/ amparo*, Case No. L. 542. XLIII, 9 September 2008 (Annex CLA-38) and *Rizzuti, Carlos Pablo c/ Poder Ejecutivo Nacional s/ amparo,* Case No. R. 483. XLIV, 22 December 2008 (Annex CLA-39).

in cases of diplomatic protection, it is not sufficient to show that those remedies are "difficult or costly. The test is […] whether the municipal system of the respondent State is reasonably capable of providing effective relief."[332] While Claimants contend that filing their claim in the Argentine courts may have given rise to substantial costs, they have not established that the financial burden imposed upon them would reach an extent that the Argentine court system cannot be deemed reasonably capable of providing effective relief. To reach such conclusion on the basis of mere financial reasons can only be envisaged, if at all, in exceptional circumstances.

623. In addition, Art. 8(4) of the Argentina-Italy BIT provides that "[f]rom the moment an arbitral proceeding is commenced, each of the parties of the dispute will adopt all the necessary measures in order to desist from the ongoing judicial proceeding." This provision may help to alleviate the financial burden by avoiding or reducing costs incumbent upon Claimants inasmuch as it also commits a Party to take the necessary steps to allow the other Party to desist from the domestic proceedings. Hence, once the 18 months term has expired and a Party decides to proceed to international arbitration, the other Party must, to the extent possible, adopt the necessary measures so that no additional costs will arise for the former Party due to the mere fact of exercising a right expressly granted to it by the BIT, namely Art. 8(3) of the BIT. Any other interpretation would not be consistent with an application of Art. 8(4) in good faith. As a possible consequence, if a Party used instruments of domestic law available to it to make the other Party leaving the domestic proceedings overly costly so as to actually restrain it from proceeding to international arbitration, this might constitute a violation of Art. 8(4) of the BIT and might lead the aggrieved Party to sue for the loss incurred in the subsequent arbitral proceedings.

(4) The Tribunal's conclusions and the Decision in the *Abaclat* case

624. The Tribunal in the *Abaclat* case came to the same result, viz., that the duty to have recourse to Argentine courts, according to Art. 8(2) and (3) of the Argentina-Italy BIT, was not violated by Claimants, albeit on the basis of a different reasoning. It did not want

[332] ILC Draft Articles on Diplomatic Protection, Art. 15(a), Commentary; see *supra* note 324.

to rely so much on the "general principle of futility" but rather on a "weighting of the specific interests at stake." This weighing of interests of the Parties aims at taking into serious consideration the host State's interest of having an opportunity to address the allegedly wrongful act within the framework of its own domestic legal system before resorting to international arbitration, and then at comparing this interest with that of the Claimants of being provided with an efficient dispute resolution mechanism. In the *Abaclat* Tribunal's opinion, "the relevant question is not 'could the dispute have been efficiently settled before the Argentine courts?', but 'was Argentina deprived of a fair opportunity to address the dispute within the framework of its own domestic legal system because of Claimants' disregard of the 18 months litigation requirement?'"[333] "[T]his opportunity must not only be a theoretical opportunity, but there must be a real chance in practice that the Host State, through its courts, would address the issue in a way that could lead to an effective resolution of the dispute".[334]

625. On the basis of that approach to the question, the *Abaclat* Tribunal concluded that "[i]n the light of the Emergency Law[335] and other relevant laws and decrees, which prohibited any kind of payment of compensation to Claimants, the Tribunal finds that Argentina was not in a position to adequately address the present dispute within the framework of its domestic legal system. As such, Argentina's interest in pursuing this local remedy does not justify depriving Claimants of their right to resort to arbitration for the sole reason that they decided not to previously submit their dispute to the Argentinean courts."[336]

626. The reasoning of the *Abaclat* Tribunal is committed to an approach focusing on "the context, as well as […] the purpose and aim of Article 8."[337] While this wording evokes elements of Art. 31 of the VCLT, the Tribunal's decision was harshly criticized in the Dissenting Opinion of Professor Abi-Saab for "tak[ing] the liberty of striking out a clear

[333] *Abaclat* Decision, para. 581 as well as paras. 582 and 584.

[334] *Ibid.*, para. 582.

[335] The *Abaclat* Tribunal hereby refers to Law No. 26.017, also referred to as *ley Cerrojo* (see *ibid.*, para. 78). As to the ambiguity of the majority decision in this regard (which also refers to the Public Emergency and Reform Law of 2002 as "Emergency Law"; *ibid.*, para. 60) see *C IV § 19, n. 12* and *R IV 16, n. 62*.

[336] *Abaclat* Decision, para. 588.

[337] *Ibid.,* para. 579.

conventional requirement, on the basis of its purely subjective judgment."[338] The present Tribunal has chosen a different path for its own reasoning on the matter and has, in the previous sub-section, laid out in detail how an interpretation strictly faithful to the requirements of Art. 31 of VCLT, notably including Art. 31(3)(c) of the Vienna Convention, leads to identify a futility exception in the pertinent *lex lata*, i.e. Art. 8(2) and (3) of the Argentina-Italy BIT.

627. The Tribunal cannot ignore, however, that on a more general level the "futility" reasoning which governs the present Decision and the "fair opportunity" approach endorsed by the *Abaclat* Tribunal are not mutually exclusive, but complement each other. In fact, they seem to be based on different perspectives on the same reality of competing interests. Whilst the "futility" reasoning rather looks at the problem from *Claimants'* side, the "fair opportunity" approach, by asking whether *Respondent* is given a fair opportunity to address the dispute through its local courts, takes the latter's perspective. Similarly, whereas the emphasis of the "futility" approach is on the existence for Claimants of an *effective* remedy, the "fair opportunity" approach draws on the idea of *forfeiture* of Respondent's right to preferential dealing with the case due to its inability or unwillingness to provide effective legal means of redress to the investor(s).

628. In sum, the challenge is to strike a balance between these equally legitimate and important interests under the circumstances of a concrete case. In view of Respondent's acts, notably the adoption of Law No. 26.017, it would seem to the Tribunal to impose an undue burden on Claimants and not to be compatible with the Tribunal's responsibility to guarantee fair and effective arbitration proceedings to construe Art. 8 of the Argentina-Italy BIT so as to require Claimants to have recourse to Argentine courts when being placed in a situation such as the present one and sanction their not having done so by dismissing the case. After all, it was acts clearly attributable to the Respondent, namely arts. 3 and 6 of Law No. 26.017, which prevented both the executive and judicial authorities of Argentina by legislative *fiat* of the Argentine Congress – laws enacted by Congress being, according to Art. 13 of the Argentine Constitution, alongside the

[338] Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 30.

Constitution itself, "the supreme law of the Nation" – from addressing, let alone effectively settling, the claims of the Claimants within the domestic legal system of Argentina. Accordingly, it cannot be concluded that the requirement of having recourse to Respondent's domestic courts, as set forth in Art. 8(2) and (3) of the Argentina-Italy BIT, was violated by Claimants.

d) No need to rely on the most favoured nation clause of Art. 3(1) of the BIT

629. In view of this result, it is not necessary for the Tribunal to enter into the question whether the most favoured nation clause contained in Art. 3 para. 1 of the Argentina-Italy BIT may have entitled Claimants to rely on the allegedly more favourable dispute resolution clause contained in Art. VII(3) of the Argentina-US BIT.

DISSENTING OPINION BY ARBITRATOR TORRES BERNÁRDEZ

630. Arbitrator Dr. Torres Bernárdez will issue a Dissenting Opinion to the present Decision on Jurisdiction and Admissibility. In agreement with Dr. Torres Bernárdez, the text of the Dissenting Opinion will be published subsequently.

DECISIONS TAKEN BY THE TRIBUNAL

631. In view of the above reasoning and subject to the mandate given to it by the Parties to restrict its decision at this stage of the proceedings to "preliminary objections of a general character only"[339], the Tribunal

- *Decides* that the present case falls within the jurisdiction of the Centre and that the Tribunal has competence to decide the present case;

- *Decides* that the Claimants' claims are admissible;

- *Therefore dismisses* all Respondent's objections as regards jurisdiction and admissibility;

- *Takes note* of the discontinuance of proceedings as of 8 February 2103 in regard to the 29 Claimants listed in para. 343 above;

- *Orders* the afore-mentioned Claimants and the Respondent to bear the arbitration costs and their own costs as set out in paras. 348-352 above and in a separate Procedural Order;

- *Reserves* the decision on the costs not decided upon in the present Decision and in the separate Procedural Order to the merits phase of the proceedings;

- *Decides* to rename the present proceedings "Ambiente Ufficio S.p.A. and others v. Argentine Republic".

[339] See *supra* para. 5.

Done in English and Spanish, both versions being equally authentic.

Judge Bruno Simma

Professor Karl-Heinz Böckstiegel

Dr. Santiago Torres Bernárdez

ANNEX 297

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arbitral settlement of claims relative to private rights acquired in all the territories ceded by Turkey in 1913 and 1914.

The Arbitrator has arrived at the conclusion, therefore, that Article 181 of the Treaty of Neuilly is applicable in the matter of the territory where the disputed forests are located. This conclusion is the result of an examination of the terms and the purpose of the article. The defendant government maintains that, in case of doubt as to the meaning of an arbitral clause, the incompetence of the Arbitrator must be presumed, according to the general rule by which a state is not obliged to have recourse to arbitration except when a formal agreement to that effect exists. The Arbitrator cannot agree with this principle of interpretation of arbitral clauses. Such a clause should be interpreted in the same way as other contractual stipulations. If analysis of the text and examination of its purpose show that the reasons in favor of the competence of the Arbitrator are more plausible than those which can be shown to the contrary, the former must be adopted.

For these reasons,

The Arbitrator judges and decides,

(1) That the application of Article 181 of the Treaty of Neuilly to the Greek claim is not excluded by the fact that the forests which are the object of this claim are situated in a region which was not transferred by virtue of said treaty;

(2) That, consequently, the Arbitrator retains jurisdiction for the purpose of deciding the other points in dispute.

(Signed) Östen Undén,
Staffan Söderblom.

PRINCIPAL QUESTION

Stockholm, March 29, 1933

The Arbitrator designated by the League of Nations Council in its session of October 2, 1930, to settle a dispute between Greece and Bulgaria concerning certain forests in Central Rhodopia, has, by arbitral award of November 4, 1931, judged and decided that the application of Article 181 of the Treaty of Neuilly to the Greek claim is not excluded by the fact that the forests which are the subject of that claim are situated in territory which was not transferred by virtue of said treaty. Consequently the Arbitrator retained jurisdiction of the case to pass upon the other points at issue.

With the consent of the parties, the Arbitrator on January 5, 1932, laid down the rules of procedure to be followed in the second phase of the case. The rules contemplated the presentation of a memorial by the party plaintiff, a counter-memorial by the party defendant, a replication by the plaintiff and, finally, a rejoinder by the defendant. They also contemplated, of course, the communication of these memorials to the adverse party, as well as the eventual institution of oral proceedings at the request of the Arbitrator or of one of the parties. The memorials provided for in the rules of procedure were duly presented by the agents of the parties and communicated to those concerned. By the terms of the rules, the last memorial was to be presented before June 15, 1932. Owing to a series of postponements caused by one or the other of the parties, this memorial, however, did not come before the Arbitrator until August 24, 1932, and documents were annexed thereto still later. It having

been judged desirable to have oral arguments, this procedure was first fixed for October 27, 1932. Postponement of the meeting having been requested at various times by each side, the argument finally took place in Geneva, February 13–15, 1933. Bulgaria was represented by M. Théodoroff, Agent for the Bulgarian Government, assisted by M. Gidel, Professor of the Faculty of Law of Paris, and Greece by M. Politis, Greek Minister at Paris, assisted by M. Iaonnidès, lawyer of Athens.

During the oral argument, the plaintiff produced a number of documents not previously presented. At the request of the defendant, the Arbitrator decided not to admit certain of these documents as proof by reason of their delayed production.

The Arbitrator has pronounced this

ARBITRAL AWARD

(Points at issue between the parties, other than the preliminary question decided by arbitral award of November 4, 1931)

The undersigned, appointed Arbitrator by the Council of the League of Nations to decide a dispute between

The Greek Government, "Plaintiff," and

The Bulgarian Government, "Defendant,"

After having heard the arguments and conclusions of the parties, has made the following decision:

The Greek Government requested that the Arbitrator decide:

(1) That the claimants possess in the forests in question property rights and rights of exploitation acquired in conformity with Turkish legislation prior to the annexation to Bulgaria of the territory in which these forests are located.

(2) That Bulgaria had the obligation towards Greece of recognizing, respecting and causing to be respected these rights, which were envisaged and protected by the provisions of Articles 10 and 11 of the Treaty of Constantinople and of Article 181 of the Treaty of Neuilly.

(3) That in spite of its international obligations, the Government of Bulgaria has manifestly violated these rights by depriving the claimants of their property and preventing them from exercising their rights.

(4) That Bulgaria could plead in excuse neither the Turkish laws, the import of which is absolutely favorable to the claimants, nor her own legislation, which cannot for any reason defeat her international obligations and of which the meaning is, moreover, contrary to her contentions.

(5) That the Bulgarian Government has thereby made itself internationally responsible toward the Greek Government and consequently assumed the duty to make reparations to the claimants adequate to the damage which it unjustly caused them;

(6) That this reparation must include restitution of the property of which the claimants were dispossessed, or, failing that, the payment as indemnity of its actual value, and the payment of an indemnity for the deprivation of enjoyment suffered by the claimants, representing in regard to each of the forests in question the exact amount of damage suffered, calculated according to the rules in force in the forest administration and taking into account the value of the woods and pasture lands in Bulgaria during the deprivation of said enjoyment.

(7) That, calculated upon these bases, the indemnity due on these

various counts amounts to a total of 20,880,000 gold Leva, or of 40,710,-977.50, dependent upon whether or not the claimants secure effective restitution of their property.

(8) That interest will accrue upon the sum charged to the Bulgarian Government from the date of the award and shall be paid to the Greek Government at the intervals and under the conditions fixed by the Arbitrator.

The Bulgarian Government requested the Arbitrator to:

(1) Declare himself incompetent;

(2) Hold that the demand of the Greek Government cannot be entertained until the remedies before Bulgarian tribunals have first been exhausted;

(3) That in any case it cannot be entertained so far as concerns the brothers Tevfik and Hakki Hadji Ahmed, and the Bulgarians Pierre Sallabacheff, Minko Semerdjieff and Pantcho Apostoloff;

(4) That even reduced to the interests of the Greek nationals alone, Ath. Christophacopoulos, Jani Doumas and Demetrios Kehaiya, the claim cannot be entertained as to the fourteen *yaïlaks* in which claimants allege they have concessions for exploitation;

(5) Exclude from the present case the claims pertaining to the forest-pasturage Kara-Bouroun and to those parts of the *yaïlaks* Gougouche, Chabanitza and Toursounitza which are situated in Greek territory.

Collaterally to the main issue:

(6) Hold that the Greek nationals on whose behalf the Greek Government brought the present suit had not legally acquired any rights in the nineteen *yaïlaks* with the forests in dispute, either under the Turkish régime up to the Turco-Bulgarian Treaty of Constantinople of September 16/29, 1913, or under the Bulgarian régime after that time;

(7) That, therefore, the Bulgarian Government in not recognizing these alleged rights of the claimants in the aforesaid public forests did not violate its international obligations (Articles 10 and 11 of the Treaty of Constantinople and Art. 181 of the Treaty of Neuilly);

(8) That consequently the Bulgarian State owes no reparation to the Greek Government acting in behalf of its nationals.

Incidentally,

(9) Appoint a commission of assessors, which, after study on the spot, shall render its opinion as to the damages eventually owing by Bulgaria and as to the determination of the amount of interest damages.

At the close of the oral arguments the two parties announced that they maintained without any change the above-mentioned conclusions reached in their respective memorials. However, the representative of the Greek Government declared that his government was disposed to accept the mediation of the Arbitrator in the matter of an agreement upon the amount of damages to be paid in case he should hold the Bulgarian Government responsible in the present case.

In regard to the incidental request of the defendant for the appointment of a commission of assessors to determine the extent of the alleged damage, the agent of the plaintiff declared he left this question to the discretion of the Arbitrator.

FINDINGS OF FACT

I

As indicated by the summary exposition of the basis of the present case, outlined in the arbitral award of November 4, 1931, the Greek Government is acting in the case in the interest of certain private persons, styling themselves Greek subjects, who assert rights of property and of exploitation in forests situated in Central Rhodopia. This territory was ceded in 1913 to Bulgaria by the Turkish Empire by the Treaty of Constantinople and has since then remained annexed to Bulgaria, which has exercised sovereignty there without interruption.

In the opinion of the Greek Government, the Bulgarian Government did not respect said rights of property and exploitation that those entitled to them had acquired prior to the annexation to Bulgaria of the territories where the forests are situated. The claimants whose cause the Greek Government espouses in this dispute are the following five persons: Athanasius Christofacopoulos, Tevfik Hadji Ahmed, Hakki Hadji Ahmed, Démétrius Kehaiyas and Jean Doumas. They were all Greek subjects at the time of the acquisition of the rights in question, but changed their nationality in consequence of the provisions of the peace treaties concluded in 1913 between Turkey, on the one hand, and Bulgaria and Greece, respectively, on the other. Having acquired their rights in conformity with Turkish law, they should have benefited by the principle of respect for acquired rights expressly sanctioned by the Treaty of Constantinople.

II

In regard to the acquisition of timber and proprietary rights in the forests, the following information was furnished by Greece. The above-mentioned Christofacopoulos and Tevfik were the chief promoters of the forest enterprise. They took in as associates a few friends and members of their families, that is, the persons designated above, as well as the person named Sadik Ibrahim, a Turkish subject, with whom they formed *L'Association exploitante des Forêts de Dospat Dagh.* Tevfik and Christofacopoulos directed the enterprise. But in most of the important contracts by which the association secured the exploitation of the principal forests of Dospat Dagh, it appeared under the name of *Maison de Commerce du Gumuldjinali Tevfik effendi & Cie,* or merely *Société Tevfik effendi & Cie.* This name was assumed as a matter of prudence, the company being anxious to appear as a venture carrying the name of a Turk.

The forests in which the timber was bought by the associates are called Avanli, Kara-Bouroun, Korfanli, Chabanidja, Kodja Kargalik, Tchal, Bitchaktchi-Diranli, Tilkili, Souloudjak, Hamam-Bounar, Olouk-Yédik, Sabourdja-Alan, Kemali-Tchoral and Toursounidja. The Greek Government produced the contracts of "sale," signed in 1910–1912, as well as regis-

tered titles relative to the forests to establish the property right of the "sellers." Reports of an official survey and specifications, required by Turkish law, were also introduced. The registered titles were delivered during the period September, 1913–June, 1914, by the General Land Registry at Constantinople. They all constitute "certificates of ownership in place of definitive titles."

The forests of which the associates acquired ownership are called Kavgali, Tchakmakli, Barakli, Kadjarli and Gougouche. For these also the titles produced were "certificates of ownership in place of definitive titles." Certain acts of sale and surveyors' reports pertaining to the five forests mentioned above were likewise introduced. The titles and acts recited above will be the subject of a more detailed analysis later on. However, it should be brought out at this point that the Greek Government insists that the authority or probative value of the proprietary titles of the Turkish Land Registry is great, and deservedly so, and formulates as follows the rule of the Turkish doctrine and jurisprudence governing the matter: "Every title is to be presumed in principle to be authentic; but it can be contradicted in court. But as long as the one who attacks it does not furnish written proof, of certain date, in support of his contentions, the court must hold the title good and rely upon its terms."

On the other hand, the Bulgarian Government formulated certain observations concerning the official documents above mentioned, notably on the subject of the "certificates of ownership taking the place of definitive titles", the probative value of which it formally denies. Besides a great number of inaccuracies and irregularities with which these certificates were tainted, the Bulgarian Government emphasizes the fact that they are a special kind of certificates issued pursuant to an *ad hoc* decision after the Bulgarian occupation and not in use before that time. The Bulgarian Government thinks it very unusual that all the original titles should have been lost, and alleges that the Bulgarian tribunals and administrations had previously, that is, immediately following the liberation of the country in 1878, been flooded with a quantity of Turkish titles to property, more or less inexact, given by conniving employés of the Turkish Land Registry for realty situated in Bulgaria. It had even been necessary to warn the Bulgarian authorities by ministerial circulars of 1882 and 1884 against Turkish titles of this kind. The Bulgarian Government is thoroughly convinced that the certificates of ownership introduced in evidence are false and not in conformity with the original titles and with the registry of titles. As to the reports and specifications, the Bulgarian Government maintains that they were not drawn up in conformity with the regulations covering the matter and that they are defective in several ways.

In reckoning the purchase price of the forests, the associates, according to the statements of the Greek Government, put into the enterprise a total sum of 73,000 Turkish pounds. The Bulgarian Government brought out the

fact that, according to the titles and documents presented by the claimants, they had paid for the right of exploiting the fourteen forests above-mentioned the total sum of 13,260 Turkish pounds, and for the acquisition of ownership of the five forests also mentioned above, 4,700 Turkish pounds, that is to say, 18,000 gold Turkish pounds, or about 400,000 gold francs in all for the nineteen forests in dispute.

III

After the cession to Bulgaria of the territory in which the enterprise was situated, the associates formed on February 9, 1915, under the firm name *Dospath-Dagh* with offices at Philippopoli, a limited liability company, taking in with them two new Bulgarian associates, General Sallabacheff and M. Semerdjieff. The contribution of the two new associates was only that of skill and acquaintance with the administration and proper exploitation of the forests. By a company letter of May 15, 1915, a one-sixteenth share in the profits of the forests Souloudjak, Bitchaktchi-Diranli and Kodja-Kargalik was allowed M. Apostoloff, a Bulgarian subject. On the other hand, the Greek Government asserts that the participation in profits, never realized, offered to Apostoloff and promised in exchange for services never rendered, gave him no right in the assets of the company. The statutes provided for the transfer to the name of the company of the forests of which the former associates were the owners, as soon as the transfer of property rights in the new Bulgarian territory had been authorized by legislative action.

Among the provisions of the charter of the company the following should be cited:

This day, the 9th of February, 1915, at Sofia, the undersigned Tevfik H. Ahmedov of Gumuldjina, Hakki H. Ahmedov, of Gumuldjina, Sadik Ibrahimov of Salonika, Athanasius N. Christofacopoulos, of the village of Klissoura (Kostour), Dimitre N. Kehaya of the village of Klissoura (Kostour) and Yani N. Douma of Salonika, acting in our name and on our behalf, on the one part, and the undersigned Peter Sallabascheff, of Sofia, retired general, and Minko Chr. Semerdjiev of Varna, acting in our name and on our own behalf, have agreed upon and undertaken the following:

1. The two contracting parties have organized a commercial limited liability company under the firm name *Dospath-Dagh*.

2. The main office of the company is at Philippopoli. It may open as many branch offices in the Kingdom as may be necessary.

3. The company has for its purpose the exploitation in a modern and proper way of the private forests granted in the Rhodope mountains, bought together with the land, as well as those leased solely for exploitation by the parties of the first part, as follows:

. . . . .

4. The company is organized for a period of six years from the 19th of February, 1915.

5. The parties of the first part, namely, Tevfik H. Ahmedov, Hakki H. Ahmedov, Sadik Ibrahimov, Athanasius N. Christofacopoulos, Dimitre Kehaya, Yani N. Doumas, have raised a capital of 2,600,000 (two million six hundred thousand) levas for expenses and purchase by contract of wood material from the forests mentioned in letters c, i, j, k, l, m, n, o, p, q, r, of Art. 3 of the present contract, and from the forests bought with the land, mentioned in letters a, b, d, e, f, g, h, s, of the same Art. 3 of the present contract. The contracts of exploitation of the forests, the procurations in the names of the parties of the first part, shall

be immediately transferred by notarial act to the name of our company as soon as the Ministry of Agriculture shall have approved them, and the right of ownership in the forests purchased with the land, mentioned in letters a, b, d, e, f, g, h, s, of Art. 3 of the present contract, shall be transferred to the name of the company by notarial act as soon as the transfer of property rights in the new territory of the Kingdom shall be authorized by legislative act. The rights of the parties of the first part in the forests enumerated in Art. 3 of the present contract are transferred to the company. The documents relating to these forests are kept in the company safe.

6. The parties of the second part, namely, Petro Sallabascheff, retired general, and M. Chr. Semerdjiev, shall contribute as capital their knowledge of the administration and proper exploitation of the forests of the company, which are valued at 600,000 (six hundred thousand) levas.

7. The capital contributed by the parties of the first part, composed of real estate valued at 2,660,000 (two million six hundred sixty thousand) [1] levas, and the intellectual capital of the parties of the second part estimated at 600,000 (six hundred thousand) levas, constitute the capital of the company, the total of which is 3,200,000 (three million two hundred thousand) levas. Shares to the number of 640 shall be issued immediately after the signature of the present contract for this capital. The shares shall carry the signatures of the Board of Directors. Every twenty shares is entitled to a vote.

8. The shares are divided as follows:

(a) The parties of the first part, namely, Tevfik H. Ahmedov, Hakki H. Ahmedov, Sadik Ibrahimov, Athanasius N. Christofacopoulos, Dimitri y Kehaya and Yani N. Doumas, receive 520 (five hundred twenty) shares, of which they become absolute owners.

(b) The parties of the second part, namely, Petro Sallbascheff, retired general, and M. Chr. Semerdjiev, receive 120 (one hundred twenty) shares of which they become absolute owners.

Concerning the functioning of the new company, the two governments disagree completely. The Greek Government asserts that the transfer of the forests to the company never took place, so that the rights acquired by the associates never changed owners and that the new company could never in fact have functioned in Bulgaria. As a consequence of the refusal of the Bulgarian Government to recognize the proprietary rights of the claimants in the five forests belonging to them in their own right, on the one hand, and the rights accruing to them from the fourteen contracts acquiring timber rights, on the other hand, there was no realization of the contributions promised by the associates and the company remained without capital. The prohibition of trading between enemies, a principle of international law affirmed by the laws promulgated in 1917 in Bulgaria as well as in Greece, implied, moreover, in consequence of the entrance into the war by Greece on the side of the Allies and against Bulgaria, the annulment of the very agreement of organization. This annulment was confirmed by Article 180 of the Treaty of Neuilly. On this point it must also be recalled that the general meeting of stockholders on June 20, 1920, proceeded to rescind the acts of the company.

[1] This figure is very probably due to an error. As a matter of fact, the capital contributed amounts, according to paragraph 5, to 2,600,000 levas, and the total of 3,200,000 levas, indicated below, supposes, if the intellectual capital is 600,000 levas, a contributed capital of 2,600,000 levas.

The Bulgarian Government presents the character of the Dospath-Dagh Company and its rôle in the case under consideration in a totally different light. This company was not only validly constituted and registered as a Bulgarian company, but also existed and functioned in fact. It was never dissolved and still exists today. By the contribution in kind of the nineteen disputed forests on the part of the associates, it acquired the right of property or concessions in said forests, the agreement of organization being under Bulgarian law a purely consensual contract which was perfect and produced all its effects by the sole agreement of the parties. The reference in the agreement of organization to the approval of the Ministry of Agriculture and to legislative authorization had no other purpose but to assure formally the rights of the company in regard to third persons. The notarial transfer was made subordinate to the legislative authorization because at that time notarial sales were still governed by a royal proclamation of December 1, 1912, forbidding all sales and transactions concerning real property in the new territories acquired from the Turkish Empire. On the Bulgarian side, it was emphasized also that the Dospath-Dagh Company acted, after 1920 also, as owner or concessionnaire of the disputed forests.

IV

There is a difference of opinion not only on the question of knowing who is the owner of the alleged rights of property and concession, but also on the nature and extent of these rights. The Bulgarian Government argues that no private individual could, according to Turkish law, acquire complete ownership in these forests, which had the character of public property in which individuals could possess only very limited rights of enjoyment.

It was therefore legally impossible, according to the Bulgarian argument, that the disputed forests should be the absolute property of the claimants or their grantees. The "certificates of ownership" were consequently inaccurate on this point, besides not conforming with the original deeds and the records of the General Land Registry at Constantinople. The latter contained no mention of "forest," falsely carried in the certificates produced by the claimants as the result of the culpable connivance of some Turkish employé. In reality it was a matter of public lands, of winter and summer pasture lands. The fundamental Turkish law limited the extent of the right of enjoyment of the possessor of land according to its intended purpose, and pasture lands were exclusively intended for the pasturing and watering of cattle. While the forests were intended for the cutting and commercialization of the timber, which was the result of the possessive title, the enjoyment and utilization of winter and summer pasturage consisted solely of a right to the grass and running water, a right of pasturing and watering, to the exclusion of every other right. The inhabitants had, however, permission to cut wood for their personal needs in return for payment to the Treasury of certain taxes. The Greek Government refuses to yield to this point of view: the physical origin

of the land would be, according to that government, pastures, become forests in the course of time by the natural growth of trees. The registered titles carried, respectively, under the heading concerning the nature of the land, mention of "pasture land" concurrently with that of "forest."

V

Next, the question of the nationality of the claimants must be considered, granting that the defendant denies the right of the plaintiff to speak before an international tribunal for the interests of the two brothers, Tevfik and Hakki, because of the nationality which they possessed at the time the damage was caused them by the alleged confiscation of the forests.

All five original associates were undeniably Turkish subjects prior to the Balkan wars of 1912 and 1913, and one of them, Sadik Ibrahim, remained so without ever changing his nationality. His share in the disputed forests, therefore, is not included in the claims of the Greek Government. The two partners Sallabacheff and Semerdjieff, associated with the others in 1915, and Apostoloff, accepted as a partner in the course of the same year, so far as is known, always had Bulgarian nationality during the period covered by the present case.

In regard to the brothers, Tevfik and Hakki, the Greek Government asserts that they changed nationality twice. Having obtained Bulgarian nationality in 1913, they then acquired Greek nationality in 1920, due to intervening territorial changes and by reason of the fact that they had established themselves in Western Thrace, which passed successively from Turkey to Bulgaria and from the latter to Greece. The acquisition by the two brothers of Greek nationality took place legally when Western Thrace was given over to Greece according to the Treaty of Neuilly, and, from the point of view of Greek domestic law, by virtue of the Greek law on the global nationalization of the inhabitants of the annexed territories. That was binding upon Bulgaria by reason of Articles 44 and 158 of the Treaty of Neuilly. The Greek Government also invokes in support of its argument certain documents, among which were documents issued March 30, 1931, by a Mixed Subcommission for Exchange of Populations and establishing the fact that Tevfik and Hakki were recognized as non-exchangeable Greek subjects, settled in Gumuldjina, as well as certificates drawn up by the Consul General of Greece at Constantinople and establishing that the two brothers were undeniably Greek subjects and had the right to reside freely in Constantinople. Although they were Bulgarians from 1913 to 1920, it should be kept in mind that the rights claimed by them dated from the time when they were Turks and that the violations of which they complain were not consummated until after the conclusion of the Treaty of Neuilly, when they became Greeks and thereby acquired the right to invoke the international protection of the Greek Government. To deprive them of this protection in the present case would be at variance with the present tendency

of international law to consider diplomatic protection as the necessary means of safeguarding individual rights in international intercourse.

The Bulgarian Government does not deny formally that the three associates Christofacopoulos, Doumas and Kehaiyas became Greek subjects, expressing, however, a doubt in this regard. Concerning the brothers Tevfik and Hakki, it maintains on the contrary that they were not Greek subjects. After having acquired Bulgarian nationality by virtue of the Treaty of Constantinople of September 16/29, 1913, the two brothers settled in Turkey and were treated by the Turkish Government as Turkish subjects. The Bulgarian Government, therefore, formally denies their Greek nationality, and invokes in support of its assertion certain information and documents. In any case, Tevfik and Hakki could not, according to that government, have become Greek subjects before August 20, 1924, the date of the ratification of the Treaty of Sèvres, under the terms of the third protocol of Lausanne, signed July 24, 1923, and on condition that they were actually settled in Thrace as the Greek Government alleges. But the Mixed Commission for Exchange of Populations by the two certificates of March 30, 1931, relied upon by the Greek Government, recognized them as non-exchangeable because they had been domiciled in Constantinople at the time of the entry into force of the instruments signed at Lausanne. Moreover, it was proved that one of the brothers, Hakki, died in Sofia, leaving heirs. While referring to the Arbitrator the task of determining the alleged Greek nationality of the two brothers, the Bulgarian Government states as an added fact that they could not in any case have become Greek subjects before the 20th of August, 1924.

VI

The Bulgarian Forestry Administration took possession of the disputed forests in February, 1913, after the military occupation of those regions by Bulgarian troops. The two parties are in disagreement upon the point of whether the Bulgarians, in occupying the region of Doevlen and taking possession of the forests, could reasonably doubt that they held property possessed and exploited by private individuals. The Greek Government alleges that the associates had had installed in these forests sawmills run by water or motor and all the other mechanical means necessary for the sawing and squaring of timber, that they had proceeded to lay out ways of access to the interior of the forests, and had constructed depots and storehouses. At Kienstendjik a dozen sawmills had been set up, and charge of them given to an Italian expert with the assistance of 84 foremen and 600 workmen, housed in special buildings. Numerous Décauville roads ran the length of the forests and a route of 50 kilometers had been constructed by the associates. The picture drawn by the Bulgarian Government is quite different: the Bulgarian occupation found in the litigated regions and forests nothing in particular in the nature of a large, well organized timber exploitation. A

few small sawmills run by water, of meager output and quite primitive, scattered in the forests of the frontier region, with huts or very light sheds, some mountain paths, no carriage route, no Décauville road, only a few habitations in the wood clearings authorized in the public forests. The configuration of the land, very mountainous, covered in all directions by vast domanial forests, likewise indicated the improbability of the existence of private forests in the midst of these vast mountainous wilds belonging to the state. Under these conditions the Bulgarian authorities did not hesitate to assume charge of all the forests in Central Rhodopia, which aroused no protest until the latter part of 1914. It was during that year that the claimants were in communication with the Ministry of Agriculture of Bulgaria with a view of establishing their alleged rights in the disputed forests. Judging by the allegations of the Greek Government, the associates were able to carry on their venture on a reduced scale during 1914 and 1915 under an authorization given Tevfik Hadji Ahmed by a ministerial order of November 21, 1914. The Bulgarian Government is anxious to emphasize on this point that it would have been necessary for Tevfik to have been elected Deputy to the Bulgarian Parliament, a member of a group producing the necessary number to constitute the majority of the Radoslavoff government, in order that the protests should have been addressed to the Ministry of Agriculture. The documents concerning the forests in dispute having been presented to the Ministry of Agriculture, the Minister, on August 10, 1915, appointed a commission composed of eminent Bulgarian jurists and officials, to examine the Turkish law in connection with the alleged rights of the interested parties. This commission made its report on January 22, 1916. That same year the Ministry of Agriculture sent two of its officials to Constantinople for the purpose of verifying the titles and documents produced by the associates. Two other commissions were successively appointed: the first, created March 9, 1917, presented its report on May 10, 1917; the second, constituted on March 21, 1918, presented its report on July 23, 1918. The Ministry of Agriculture also ordered an inquiry to be held on the spot by a high forestry official. The conclusions reached by these various inquests are differently interpreted by the two parties.

During all this time the Bulgarian Government, while awaiting the definitive settlement of the controversy, did not permit the cultivation of the forests except upon payment of the price of cut wood at the rate fixed for state forests. In the ministerial ordinance of August 4, 1916, mention is made of a dispute, and in that of July 28, 1917, of the absence of a solution of the question of ownership of the forests.

On September 20, 1918, the Minister of Agriculture addressed to the forest inspectors in the annexed territories an order by which all the forests in the category of those forming the subject of the present litigation were to be considered as property of the state. The text of this order was worded thus:

In conformity with Art. I of the Forest Law, all the *yaïlaks* within the limits of your district are property of the state.

The right of pasturing and watering of the former owners of the *yaïlaks* will be appropriated within a short period.

I cancel all prior orders of the Ministry by which the owners of the *yaïlaks* were given the right of enjoyment of the natural growth in the *yaïlaks*, as contrary to the provisions of the Forest Law.

All taxes paid up to the present time by the owners of the *yaïlaks* for the exploitation of the trees in the *yaïlaks* shall be deposited in the Treasury.

The cultivation of these forests shall be carried out according to Art. 24 of the Forest Law.

The owners of the *yaïlaks* shall be entitled only to the enjoyment of pasturing and watering in accordance with the proper documents verified by the public authorities with the originals. Otherwise, the right of pasturage shall be utilized as belonging to the state in accordance with the orders given by the Forest Law.

It followed that the various measures attempted by the parties were in vain. In September, 1919, they addressed to the Bulgarian Government a formal protest signed by Tevfik, in which there was, in addition, the question of eventual recourse to the courts. By a request presented December 22, 1921, the parties then carried their complaint to the Greco-Bulgarian Mixed Arbitral Tribunal in Paris, which declared itself by decision of March 22, 1924, without jurisdiction in the case. Since the spring of 1921, the Greek Government has extended diplomatic protection to the parties and made representations to the Bulgarian Government in their behalf. In a *note verbale* of January 10, 1925, the Ministry of Foreign Affairs of Bulgaria finally informed the Greek Legation at Sofia that the Ministry of Agriculture and Public Domains, having examined the case, would hold that the Dospath-Dagh forests were *yaïlaks* and that the servitudes of pasturage and watering were, by virtue of Article 5 of the Forest Law, taken over for the benefit of the state, which, in accordance with Article 4 of the same law, had taken possession of the forests. The interested party in the case, the Dospath Dagh Company, could, if it was not satisfied, safeguard its rights by taking the case into court, especially since the Ministry of Agriculture was not competent to pass upon the validity of titles to property.

The facts concerning the examination of the affair by the Council of the League of Nations, which resulted in the appointment of an Arbitrator under Article 181 of the Treaty of Neuilly, are set out in the arbitral award of November 4, 1931.

Findings of Law

A. Upon the preliminary questions

I

Before proceeding to the consideration of the different legal questions raised by the parties, the Arbitrator wishes to point out that his rôle in the

present case is defined by Article 181 of the Treaty of Neuilly, the tenor of which may be cited here:

> Transfers of territory made in execution of the present treaty shall not prejudice the private rights referred to in the Treaties of Constantinople, 1913, of Athens, 1913, and of Stamboul, 1914.
>
> All transfers of territory made by or to Bulgaria in execution of the present treaty shall equally and on the same conditions, ensure respect for these private rights.
>
> In case of disagreement as to the application of this article, the difference shall be submitted to an arbitrator appointed by the Council of the League of Nations.

It follows from this text that the contracting parties, among them Bulgaria, bound themselves reciprocally by virtue of the provisions of said Article 181 to respect the acquired rights referred to in the treaties concluded following the Balkan Wars, especially in the Treaty of Constantinople signed in 1913 between Bulgaria and the Ottoman Empire. Said treaty contains the following provisions:

> ARTICLE 10
>
> Rights acquired previous to the annexation of the territories, as well as the judicial documents and official titles emanating from the competent Ottoman authorities, shall be respected and held inviolable until there is legal proof to the contrary.
>
> ARTICLE 11
>
> The right of holding landed property in the ceded territories by virtue of the Ottoman law on urban and rural properties shall be recognized without any restriction.
>
> The proprietors of real or personal property in the said territories shall continue to enjoy their property rights, even if they fix their personal residence temporarily or permanently outside of Bulgaria. They shall be able to lease their property or administer it through third parties.

The Treaty of Constantinople contains no provision concerning the nationality of the individuals whose acquired rights Bulgaria engaged to respect. This being the case, one might ask whether Articles 10 and 11 of the treaty apply only to invididuals who were Turkish subjects before the annexation and remained so afterwards, or whether they are equally applicable to persons possessing another nationality. Neither of the parties in the course of the present case has attempted to so limit the application of the two articles mentioned above, according to the nationality of the parties entitled. It also appears more likely that the purpose of the aforesaid provisions was to establish a guarantee of respect for rights acquired under the protection of Turkish legislation, independently of the nationality of the parties entitled. This guarantee was, however, incomplete and of a very limited practical value as long as it could not be invoked by a signatory of the treaty other than Turkey.

In the opinion of the Greek Government, the conclusion of the Treaty of Neuilly has had the result of rendering more efficacious the above-mentioned provisions. Article 181 of said treaty changed the obligation assumed in 1913 and 1914 toward the Turkish Empire by the three Balkan States into a general obligation of each of them toward all the signatories of the Treaty of Neuilly, and increased its practical value by assuring its observation through the guarantee of final recourse to arbitration. It is therefore by virtue of Article 181 that the Greek Government feels justified in invoking before the arbitral tribunal provided by that article the obligation assumed in 1913 by Bulgaria towards the Turkish Empire of respecting acquired rights. It is understood that the Greek Government does not claim the right to exercise diplomatic and legal protection in behalf of persons other than those possessing Greek nationality.

This argument means, as regards the acquired rights of the claimants who had become Greek subjects following the Treaty of Athens of 1913, that these rights were already protected by the existence of the material provisions of Articles 10 and 11 of the Treaty of Constantinople. But until the entry into force of the Treaty of Neuilly, the Greek Government, not being a signatory of the Treaty of Constantinople, had no legal grounds to set up a claim based upon the relevant stipulations of that treaty. Article 181 of the Treaty of Neuilly created this legal basis.

This point of view was not expressly contradicted by the defendant. It rather impliedly admitted it in its pleadings by invoking in its argument Articles 10 and 11 of the Treaty of Constantinople.

The Arbitrator adopts the interpretation of the Treaty of Neuilly according to which the Greek Government can invoke in behalf of its nationals the provisions of Articles 10 and 11 of the Treaty of Constantinople.

This conclusion, however, concerns only the three claimants who had acquired Greek nationality in 1913, that is, Christofacopoulos, Doumas and Kehaya. The question of the other claimants is considered below (see Section III).

II

To the Greek claim the Bulgarian Government raised certain preliminary objections, reproduced below, relating to the incompetence of the Arbitrator or to the inadmissibility of the claim of the adverse party. It is therefore necessary to examine first of all the basis of these objections.

In its first two exceptions the defendant asks the Arbitrator to (1) declare himself incompetent, and (2) hold that the demand of the Greek Government cannot be entertained prior to the exhaustion of remedies before the Bulgarian courts.

The tenor of the written and oral arguments of the representatives of the Bulgarian Government is that the objection of incompetence is based on the argument that the dispute relates to questions of internal law. The func-

tion of the Arbitrator was discharged by the award already pronounced upon the applicability to the case, of Article 181 of the Treaty of Neuilly, that being the only question of an international nature. The Arbitrator is not competent to pass upon the question of whether the claimants obtained in a regular way proprietary and exploiting rights in the disputed forests. Only national courts are qualified to pass upon the very existence of a real property right.

The exception taken on the principle of exhaustion of local remedies can be considered as subsidiary to the first one. An action before an international tribunal to enforce private acquired rights is not, in any case, entertainable before the exhaustion of local remedies at the disposition of the claimant. This condition not having been fulfilled in the present case, the result of the action can only be a dismissal of the suit.

Although these two exceptions are not absolutely identical, they include each other in part, and evidently arise from the same point of view: as a general rule, an international tribunal ought not to undertake the hearing of a dispute normally within the jurisdiction of national courts. It is expedient, then, to consider the two objections at the same time.

The provisions of Articles 10 and 11 of the Treaty of Constantinople impose upon Bulgaria the obligation to respect certain acquired rights and, besides, to respect the judicial acts and official titles emanating from the competent Turkish authorities. Said rights and titles "shall be respected and held inviolable until there is legal proof to the contrary." Article 11 imposes upon Bulgaria the obligation to recognize without any restriction the right of land ownership in the ceded territories under the Turkish law concerning urban and rural realty.

In the present case, the defendant admitted itself bound, by virtue of an international agreement, to respect the acquired rights referred to in Articles 10 and 11. There is no divergence of opinion, therefore, on the validity of the principle itself. It is the opinion of the defendant, apparently, that, under these circumstances, there exists no dispute according to the last paragraph of Article 181 of the Treaty of Neuilly.

It is evident that this interpretation of the relevant texts is too restricted. When an international convention imposes upon one of the contracting parties the obligation to respect acquired rights and to recognize official titles until legal proof to the contrary, a general refusal to conform to the rule embodied in the treaty may evidently constitute a violation of that obligation. But this violation can take other forms as well. It may also consist of a refusal to recognize in a given case the validity of a law, under the pretext that the law has not been sufficiently proved. The adoption by Bulgaria of an attitude implying the refusal of the Bulgarian authorities to respect the presumption in favor of the acquired rights and Turkish official titles, provided for in Article 10, may evidently constitute a violation of that article. In the present case, the Bulgarian authorities have denied the

claimants the right to avail themselves of the presumption created by Article 10. The Bulgarian Government now maintains that it had special reasons for its refusal. This question belongs to the main point of the dispute and will be considered later. But the Bulgarian Government cannot withdraw from the examination of the Arbitrator the question of whether or not it was justified in refusing to recognize the contracts and titles of ownership produced by the claimants.

It may be noted, however, that, in exercising the jurisdiction created by Article 181 of the Treaty of Neuilly, the Arbitrator will examine, as incidental only, the question of the actual existence of proprietary or other rights in respect to Turkish legislation (*cf.* judgment No. 7 of the Permanent Court of International Justice, page 42). But he cannot evaluate the attitude of the defendant in regard to provisions 10 and 11 without considering to a certain extent the questions of the existence, according to civil law, of the rights invoked by the claimants.

The Bulgarian Government also relied upon the well-known principle of international law of prior exhaustion of local remedies. When, following the occupation of the territory by the Bulgarian troops in 1912 and 1913, the Bulgarian Forestry Administration took possession of the disputed forests, it considered them as Turkish domanial property, destined to become the property of the Bulgarian State by the final annexation of the territory. The possession of the Forestry Administration having been thus established, the individuals claiming rights in the forests should, according to the defendant, have asserted their rights in the usual legal way by resorting to the Bulgarian courts of competent jurisdiction. The demands of the claimants are therefore hardly justified on their face. The Bulgarian Government alleged, moreover, that the titles produced by the claimants are tainted with irregularities of form so obvious that they could not be considered as establishing the so-called acquired rights. This fact constitutes an additional reason for considering the question as belonging to the jurisdiction of the national courts.

On the Greek side, on the other hand, the special aspects of the present dispute are insisted upon. The rule of exhaustion of local remedies cannot be pleaded in the present case against the Greek Government, first, because recourse to national courts offers the claimants no possibility of obtaining justice, these tribunals being bound on the matter by Bulgarian national legislation, and next because Article 181 of the Treaty of Neuilly carries the implicit exclusion of the rule. Concerning the Bulgarian national legislation, the plaintiff cites the law of 1904 which renders useless all recourse to Bulgarian courts.

The objection here considered is not justified either, and for several reasons.

First of all, under the legal presumption embodied in Article 10 of the Treaty of Constantinople, the Bulgarian Forestry Administration could not

refuse to recognize the rights and titles of the claimants without "legal proof to the contrary." The exception of exhaustion of local remedies would have more foundation if the Forestry Administration had itself taken the initiative in a suit against those holding title and this action had been pending, or even if the Bulgarian Government had raised this objection so that it could later institute a legal action before those tribunals against the parties allegedly entitled. But the Bulgarian Government has in no way manifested such an intention. Under these circumstances, it is the duty of the Arbitrator to declare that, in case the Bulgarian Government had wished to contest the validity of the contracts and titles produced, their annulment, except in case of manifest irregularities of form, could have been brought about only by judicial decision (*cf.* Judgment No. 7 of the Permanent Court of International Justice, page 42). The examination made by the administrative authorities was not sufficient to satisfy the requirement of Article 10, according to which the presumption shall prevail "until legal proof to the contrary." Moreover, the Bulgarian Government itself admitted—see the text of the *note verbale* addressed on January 10, 1925, to the Greek Legation at Sofia, cited above—that the Ministry of Agriculture which examined the titles of the claimants "is not a tribunal which can pass upon the validity of titles of ownership." The rule of exhaustion of local remedies is necessarily restricted in its application by the establishment in the terms of the treaty of said legal presumption.

Besides, the rule of exhaustion of local remedies does not apply generally when the act charged consists of measures taken by the government or by a member of the government performing his official duties. There rarely exist local remedies against the acts of the authorized organs of the state.

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

The conclusion from the foregoing considerations is that the objection on the ground of incompetence and of inadmissibility of the Greek claim must be overruled.

III

It is proper to consider next the competence of the Greek Government to act in behalf of the brothers Tevfik and Hakki Ahmed who acquired Bulgarian nationality in 1913.

On this question the defendant has drawn up an exception thus worded:

That in any case, it (that is, the demand of the Greek Government)

> cannot be entertained in so far as concerns the participation of the brothers Tevfik and Hakki Hadji Ahmed, and the Bulgarians Peter Sallabacheff, Minko Semerdjieff and Pantcho Apostoloff.

Of the two questions thus mentioned, only the first has a preliminary character and will be treated here. The defendant denies that the Greek Government can act as protector of the Ahmed brothers in this case. On the other hand, the plaintiff claims nothing for the benefit of the three Bulgarian associates, and the defendant's exception therefore only has the result of reducing the eventual shares of the other associates in a sum corresponding to the financial interests of the Bulgarian subjects in the forestry enterprise.

The two parties argued at some length the nationality of the brothers Tevfik and Hakki Hadji Ahmed, upon which they hold rather divergent opinions. However, they are agreed that in 1918 the brothers were both Bulgarian subjects. At the time of the act complained of—the alleged confiscation of the forests—they were therefore undeniably nationals of the country which took the steps charged. Under these circumstances it is not admissible, according to common international law, to admit the right of the Greek Government to present claims in their behalf for these injurious acts, inasmuch as the latter were caused by their own government. "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right—its right to ensure, in the person of its subjects, respect for the rules of international law." (Judgment No. 2 of the Permanent Court of International Justice, page 12.) This being so, Greece cannot base a claim on the fact that a Bulgarian national was injured by confiscatory measures on the part of the Bulgarian Government, even though he later became a Greek subject. Neither is there ground for interpreting Article 181 of the Treaty of Neuilly and the provisions of the Treaty of Constantinople to which that article refers, as extending to such a degree the right of the Greek Government to undertake the diplomatic and legal protection of persons acquiring Greek nationality as a result of various recent peace treaties.

The conclusion is that the reclamation of the Greek Government cannot be entertained as regards the two claimants Tevfik and Hakki Ahmed.

IV

The Bulgarian Government has requested the Arbitrator, as an exception (under No. 5) to

> Exclude from the present case the claims pertaining to the forest-pasturage Kara-Bouroun and to those parts of the *yaïlaks* Gougouche, Chabanitza and Toursounitza which are situated in Greek territory.

On this point the defendant declared that the forest of Kara-Bouroun was situated in a region in dispute between the Bulgarian and Turkish Govern-

ments before the wars of 1912–13. In the opinion of the Bulgarian Government, this region was part of the territory formerly Bulgarian. In support of its allegation, the defendant produced a letter issued from the Forests and Hunting Section of the Bulgarian Ministry of Agriculture and Public Lands, dated August 12, 1932. It states particularly:

> Concerning the forest in the *yaïlak* Kara-Bouron, this forest, situated west of the former Turco-Bulgarian frontier and forming part of the State Forest of Fotène, has always been, as well before the Balkan War as at the present time, in the possession and under the administration of the Forestry Office of Fotène, District of Pechtera.

There was also produced a letter from the Bulgarian General Staff, dated August 16, 1932, in which it is declared that the said lands of Kara-Bouroun have always been a part of Bulgarian territory and have been guarded by Bulgarian troops. A map published in 1907 by the General Staff, a copy of which was introduced during the argument, confirms that the frontier was, according to Bulgarian opinion, laid out in the manner indicated thereon.

The plaintiff maintains that the fact that the territory was in dispute before the conclusion of the treaty is not important, and that it did not actually belong to Bulgaria except by virtue of the treaty.

In view of the precise data furnished by the Bulgarian Government on this question, and in view of the limits upon the jurisdiction of the Arbitrator laid down by Article 181 of the Treaty of Neuilly, the Arbitrator is of opinion that the plaintiff has not proved its right to bring before him a claim against the Bulgarian Government on the subject of the rights of Greek citizens in the forest of Kara-Bouroun.

As to the other three forests which are partly situated in Greek territory, the plaintiff denied the allegation of the defendant, but maintained, in addition, that the quantity of wood sold in accordance with the cutting contracts could have been obtained in any case in Bulgarian territory. The Arbitrator could not, in view of this latter possibility, allow the Bulgarian objection as a preliminary exception.

V

The defendant presented, in the form of an objection of inadmissibility, a request to remove from the case the claim of the plaintiff concerning the fourteen *yaïlaks* in which claimants allege rights of exploitation.

This point, which is rather a question of substance, will be considered later.

B. ON THE MAIN ISSUE

I

In declaring admissible the reclamation of the Greek Government, the Arbitrator has not taken a final position concerning the existence of the acquired rights claimed by the plaintiff on behalf of its nationals. The pre-

liminary question includes in effect the jurisdiction of the Arbitrator as it has been established by the provisions of Article 181 of the Treaty of Neuilly. The conclusion to which the Arbitrator has come in the first part of that judgment is that the defendant is not justified in withdrawing from the consideration of the Arbitrator the question whether or not the acquired rights of certain Greek subjects have been violated. In the opinion of the Arbitrator, that is not a question which is within the exclusive jurisdiction of the national courts of Bulgaria. The rule of prior exhaustion of local remedies cannot be invoked in the case as a defense intended to prevent the examination of the main point of the dispute. It is the Arbitrator's function to judge whether or not the attitude of Bulgaria towards the parties in interest implies, on the part of that country, a failure in its international obligations contained in Article 181 of the Treaty of Neuilly.

The general argument of the defendant concerning the jurisdiction of the Arbitrator being thus rejected, it remains for the Arbitrator to consider in order each of the claims presented by the plaintiff. First, however, it will be proper to consider certain questions, raised by either one or the other of the parties in the course of the case, which concern all the claims, or most of them, and are therefore of a rather general character.

II

It follows from the preceding arguments that the Greek Government bases its claim on the fact that the Bulgarian Government took possession of several forest tracts in which Greek nationals held certain rights and declared them state property. When the Bulgarian Forestry Administration took possession of them—which appears to have taken place in February, 1913—a state of war existed between Bulgaria and the Turkish Empire. It has been stated on the part of Bulgaria that there was then no ground for supposing the existence of private forests. No claim was asserted before the last half of 1914. The claimants having brought their complaints to the attention of the proper authorities, the Bulgarian Ministry of Agriculture and the special commissions appointed by it for this purpose submitted them to a scrupulous examination. It was not until 1918 that the inquiry was completed. A letter from the Minister of Agriculture, dated September 20, 1918, gave notice of the final decision to treat the disputed forests as public forest lands.

The Bulgarian Government now declares that that measure was proper, chiefly because the forests had, according to Turkish legislation, the character of public domains in which individuals could generally have no other rights than a very restricted right of enjoyment (right of pasturage). Private owners of *yaïlaks* (public pasture land placed at the disposition of private cattle) could not, according to the opinion of the defendant, exploit the trees thereon. These *yaïlaks*, according to this argument, were in the category of real property, denominated *miri* in Turkish terminology, as distinguished

from that called *mulk*, that is to say, realty owned by individuals with full rights of ownership.

That question constituted the main subject of the inquiry undertaken by the commissions appointed by the Minister of Agriculture of Bulgaria to examine the claims. The first of these commissions, according to a *procès-verbal* of January 22, 1916, arrived at the conclusion that the proprietors (possessors), of the *yaïlaks* are at the same time owners (possessors) of the natural forests situated within the limits of these *yaïlaks*, and that in order that they should be treated as such it was sufficient for them to present either the *procès-verbal* of the execution of the judicial inquiry and the formal decision, or other documents stating that the judicial inquiry had been completed and that the fixation of the tax *Orman Resmi* (a kind of tithe on forests) had been proceeded with. The second commission, according to the *procès-verbal* of May 10, 1917, made a similar decision. In its opinion, the judicial inquiry and the fixation of the *Orman Resmi* tax serve to confirm the right of possession (ownership) and of enjoyment of the *yaïlaks* in the forests to the proprietors to whom titles of possession of *yaïlaks* had been delivered, thus legally modifying the very nature of the property which is thus transformed from *yaïlaks* into forests. The result is that the commissions admitted the possibility of the existence of private rights in the trees growing in a *yaïlak*, although private rights of this kind can be conceded only in pursuance of a special procedure and on the basis of an inquiry undertaken by the competent authority.

In finally declaring on September 20, 1918, that the disputed forests were to be treated as public forests, the Bulgarian Minister of Agriculture did not rely upon the Turkish law in force in the territory before annexation, but on the Bulgarian Forest Law of 1904: "In conformity with Art. 1 of the Forest Law, all the *yaïlaks* within the limits of your district are property of the state."

In the *note verbale* addressed on January 10, 1925, to the Greek Legation at Sofia by the Ministry of Foreign Affairs of Bulgaria, mention is likewise made of the fact that the Bulgarian State had taken possession of the forests in dispute conformably to Article 4 of the Bulgarian Forest Law. Nor did this note invoke the Turkish law in force prior to the annexation.

It may be noted here that one of the commissions above mentioned expressly pointed out certain differences existing between the Bulgarian law as applied by the courts, on the one hand, and the Turkish law, on the other, in regard to the treatment of realty of the kind in question.

It may be concluded from the lengthy discussion which took place in the course of the case on the question whether the disputed forests had the character of *mulk* or of *miri*, that the Bulgarian thesis is accurate as regards the assertion that the properties were *miri* lands and not *mulk* lands. But it was proved on the part of Greece that individuals could also, under Turkish law, obtain concessions of *miri* lands with rights so extensive that they were

permitted to utilize or even dispose of the timber growing thereon. The question whether it is necessary to characterize as a right of ownership the legal situation of the possessors of *yaïlaks* who have duly secured such extensive rights seems to be a rather theoretical one. This is confirmed by a letter of the Ministry of Foreign Affairs of Turkey to the Bulgarian Legation at Ankara, dated August 18, 1932, in which the following passage appears:

> Those persons having a right of ownership in property in the categories of *miri* and *vakouf* enjoy all the rights recognized by the law in every owner of *mulk* property. They also possess, equally with the latter, the free and entire disposition of this property and consequently can alienate it, pledge it as security, bestow it as a gift; and on their decease this property passes into the ownership of their legal heirs. This property cannot return under the administrations of the *Miri* or of the *Vakouf* except only in the cases provided by law and notably in the case of escheat. Likewise, these administrations have no legal right to reenter into possession of this property in any other guise. The fact that this property has been recorded in the land register or indicated in the title deeds as *Miri*, *Vakou* or *Mulk* could not give rise to any distinction between them as to the right of disposal of such property.

It may be mentioned that the Mixed Commission on Greco-Bulgarian Emigration was confronted with the same problem and that in 1929 it decided to consider the forests situated on the *yaïlaks* as private property.

The conclusion of the Arbitrator is, therefore, that according to Turkish law, the possessors of *yaïlaks* could have been in a legal situation essentially similar to that of an owner and consequently could have had the right to use and dispose of the trees. The Turkish law in force in the annexed territory before 1913 did not forbid the concession to private persons of rights in the timber growing on the *yaïlaks*. Under these circumstances, it is not indispensable to the settlement of the present dispute to decide the point of whether these rights must be considered rights of full ownership or rather as in the nature of a permanent usufruct.

III

As said above, the defendant formulated a preliminary exception requesting the Arbitrator to hold

> That even reduced to the interests of the Greek nationals only, Ath. Christophacopoulos, Jani Doumas and Demètre Kehaya, the claim cannot be entertained as to the fourteen *yaïlaks* in which claimants allege they have concessions for exploitation.

We will now proceed to consider this exception, which touches on a rather basic question.

The defendant asserts that the claims of the plaintiff founded on the fourteen cutting contracts made by claimants with the owners of certain forests, could not be very well based upon the juridical nature of cutting rights, for such rights include only personal obligations toward the grantee and not

rights of property or other real rights. The measures of the Bulgarian Government were therefore aimed at the proprietors and not directly at the persons holding the right to cut. If the rights in question are personal obligations, the action of the claimants should be directed against their grantors, and the Greek Government has no direct recourse against the Bulgarian Government. The defendant refers on this point to a clause inserted in the contracts, according to which the "vendor" agrees to take all useful and proper measures to remove any obstacles which might later arise to injure his property rights. Added thereto is the following passage:

> In case he cannot succeed in so doing, and it is shown that all the rights of the vendee are destroyed, the vendor agrees to indemnify the vendee for all the damage suffered by the latter, without recourse to any protest or questioning whatsoever.

The plaintiff asserts in rebuttal that the cutting contracts imply the sale of the trees and that the buyer must be considered as the owner. The clause in the contracts cited above does not mean that the obligation imposed by it upon the grantor is the only possibility open to the parties having the rights in question. The latter were, as owners of the trees, victims of confiscatory measures taken by the Bulgarian Government.

The two parties have developed in detail the reasons working in favor of both theses. The Arbitrator has concluded that the rights of cutting of the kind in question—rights not recorded in the land register—belonged under Turkish law to the domain of personal contract rights.

It remains then to determine whether the legal nature of the cutting rights prevents the Greek Government from presenting claims based on international law.

It should first be recalled that the right of a state to assert claims under common international law is disputed in cases of the kind here in question. According to one generally accepted opinion, a claim can be made not only in case of violation of property rights resulting from measures taken by the authorities of another country, but also, for example, when the claimant possesses in a foreign country a mortgage on realty or on a ship which has been confiscated. But generally, in a case in which the demand of the claimant is based, for example, upon the fact that his debtor in the foreign country has become insolvent as a result of confiscation, diplomatic intervention or action before an international tribunal based on common international law will not be allowed (*cf.* Borchard, *Diplomatic Protection of Citizens Abroad*, 295–300).

There are frequently found in international treaties provisions for the protection of rights other than real ones. Several instances may be cited in the peace treaties concluded following the last World War.

In the present case it is a question of the interpretation of Article 181 of the Treaty of Neuilly and of Article 10 of the Treaty of Constantinople. The first of these two articles speaks of "private rights," and the second of

"acquired rights." Article 11 of the Treaty of Constantinople enunciates, moreover, a special rule concerning "property rights in land." It seems necessary, because of the context, to interpret the first two expressions as not limited to real rights. Hence, if, after the annexation of the territory in dispute, the Bulgarian Government had promulgated a law annulling, for example, all the personal contract rights acquired before the annexation in relation to the inhabitants of the territory, that law would have to be considered as incompatible with Article 10 of the Treaty of Constantinople.

Concerning the cutting rights, it can be said that they are not entirely annulled since the subsidiary right to an indemnity accorded the parties in interest by the grantors in the cutting contracts has not, so far as known, been abrogated. Some doubts may therefore arise as to the competence of the Greek Government to interpose in behalf of persons holding cutting rights. It is also possible that, according to Turkish law, rights of cutting were so precarious that a regular cession of the realty to a new owner would have resulted in the impossibility of asserting the cutting right against the latter by transforming it into a right to indemnity against the grantor. This point was not entirely clarified during the hearings. But, in the present case, the Bulgarian Minister of Agriculture prohibited all further cutting, with full knowledge of the claims of the contending parties, giving as the sole reason the fact that the forests were state property according to the Bulgarian Forest Law of 1904. The Bulgarian Government therefore took a step directly aimed at the rights of cutting as well, and based on the unjustifiable ground that the concession of that kind of rights was not allowable because the forests were the property of the state. Under these circumstances, it can hardly be doubted that the attitude of the Bulgarian Government concerning the cutting rights was incompatible with the respect for "acquired rights" imposed upon Bulgaria by Article 10 of the Treaty of Constantinople.

IV

The defendant made several observations on the subject of the proofs introduced by the plaintiff in support of the right of the claimants in the forests. The documents produced were, in its opinion, filled with such manifest irregularities that they could not uphold the presumption of the existence of the alleged rights of the claimants.

First, it is proper to make an observation of a general kind as to the nature of the titles of ownership produced by the claimants. As was mentioned above, the claimants sought to prove their rights of ownership in the forests —either those of the persons who granted the cutting rights to the claimants or those of the latter themselves—by invoking a species of documents called "certificates of ownership in place of definitive titles." No original title of ownership or of possession (*tapou*) was produced. Nor does the defendant think it very probable that all the originals without exception were lost; it

advances the hypothesis that the *tapous* were not produced because they contained references disadvantageous to the allegations of the claimants. On the subject of the certificates produced, the defendant remarks that they are a hitherto unknown and unused form of proprietary titles. It was by virtue of a special decision of the Grand Vizier of May 1, 1329 (1913), that the Turkish authorities issued these certificates, which were not in use prior to that time in Turkey, and then only for real property situated in the territories taken away from the Turkish Empire after the Balkan War. Hence the Government of Constantinople at the time of that decision of the Grand Vizier in fact no longer exercised authority in the territories occupied by the Allied Powers. Under these circumstances, the Bulgarian Government denies that the acts and decisions of the Turkish authorities of Constantinople have any effect in relation to the territories under Bulgarian occupation and jurisdiction.

While admitting that the new form of titles of ownership was not in use in 1913, the plaintiff maintains that even after the occupation or annexation of the territory by Bulgaria, the Turkish authorities retained the right to determine the form of the certificates confirming the rights in real property which such persons had acquired in the past under the Ottoman régime.

The Arbitrator agrees with the opinion in that regard expressed by the plaintiff. The obligation assumed by Bulgaria to respect official titles emanating from the Turkish authorities implies the obligation to recognize the certificates of ownership duly issued by the competent Turkish authority on the basis of the Turkish land register in which the property was recorded.

But the defendant raises objections likewise in regard to the content of the certificates. Relying upon an attestation issued by a Turkish official upon whom it devolved to keep the land title register, it asserts that the certificates contain certain indications not conforming to the register. This inaccurate information in the certificates relates, on the one hand, to the juridical nature of the forests and, on the other, to their extent. Thus one finds in certain certificates the indication that the forests had the character of *mulk* (full ownership), while the register does not contain such an indication at all, but contains others according to which the forests are *miri* land. In addition, certain certificates mention "forest," while the register designates the same property only as "*yaïlak*" (pasturage land).

The Arbitrator does not see any reasons for him to cast doubt upon the accuracy of the defendant's allegation concerning the non-conformity on certain points of the certificates with the land title register—being based upon the attestation of a Turkish official, and obtained through the Ministry of Foreign Affairs of Turkey. However, it seems probable that it was the competent Turkish authority who inserted the information in question in the certificates at the time of their issuance. If the Bulgarian administration had thought that the certificates were falsified it could at any time, by bringing action before the proper Bulgarian court, have called for a judicial

decision concerning their validity or their probative value. It appears, however, that the allegation of falsity was formulated only during the present litigation.

It is nevertheless decisive that the certificates produced by the defendant on the subject of the contents of the land title register confirm the fact that in essential points these titles are in conformity with the land register. In view of the conclusion to which the Arbitrator came above on the question of the difference existing between *mulk* and *miri* according to Turkish law, decisive importance should not be given to the question whether one or the other of these terms was employed in the register for the property in dispute.

V

1. Concerning the forests of Kavgali and Tchakmakli, the plaintiff asserted the right of ownership for Christofacopoulos and Tevfik, relying upon six "certificates of ownership in place of definitive titles." No contract of sale was produced. The certificates establish the fact that the grant of the right of ownership was recorded in the land register in May, 1913. The defendant called attention to the fact that the acquisition of the right of ownership took place after the Bulgarian occupation of the territory in which the forests are situated and in violation of the proclamation of King Ferdinand of December 1, 1912, providing as follows:

> On and after the day of occupation it is forbidden to enter into contracts or transactions of any sort whatever dealing with immovable property located in the occupied territories.
>
> All instruments concluded after the 5th of October, 1912, are held void at law.

It is evident that the certificates of ownership lose their probative value as proofs of acquired rights if it appears from them that the cession of those rights took place at a time when such cession was not allowed. The question therefore arises whether there are grounds for taking into consideration the proclamation of King Ferdinand from the point of view of international law.

The Treaty of Constantinople provides that "rights acquired previous to *the annexation* of the territories . . . shall be respected." We should compare with this text the declaration annexed to the treaty, in which the Turkish Government declares as follows:

> In regard to Article 10 of the treaty, the Imperial Ottoman Government declares that it has not consented, since the occupation of the ceded territories by Bulgarian forces, to transfers of rights to individuals for the purpose of limiting the sovereign rights of the State of Bulgaria.

The terms of Article 10 of the Treaty of Constantinople might lead to the conclusion that Bulgaria engaged to respect rights acquired in the territory in question before the entry into force of the treaty. At that time only did the sovereignty pass definitively to Bulgaria. The word "annexation" is

not so exact, however, that it necessarily excludes an interpretation fixing the crucial moment at a prior date. It should be noted that the Treaty of Athens of November 1/14, 1913, between Turkey and Greece (Article 6), as well as the Treaty of Stamboul of March 1/14, 1914, between Turkey and Serbia (Article 5), contain the word "occupation" instead of "annexation" in the text of the corresponding provisions. The two allies of Bulgaria in these two treaties with Turkey did not engage to respect rights acquired after occupation. This fact is not without importance in the interpretation of the Treaty of Constantinople, since it is hardly likely that the contracting parties would have wished to make a distinction on this point between the treaties. Besides, it should be noticed that the Treaty of Constantinople does not invalidate the proclamation of King Ferdinand but, on the contrary, contains in an annex a declaration tacitly expressing the same idea as the proclamation in regard to grants of property by the Turkish Government to private individuals.

Exclusive of the argument concerning the meaning of the word "annexation" in Article 10 of the Treaty of Constantinople, an argument which touches on the preliminary question of the competence of the Arbitrator, a still more definite conclusion may be arrived at by other means. Bulgaria promised to respect rights validly acquired before the annexation. The aforesaid proclamation of King Ferdinand forbade grants of realty. If this prohibition was legally valid, the acquisition in May, 1913, of the two forests now in question is not valid. One may set aside here the question of how this problem should be considered from the point of view of common international law. But it is important to establish that Turkey, by the Treaty of London of May 17/30, 1913, previously alienated her sovereignty over this territory in favor of the Allied Powers, that is, Bulgaria, Greece, Montenegro and Serbia. It is true, as the plaintiff pointed out, that the Treaty of London was never ratified and its provisions were modified in part by later treaties. But a provision of the Treaty of Constantinople declares that the provisions of the Treaty of London are to be enforced in regard to the Imperial Turkish Government and the Kingdom of Bulgaria in so far as they are not abrogated or modified by the stipulations of the Treaty of Constantinople. It follows, in the opinion of the Arbitrator, that the proclamation of King Ferdinand had full legality for the territory, at least from the date of the signature of the Treaty of London. It has not been established by the plaintiff that the sale took place prior to that date.

It may be presumed also, with reference to what has been said above, that the expression "annexation" in Article 10 of the Treaty of Constantinople contemplates a date which is not subsequent to May 17/30, 1913.

As a result of the foregoing, the plaintiff cannot base any claim in favor of the claimants on a right of ownership acquired in these two forests.

2. With regard to the forests of Barakli and Madjarli, the defendant maintained that they were acquired by Christofacopoulos and Tevfik by contract

of sale drawn up on April 1, 1914, before the second notary at the court of first instance of Sofia. The plaintiff, however, could not produce any other proofs of the acquisition of proprietary rights except a copy from the register kept by the aforesaid notary showing that a contract of sale concerning a forest was entered into on the above-mentioned day by Christofacopoulos and Tevfik and certain designated persons, and certificates of ownership delivered for the vendors and other persons concerning the two forests. On the Bulgarian side, it was pointed out that the contract of sale was not produced and that, in any case, it did not fulfill the condition required by Bulgarian law by which the grant of real property must be made by notarial deed drawn up by the notary under whose jurisdiction the property is located, under penalty of being void. On the Greek side, the opinion was expressed that a deed to which the signatures of the contracting parties are legalized before a notary, and which is copied in the notary's book, takes on the character of a notarial deed. Moreover, in case the Arbitrator decides that the bare ownership of these two forests was not transferred to the claimants, due to an irregularity of form, the plaintiff bases its claim on a prior contract for the purchase of the wood cuttings from these forests.

The results of this recital is that the plaintiff has produced no title of ownership nor any other conclusive proof concerning the two forests of Barakli and Madjarli. The legal presumption of acquired property rights is therefore not established. In this case there is still less proof of a right acquired before the annexation of the territory and consequently falling within the jurisdiction of the Arbitrator. The exploitation contract likewise invoked by the plaintiff was concluded March 16, 1908, for a period of ten years from the beginning of the cutting, without right of renewal. According to the very terms of the contract, it must have expired in 1918. Under these conditions it could not serve as the basis for a claim.

3. In regard to the forest of Gougouche, the plaintiff maintained that Tevfik acquired ownership of it in January, 1908.[2] In support of this allegation plaintiff invoked a certificate showing that Tevfik is the owner of the forests and that a statement to that effect was entered in the land register in January, 1908. The certificate was delivered September 21, 1913. Certain observations were made on behalf of Bulgaria in regard to the certificate. And it must be admitted that the certificate contains certain irregularities. Under the heading "Explanation of reasons for drawing up the title," the following information is found:

> Copy taken from the official records on written demand of Tevfik Effendi who, in his quality as lessee duly established by certificate, requested the delivery of this copy, pleading the loss of the original in his possession delivered in January 1326, based upon entries inscribed at that date by purchase from Edhem Effendi.

[2] The plaintiff dates its title from "1324–1909" and an expert's report from "1325–1910." It appears, however, that it should have placed the dates at "1324–1908" and "1325–1909."

In this note Tevfik is designated as "lessee," while he is named "owner" in another place in the same certificate. Neither does the year 1326 (1910) indicated in the certificate conform to another statement made in the certificate according to which the acquisition of the right of ownership by Tevfik was registered in 1324 (1908). It appears, however, from the copy of the register produced by the defendant that the entry was made in 1908. In one (copy of a) "letter of specification" of September 5, 1325 (1909), Tevfik is likewise designated as the owner entered in the register. Another inaccuracy in the certificate, it appears, is the indication of the area as 140 ancient *deunums* while the register shows the figure 40.

In spite of the irregularities pointed out on this subject, the Arbitrator is of the opinion that the documents produced ought to have been recognized by Bulgaria as titles of ownership until proof to the contrary by judicial means. In refusing to recognize these titles the defendant, therefore, failed in its international engagements.

4. Concerning the forest of Toursounidja, the defendant observed that no cutting contract was produced. It objects therefore to this claim being taken into consideration. The plaintiff alleges that the contract was lost, but submits at the same time that its existence is sufficiently established by the tenor of the titles of ownership appertaining to this forest.

It is true that Tevfik is designated in these deeds as "the lessee of the forest," a status "duly proved by certificate." But, on the other hand, there exists no information concerning the content of the contract. The plaintiff has not proved therefore that the defendant failed in its obligations concerning respect for acquired rights, or rather concerning the rule of presumption contained in Article 10 of the Treaty of Constantinople. The Arbitrator is therefore obliged to reject the claim presented on the subject of this forest.

5. The contract produced by the plaintiff concerning the cutting rights in the forest of Hamam-Bounar was drawn up on February 7, 1910, for a period of five years, without the privilege of renewal. This contract does not provide for the sale of a fixed quantity of wood. Therefore, according to its own terms, it must have expired in 1915. The Arbitrator, therefore, cannot do otherwise than reject the claim concerning this forest.

6. Concerning the other cutting rights, the defendant raised various objections to their validity. These observations are aimed at either the incompetence of the alleged owner of a forest to grant a right of cutting, or at some irregularities in the form of the statements covering the description of the forests which are obligatory according to Turkish law, or else at the absence of a decision of the proper authorities concerning the approval of such statements.

After examining all the documents concerning the various forests, the Arbitrator has, however, arrived at the conclusion that, there being no judicial decision invalidating the alleged rights, he must proceed on the

presumption of their validity, assuming that no manifest and serious irregularities have been shown.

The result of the examination of the various points at issue may be summed up as follows:

The defendant's claim in regard to the forest of Kara-Bouroun cannot be considered (see Title IV, A) and the claims concerning the forests of Kavgali, Tchakmakli, Madjarli, Barakli, Toursounidja and Hamam-Bounar must be rejected.

Among the claims based on the right of ownership there is ground for allowing only that concerning the forest of Gougouche.

Among the claims based on the right of cutting for a limited time and a fixed quantity of wood, there is ground for allowing the following eleven, that is, those concerning the forests of Avanli, Olouk-Yédik, Korfanli, Tchal, Souloudjak, Kodja-Kargalik, Sabourdja-Alan, Bitchaktchi-Diranli, Chabanidja, Tilkili and Kemali-Tchoral.

VI

It follows from the conclusion drawn by the Arbitrator above, that the attitude of the defendant in regard to the claimants did not accord, as far as concerns certain of the forests in question, with Article 10 of the Treaty of Constantinople and with Article 181 of the Treaty of Neuilly. Considering the damage thus caused the plaintiff by the defendant, the latter must be held to pay an indemnity.

It was suggested in the course of the proceedings that, should the claim be upheld in whole or in part, the defendant should be obliged to restore the forests to the claimants. The plaintiff, however, left to the discretion of the Arbitrator the expediency of such restitution.

The Arbitrator is of the opinion that the obligation of restoring the forests to the claimants cannot be imposed upon the defendant. There are several reasons which may be given in favor of this opinion. The claimants in whose behalf a claim put forward by the Greek Government has been held admissible, are partners in a commercial organization composed of other partners as well. It would therefore be inadmissible to compel Bulgaria to restore integrally the disputed forests. Moreover, it is hardly likely that the forests are in the same condition that they were in 1918. Assuming that most of the rights in the forests are rights of cutting a fixed quantity of wood, to be removed during a certain period, a decision holding for restitution would be dependent upon an examination of the question whether the quantity contracted for could be actually obtained. Such a decision would also require examining and determining the rights which may have arisen meanwhile in favor of other persons, and which may or may not be consistent with the rights of the claimants.

The only practicable solution of the dispute, therefore, is to impose upon the defendant the obligation to pay an indemnity. This solution also en-

counters serious difficulties by reason of conditions peculiar to the instant case.

Here may be discussed a preliminary objection raised by Bulgaria, which was not considered along with the other objections because it belongs rather to the main issue of the dispute. The defendant alleged that the demand "is not admissible in so far as concerns the participation of the Bulgarians Pierre Sallabacheff, Minko Semerdjieff and Pantcho Apostoloff."

As was remarked before, this objection implies the obligation, in calculating the final indemnity, to deduct the shares which would have reverted to the three persons above mentioned according to the partnership contract. Of these three persons, Apostoloff's share would be $\frac{1}{16}$ of the net profits of three forests, while the share of the other two would be that indicated in the partnership contract. On behalf of Greece it was observed, as mentioned above, that the participation of Apostoloff was subject to certain conditions which were not fulfilled, and that, besides, Apostoloff was not authorized to receive any profit in case the Bulgarian Government did not recognize the rights of the claimants in the forests. As regards Semerdjieff, the plaintiff asserted that he was excluded from the partnership and therefore did not possess any share in the assets of the company.

In regard to Sallabacheff, the plaintiff alleges that a right could not be claimed in his behalf unless the company established in Bulgaria had itself acquired as an entity ownership of the five forests and the wood cuttings derived from the fourteen exploitation contracts. According to the plaintiff, the Dospath-Dagh Company, although regularly organized, never actually existed because the capital fund provided for in the contract was never established. It never realized on the capital assets promised by the partners, and for that reason the company never became the owner of any right. The result is that Sallabacheff never became a participant in any capital fund. The plaintiff added still another consideration, that is, that the partnership contract concluded in Sofia in 1915, according to Article 180 of the Treaty of Neuilly ceased to exist following the entry of Greece into the war on the side of the Allies. Several of the contracting parties having become enemies, the contract was abrogated by operation of law.

Taking up first this last allegation, the defendant's observation should be emphasized, according to which certain exceptions are foreseen to the general principle of Article 180 of the Treaty of Neuilly, especially in relation to contracts having for their object the transfer of ownership of goods and effects, personal or real, in case of the transfer of the property or of the delivery of the article before the parties became enemies. As the defendant also asserted, the Dospath-Dagh Company did not consider itself as having been dissolved by the Treaty of Neuilly. The claim presented December 22, 1921, against Bulgaria before the Greco-Bulgarian Mixed Arbitral Tribunal was made in the name of the partners in the Dospath-Dagh Company, Limited. The diplomatic representations of the Greek Government were

likewise made in behalf of the stockholders and representatives of the company. The existence of a number of proofs of the functioning of the company even after the World War does not permit the Arbitrator to hold, against the denial of the defendant, that the company had legally ceased to exist.

If the argument of the plaintiff were upheld on the subject of the abrogation of the partnership contract, the consequence would be perhaps, in addition, the total or at least partial collapse of the foundation of the claims. The defendant has observed in this connection that, according to the point of view just indicated, one could not understand on what ground would be justified the claims of persons other than those whose names appear as owner-purchasers in the certificates of ownership or as owners of concessions in the exploitation contracts. One can image still other consequences of the argument for the abrogation of the partnership contract. But there is no reason for discussing this eventuality in more detail.

And while on the subject of the claims made in the present proceeding, this is the place to examine the question as to what persons are to be considered as shareholders in the assets of the company, keeping in mind the date of the confiscation of the forests. According to the minutes of the meeting of the company held May 18, 1918, there were eight interested parties, namely, besides the five persons whose rights the Greek Government invokes in this case, the two Bulgarians, Sallabacheff and Semerdjieff, and the Turk, Sadik Ibrahim. Admitting that it has not been proved that any of them withdrew from the company before September 20, 1918, the date on which the forests were declared the property of the Bulgarian State, the Arbitrator can only presume that there were at that time eight persons interested in the company, in which Sallabacheff and Semerdjieff together owned 120/640 shares and the others together held 520/640 shares. The contract contains no clause relating to the proportion in which each of the latter six shared in the company. It may be presumed, however, that their shares were equal. It follows that the three claimants whose interests the Greek Government is competent to represent in the present case hold in the company a financial interest corresponding to 260/640 of its assets.

VII

In figuring the indemnity which it feels justified in claiming, the plaintiff has based its calculation as regards the exploitation contracts on certain admitted facts concerning the quantity of wood the claimants had the right to utilize according to the terms of the contract, as well as on an average price of 10 gold levas a cubic meter (m^3) of standing wood. Concerning the forests as to which the claimants asserted a right of ownership, the valuation is based upon the extent, the density of the forest, the rapidity of the new growth, and the average price of the above-mentioned wood. In addition, payment of interest is claimed from the date on which this arbitral award shall have been rendered.

Such a method of evaluation raises some legitimate objections as to the value of the standing wood; it is well known that the latter is subject to very serious fluctuations according to contingencies, the location of the forest, the possibilities for use of the wood for various purposes in the industrial establishments of that locality, the existence of means of communication, etc. Standing wood can, therefore, in certain places and at a certain specified time, have a comparatively high value, while in other places or at another time it will have no commercial value at all, and therefore cannot be utilized. It is true that the plaintiff produced some information on the sale by auction of various quantities of wood in the regions where the forests in litigation are situated, but these facts are not of sufficient probative value when evaluating forest lands of large extent. Moreover, this fact is accentuated by the enormous difference existing between the sums for which the claimants acquired their rights in the forests and those at which they estimate their actual value.

The defendant has insisted upon the institution of a local survey by the Arbitrator in case he decides upon the payment of damages. The plaintiff left to the Arbitrator the duty of judging of the expediency of such an assessment by experts. The Arbitrator does not believe that it would be practical at the present time to proceed with such a survey, considering the length of time that has elapsed since the date of the seizure of the forests by Bulgaria, and considering the fact that considerable cutting may have been done in that interval for the benefit of other persons. It may also be noted that in most of the cases it is a matter of cutting contracts concluded for a definite period and that any evaluation should therefore take into account the question of whether the exploitation contemplated in the contracts could have profitably been exercised on such a scale during the time fixed.

In the Arbitrator's opinion this case presents several elements giving the impression that the acquisition of the forests in question and the conclusion of the cutting contracts reveal speculative characteristics in which the chances of success were from the beginning of the most doubtful nature. The location of the forests in a frontier region, as well as the uncertainty of political conditions at the time of the purchases, are in themselves of a nature to give the transactions a hazardous character.

It is hardly possible, without taking into account these special conditions, to make an equitable estimate of the indemnity which should be awarded the Greek Government because certain of its nationals have received treatment incompatible with the international obligations of Bulgaria.

It may be recalled that the claimants bought all the forests and all cutting rights, according to calculations of the defendant on the basis of the contracts produced by the plaintiff, for a total sum of 18,000 Ltqs. According to the plaintiff, the capital invested in the various installations for exploitation including the sums paid for the forests, amounted to 73,000 Ltqs.

At the time of the conclusion of the contract of the Dospath-Dagh Com-

pany, Ltd., which took place several years later, February 9, 1915, an indication of the value of the forests, as well as the equipment, was inserted in the contract. That value was placed at 2,600,000 levas. The value of Bulgarian currency at that date was, 118.50 levas to 100 Swiss francs (according to the comparative study of world exchange published by M. Emil Diesen).

The claimants ultimately fixed the value of the forest enterprise a few months before the date when they were declared state property in 1918. According to the memorandum of May 18, 1918, the members of the company decided to sell all the forests and all the exploitation rights for a total sum of 3,200,000 levas. At that date the current rate of the leva was, according to the above-mentioned authority, 158 levas to 100 Swiss francs.

According to the general principles of international law, interest-damages must be determined on the basis of the value of the forests, respectively of the exploitation contracts, at the date of the actual dispossession, that is, on September 20, 1918, in addition to an equitable rate of interest estimated on that value from the date of dispossession. The only certified indication which exists concerning the value of the forests in 1918 is the sum just mentioned, which is considerably higher than the purchase price but does not vary too much from the value indicated in the partnership contract of 1915. It is true that the plaintiff alleged that this price was fixed under pressure of the attitude of the Bulgarian authorities. But it has been emphasized above that the value of the rights in question was influenced by several other uncertain factors capable of lowering it, the same factors, moreover, which doubtless have been felt since the fixing of the purchase price and the value placed in the partnership contract.

In the total value of the alleged rights of the claimants, estimated in 1918 at about 2,025,000 Swiss francs, are also included the forests on account of which the claim of the plaintiff cannot be allowed. Therefore, there should be deducted from this total value, the value of four of the five forests of which the claimants allege they are the owners, as well as the value of three of the fourteen exploitation contracts. It is obviously difficult enough to determine, on the basis of the information at the Arbitrator's disposal, the proportion of the total value represented by these forests and contracts. However, the Arbitrator believes he can calculate approximately, on the basis of the data furnished by the plaintiff concerning the value of the different contracts and forests, that two-thirds of the damages demanded are on account of the forests concerning which the plaintiff has not sufficiently established his claims. There then remains a third of the total sum indicated above, that is, 675,000 Swiss francs. It has also been shown above that the plaintiff is competent only to act concerning the shares of three of the eight associates comprising the company in 1918. These three associates held 260/640 of the assets of the company. Their share in the above-mentioned total would therefore amount to 274,219 Swiss francs, or in round figures, 275,000 Swiss francs. According to the method of evaluation applied by the Arbitrator, interest should be calculated at 5% on that sum from 1918.

The total amount of the indemnity to be paid according to this valuation comes to 475,000 Swiss francs or gold levas.

For these reasons the Arbitrator

UPON THE PRELIMINARY EXCEPTIONS

1. Rejects the exception of incompetence raised by the Bulgarian Government;

2. Rejects the preliminary objection of the Bulgarian Government that the demand of the Greek Government is not admissible before the prior exhaustion of local remedies;

3. Rejects the preliminary objection of the Bulgarian Government that the claim of the Greek Government is not admissible as to the fourteen *yaïlaks* in which the claimants assert the right of exploitation;

4. Allows the preliminary objection of the Bulgarian Government that the claim of the Greek Government is not admissible in so far as it concerns the rights of the brothers Tevfik and Hakki Hadji Ahmed;

5. Allows the preliminary objection of the Bulgarian Government that the claim of the Greek Government is not admissible in so far as it concerns the reclamation relative to the forest of Kara-Bouroun;

ON THE MAIN ISSUE

Decides and judges

1. That it is necessary to overrule the claims of the Greek Government concerning the forests of Kavgali, Tchakmakli, Madjarli, Barakli, Toursounidja, and Hamam-Bounar;

2. That the decision of the Bulgarian Government, announced in the letter of the Minister of Agriculture of September, 1918, showing the non-recognition by the Bulgarian authorities of the rights acquired by the three Greek nationals, Athanasius Christofacopoulos, Démétrius Kehayias and Jean Doumas, in common with the other partners of the Dospath-Dagh Company, in the forest of Gougouche as well as in the forests of Avanli, Olouk-Yedik, Korfanli, Tchal, Souloudjak, Kodja-Kargalik, Sabourdja-Alan, Bitchaktchi-Diranli, Chabanidja, Tilkili and Kemali-Tchoral, before the annexation by Bulgaria of the territory where the said forests are situated, was not consistent with the international obligations of Bulgaria;

3. That by virtue of Article 181 of the Treaty of Neuilly, Bulgaria is responsible to Greece for failing to respect the acquired rights of said nationals of Greece, and that, consequently, an indemnity on this account is due to Greece;

4. That the damage suffered by the three Greek nationals furnishes an equitable measure of the reparation due the Greek Government;

5. That the indemnity due to the Greek Government is fixed at the global sum of 475,000 (four hundred seventy-five thousand) gold levas, plus five per cent interest from the date on which this arbitral award is rendered.

(Signed) ÖSTEN UNDÉN,
Staffan Söderblom.

ANNEX 298

139 S.Ct. 1048
Supreme Court of the United States.

REPUBLIC OF SUDAN, Petitioner
v.
Rick HARRISON, et al.

No. 16-1094
|
Argued November 7, 2018
|
Decided March 26, 2019

Synopsis

Background: Navy servicemembers and their spouses brought action against Republic of Sudan under Foreign Sovereign Immunities Act (FSIA) to recover for injuries servicemembers sustained in terrorist attack. After entry of default judgment against Sudan, 882 F.Supp.2d 23, plaintiffs sought to enforce it against funds held by banks. The United States District Court for the Southern District of New York, Tina Cheryl Torres, J., issued turnover orders, and Sudan appealed. The Court of Appeals for the Second Circuit, Denny Chin, Circuit Judge, affirmed, 802 F.3d 399, and subsequently denied Sudan's petitions for rehearing, 838 F.3d 86, and rehearing en banc. Certiorari was granted.

[Holding:] The Supreme Court, Justice Alito, held that the third means enumerated in the FSIA for a litigant to serve a foreign state in the courts of the United States is not satisfied when a service packet that names the foreign minister is mailed to the foreign state's embassy in the U.S. but, instead, requires that a mailing be sent directly to the foreign minister's office in the minister's home country.

Reversed and remanded.

Justice Thomas filed a dissenting opinion.

West Headnotes (23)

[1] **International Law** Scope of Immunity; Nature of Claims Assertable

Under the Foreign Sovereign Immunities Act (FSIA), a foreign state is immune from the jurisdiction of courts in the United States unless one of several enumerated exceptions to immunity applies. 28 U.S.C.A. §§ 1604, 1605-1607.

1 Cases that cite this headnote

[2] **International Law** Exceptions to immunity in general

If a lawsuit falls within one of the exceptions to immunity set forth in the Foreign Sovereign Immunities Act (FSIA), the FSIA provides subject-matter jurisdiction in federal district courts. 28 U.S.C.A. §§ 1330(a), 1604, 1605-1607.

[3] **International Law** Process

Foreign Sovereign Immunities Act (FSIA) provides for personal jurisdiction where service has been made under the section of the statute governing service of process on a foreign state or political subdivision of a foreign state. 28 U.S.C.A. §§ 1330(b), 1608.

7 Cases that cite this headnote

[4] **International Law** Process

Section of the Foreign Sovereign Immunities Act (FSIA) governing service of process on foreign state or political subdivision of foreign state sets out, in hierarchical order, four methods by which service shall be made: first method is by delivery of copy of summons and complaint in accordance with any special arrangement for service between plaintiff and foreign state or political subdivision, if no special arrangement exists then service may be made by second method, namely, delivery of copy of summons and complaint in accordance with applicable international convention on service of judicial documents, third method, whereby service packet is mailed to foreign state's head of ministry of foreign affairs, may be used if service is not possible under either of the first two methods, and fourth method, which involves

sending service packet to Secretary of State for transmittal through diplomatic channels, may be used if service cannot be made within 30 days under third method. 28 U.S.C.A. §§ 1608(a), 1608(a)(1), 1608(a)(2), 1608(a)(3), 1608(a)(4).

8 Cases that cite this headnote

[5] **International Law** ⇐ Pleading

Under the Foreign Sovereign Immunities Act (FSIA), once it has been served, a foreign state or political subdivision has 60 days to file a responsive pleading. 28 U.S.C.A. § 1608(d).

1 Cases that cite this headnote

[6] **International Law** ⇐ Default; proceedings and judgment thereon

Under the Foreign Sovereign Immunities Act (FSIA), if a foreign state or political subdivision does not file a responsive pleading within 60 days after it has been served, it runs the risk of incurring a default judgment, a copy of which must be sent to the foreign state or political subdivision in the same manner prescribed for service. 28 U.S.C.A. §§ 1608(d), 1608(e).

[7] **Statutes** ⇐ Language

In interpreting a statutory provision, court begins where all such inquiries must begin: with the language of the statute itself.

3 Cases that cite this headnote

[8] **International Law** ⇐ Process

Third means enumerated in the Foreign Sovereign Immunities Act (FSIA) for a litigant to serve a foreign state in the courts of the United States, which requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned," is not satisfied when a service packet that names the foreign minister is mailed to the foreign state's embassy in the U.S. but, instead, requires that a mailing be sent directly to the foreign minister's office in the minister's home country; this reading of statute, while not the only plausible reading, is the most natural reading, is supported by several related provisions of the Act, and avoids potential tension with a treaty and the civil procedure rules. 28 U.S.C.A. § 1608(a)(3).

5 Cases that cite this headnote

[9] **International Law** ⇐ Process

For purposes of third means enumerated in the Foreign Sovereign Immunities Act (FSIA) for a litigant to serve a foreign state in the courts of the United States, which requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned," a letter or package is "addressed" to an intended recipient when his or her name and "address" is placed on the outside of the item to be sent. 28 U.S.C.A. § 1608(a)(3).

2 Cases that cite this headnote

[10] **International Law** ⇐ Process

For purposes of third means enumerated in the Foreign Sovereign Immunities Act (FSIA) for a litigant to serve a foreign state in the courts of the United States, which requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned," the noun "address" means the designation of a place, such as a residence or place of business, where a person or organization may be found or communicated with. 28 U.S.C.A. § 1608(a)(3).

[11] **International Law** ⇐ Process

For purposes of third means enumerated in the Foreign Sovereign Immunities Act (FSIA) for a litigant to serve a foreign state in the courts of the United States, which requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs

of the foreign state concerned," to "dispatch" a communication means to send it off or away, as to a special destination, with promptness or speed, often as a matter of official business. 28 U.S.C.A. § 1608(a)(3).

1 Cases that cite this headnote

[12] **International Law** ⇐ Process

For purposes of third means enumerated in the Foreign Sovereign Immunities Act (FSIA) for a litigant to serve a foreign state in the courts of the United States, which requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned," to "dispatch" a letter to an addressee connotes sending it directly. 28 U.S.C.A. § 1608(a)(3).

4 Cases that cite this headnote

[13] **Contracts** ⇐ Contracts by correspondence

Pursuant to the venerable "mailbox rule," there is a presumption that a mailed acceptance of an offer is deemed operative when "dispatched" if it is "properly addressed," though no acceptance would be deemed properly addressed and dispatched if it lacked, and thus was not sent to, the offeror's address or an address that the offeror held out as the place for receipt of an acceptance. Restatement (Second) of Contracts § 66.

3 Cases that cite this headnote

[14] **Statutes** ⇐ Express mention and implied exclusion; expressio unius est exclusio alterius

Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.

8 Cases that cite this headnote

[15] **Statutes** ⇐ Superfluousness

Courts are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.

4 Cases that cite this headnote

[16] **International Law** ⇐ Process

Third means enumerated in the Foreign Sovereign Immunities Act (FSIA) for a litigant to serve a foreign state in the courts of the United States, which requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned," does not deem a foreign state properly served solely because the service method is reasonably calculated to provide actual notice. 28 U.S.C.A. § 1608(a)(3).

6 Cases that cite this headnote

[17] **International Law** ⇐ Process

Subsection of the Foreign Sovereign Immunities Act (FSIA) providing for delivery of a service packet to an officer or a managing or general agent of the agency or instrumentality of a foreign state or to any other agent authorized by appointment or by law to receive service of process in the United States expressly allows service on an agent and makes clear that service on the agent may occur in the U.S. if an agent here falls within the provision's terms. 28 U.S.C.A. § 1608(b)(2).

1 Cases that cite this headnote

[18] **International Law** ⇐ Process

Under first three methods enumerated in the Foreign Sovereign Immunities Act (FSIA) for a litigant to serve a foreign state in the courts of the United States, service is deemed to have occurred on the date shown on a document signed by the person who received it from the carrier. 28 U.S.C.A. §§ 1608(a), 1608(c).

1 Cases that cite this headnote

[19] **International Law** ⇐ Process

Under fourth means enumerated in the Foreign Sovereign Immunities Act (FSIA) for a litigant to serve a foreign state in the courts of the United

States, which requires the Secretary of State to transmit a service packet to the foreign state through diplomatic channels, service is regarded as having occurred on the transmittal date shown on the certified copy of the diplomatic note sent by the Secretary to the clerk of the court. 28 U.S.C.A. §§ 1608(a)(4), 1608(c)(1).

3 Cases that cite this headnote

[20] **International Law** Process

Under all four methods enumerated in the Foreign Sovereign Immunities Act (FSIA) for a litigant to serve a foreign state in the courts of the United States, service is deemed to have occurred only when there is a strong basis for concluding that the service packet will very shortly thereafter come into the hands of a foreign official who will know what needs to be done. 28 U.S.C.A. §§ 1608(a), 1608(c).

[21] **International Law** Assertion by United States government

Because the State Department helped to draft the language of the Foreign Sovereign Immunities Act (FSIA), courts pay "special attention" to the Department's views on sovereign immunity. 28 U.S.C.A. § 1602 et seq.

[22] **International Law** Legislative or executive construction

Interpretation of a treaty by the Executive Branch is entitled to great weight.

[23] **International Law** Process

Service rules set out in the third subsection of the section of the Foreign Sovereign Immunities Act (FSIA) enumerating the means by which a litigant may serve a foreign state in the courts of the United States, which apply to a category of cases with sensitive diplomatic implications, involve circumstances in which the rule of law demands adherence to strict requirements even when the equities of a particular case may seem to point in the opposite direction. 28 U.S.C.A. § 1608(a)(3).

***1051** *Syllabus*[*]

The Foreign Sovereign Immunities Act of 1976 (FSIA) generally immunizes foreign states from suit in this country unless one of several enumerated exceptions to immunity applies. 28 U.S.C. §§ 1604, 1605–1607. If an exception applies, the FSIA provides subject-matter jurisdiction in federal district court, § 1330(a), and personal jurisdiction "where service has been made under section 1608," § 1330(b). Section 1608(a) provides four methods of serving civil process, including, as relevant here, service "by any form of mail requiring a signed receipt, to be addressed and dispatched ... to the head of the ministry of foreign affairs of the foreign state concerned," § 1608(a)(3).

Respondents, victims of the bombing of the USS *Cole* and their family members, sued the Republic of Sudan under the FSIA, alleging that Sudan provided material support to al Qaeda for the bombing. The court clerk, at respondents' request, addressed the service packet to Sudan's Minister of Foreign Affairs at the Sudanese Embassy in the United States and later certified that a signed receipt had been returned. After Sudan failed to appear in the litigation, the District Court entered a default judgment for respondents and subsequently issued three orders requiring banks to turn over Sudanese assets to pay the judgment. Sudan challenged those orders, arguing that the judgment was invalid for lack of personal jurisdiction, because § 1608(a)(3) required that the service packet be sent to its foreign minister at his principal office in Sudan, not to the Sudanese Embassy in the United States. The Second Circuit affirmed, reasoning that the statute was silent on where the mailing must be sent and that the method chosen was consistent with the statute's language and could be reasonably expected to result in delivery to the foreign minister.

Held: Most naturally read, § 1608(a)(3) requires a mailing to be sent directly to the foreign minister's office in the foreign state. Pp. ——– ——.

(a) A letter or package is "addressed" to an intended recipient when his or her name and address are placed on the outside. The noun "address" means "a residence or place of business."

Webster's Third New International Dictionary 25. A foreign nation's embassy in the United States is neither the residence nor the usual place of business of that nation's foreign minister. Similarly, to "dispatch" a letter to an addressee connotes sending it directly. It is also significant that service under § 1608(a)(3) requires a signed returned receipt to ensure delivery to the addressee. Pp. ——— ———.

(b) Several related provisions in § 1608 support this reading. Section 1608(b)(3)(B) contains similar "addressed and dispatched" language, but also says that service by its method is permissible "if reasonably calculated to give actual notice." Respondents' suggestion that § 1608(a)(3) embodies a similar standard runs up against well-settled principles of statutory interpretation. See *Department of Homeland Security v. MacLean*, 574 U.S. ——, ——, 135 S.Ct. 913, 919, 190 L.Ed.2d 771, and *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 100 L.Ed.2d 836. Section 1608(b)(2) expressly allows service on an agent, specifies the particular individuals who are permitted to be served as agents of the recipient, and makes clear that service on the agent may occur in the United States. Congress could have included similar terms in § 1608(a)(3) had it intended the provision to operate in this manner. Section 1608(c) deems service to have occurred under all methods only when there is a strong basis for concluding that the service packet will very shortly thereafter come into the hands of a foreign official who will know what needs to be done. Under § 1608(a)(3), that occurs when the person who receives it from the carrier signs for it. Interpreting § 1608(a)(3) to require that a service packet be sent to a foreign minister's own office rather than to a mailroom employee in a foreign embassy better harmonizes the rules for determining when service occurs. Pp. ——— ———.

(c) This reading of § 1608(a)(3) avoids potential tension with the Federal Rules of Civil Procedure and the Vienna Convention on Diplomatic Relations. If mailing a service packet to a foreign state's embassy in the United States were sufficient, then it would appear to be easier to serve the foreign state than to serve a person in that foreign state under Rule 4. The natural reading of § 1608(a)(3) also avoids the potential international implications arising from the State Department's position that the Convention's principle of inviolability precludes serving a foreign state by mailing process to the foreign state's embassy in the United States. Pp. ——— ———.

(d) Respondents' remaining arguments are unavailing. First, their suggestion that § 1608(a)(3) demands that service be sent "to a location that is likely to have a direct line of communication to the foreign minister" creates difficult line-drawing problems that counsel in favor of maintaining a clear, administrable rule. Second, their claim that § 1608(a)(4)—which requires that process be sent to the Secretary of State in "Washington, District of Columbia"—shows that Congress did not intend § 1608(a)(3) to have a similar locational requirement is outweighed by the countervailing arguments already noted. Finally, they contend that it would be unfair to throw out their judgment based on petitioner's highly technical and belatedly raised argument. But in cases with sensitive diplomatic implications, the rule of law demands adherence to strict rules, even when the equities seem to point in the opposite direction. Pp. ——— ———.

802 F.3d 399, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion

Justice ALITO delivered the opinion of the Court.

This case concerns the requirements applicable to a particular method of serving civil process on a foreign state. Under the Foreign Sovereign Immunities Act of 1976 (FSIA), a foreign state may be served by means of a mailing that is "addressed and dispatched ... to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). The question now before us is whether this provision is satisfied when a service packet that names the foreign minister is mailed to the foreign state's embassy in the United States. We hold that it is not. Most naturally read, § 1608(a)(3) requires that a mailing be sent directly to the foreign minister's office in the minister's home country.

I

A

[1] [2] [3] Under the FSIA, a foreign state is immune from the jurisdiction of courts in this country unless one of several enumerated exceptions to immunity applies. 28 U.S.C. §§ 1604, 1605–1607. If a suit falls within one of these exceptions, the FSIA provides subject-matter jurisdiction in federal district courts. § 1330(a). The ***1054** FSIA also provides for personal jurisdiction "where service has been made under section 1608." § 1330(b).

[4] Section 1608(a) governs service of process on "a foreign state or political subdivision of a foreign state." § 1608(a); Fed. Rule Civ. Proc. 4(j)(1). In particular, it sets out in hierarchical order the following four methods by which "[s]ervice ... shall be made." 28 U.S.C. § 1608(a). The first method is by delivery of a copy of the summons and complaint "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision." § 1608(a)(1). "[I]f no special arrangement exists," service may be made by the second method, namely, delivery of a copy of the summons and complaint "in accordance with an applicable international convention on service of judicial documents." § 1608(a)(2). If service is not possible under either of the first two methods, the third method, which is the one at issue in this case, may be used. This method calls for

> "sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, *by any form of mail requiring a signed receipt, to be addressed and dispatched* by the clerk of the court *to the head of the ministry of foreign affairs of the foreign state concerned.*" § 1608(a)(3) (emphasis added).

Finally, if service cannot be made within 30 days under § 1608(a)(3), service may be effected by sending the service packet "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia," for transmittal "through diplomatic channels to the foreign state." § 1608(a)(4).

[5] [6] Once served, a foreign state or political subdivision has 60 days to file a responsive pleading. § 1608(d). If the foreign state or political subdivision does not do this, it runs the risk of incurring a default judgment. See § 1608(e). A copy of any such default judgment must be "sent to the foreign state or political subdivision in the [same] manner prescribed for service." *Ibid.*

B

On October 12, 2000, the USS *Cole*, a United States Navy guided-missile destroyer, entered the harbor of Aden, Yemen, for what was intended to be a brief refueling stop. While refueling was underway, a small boat drew along the side of the *Cole*, and the occupants of the boat detonated explosives that tore a hole in the side of the *Cole*. Seventeen crewmembers were killed, and dozens more were injured. Al Qaeda later claimed responsibility for the attack.

Respondents in this case are victims of the USS *Cole* bombing and their family members. In 2010, respondents sued petitioner, the Republic of Sudan, alleging that Sudan had provided material support to al Qaeda for the bombing. See 28 U.S.C. §§ 1605A(a)(1), (c). Because respondents brought suit under the FSIA, they were required to serve Sudan with process under § 1608(a). It is undisputed that service could not be made under § 1608(a)(1) or § 1608(a)(2), and respondents therefore turned to § 1608(a)(3). At respondents' request, the clerk of the court sent the service packet, return receipt requested, to: "Republic of Sudan, Deng Alor Koul, Minister of Foreign Affairs, Embassy of the Republic of Sudan, 2210 Massachusetts Avenue NW, Washington, DC 20008." App. 172. The clerk certified that the service packet had been sent and, a few days later, certified that a signed receipt had been ***1055** returned.[1] After Sudan failed to appear in the litigation, the District Court for the District of Columbia held an evidentiary hearing and entered

a $314 million default judgment against Sudan. Again at respondents' request, the clerk of the court mailed a copy of the default judgment in the same manner that the clerk had previously used. See § 1608(e).

With their default judgment in hand, respondents turned to the District Court for the Southern District of New York, where they sought to register the judgment and satisfy it through orders requiring several banks to turn over Sudanese assets. See 28 U.S.C. § 1963 (providing for registration of judgments for enforcement in other districts). Pursuant to § 1610(c), the District Court entered an order confirming that a sufficient period of time had elapsed following the entry and notice of the default judgment, and the court then issued three turnover orders.

At this point, Sudan made an appearance for the purpose of contesting jurisdiction. It filed a notice of appeal from each of the three turnover orders and contended on appeal that the default judgment was invalid for lack of personal jurisdiction. In particular, Sudan maintained that § 1608(a)(3) required that the service packet be sent to its foreign minister at his principal office in Khartoum, the capital of Sudan, and not to the Sudanese Embassy in the United States.

The Court of Appeals for the Second Circuit rejected this argument and affirmed the orders of the District Court. 802 F.3d 399 (2015). The Second Circuit reasoned that, although § 1608(a)(3) requires that a service packet be mailed "to the head of the ministry of foreign affairs of the foreign state concerned," the statute "is silent as to a specific location where the mailing is to be addressed." *Id.*, at 404. In light of this, the court concluded that "the method chosen by plaintiffs —a mailing addressed to the minister of foreign affairs at the embassy—was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person." *Ibid.*

Sudan filed a petition for rehearing, and the United States filed an *amicus curiae* brief in support of Sudan's petition. The panel ordered supplemental briefing and heard additional oral argument, but it once again affirmed, reiterating its view that § 1608(a)(3) "does not specify that the mailing be sent to the head of the ministry of foreign affairs *in* the foreign country." 838 F.3d 86, 91 (CA2 2016). The court thereafter denied Sudan's petition for rehearing en banc.

Subsequent to the Second Circuit's decision, the Court of Appeals for the Fourth Circuit held in a similar case that § 1608(a)(3) "does not authorize delivery of service to a foreign state's embassy even if it correctly identifies the intended recipient as the head of the ministry of foreign affairs." *Kumar v. Republic of Sudan*, 880 F.3d 144, 158 (2018), cert. pending, No. 17–1269.

We granted certiorari to resolve this conflict. 585 U.S. ——, 138 S.Ct. 2671, 201 L.Ed.2d 1070 (2018)

II

A

[7] The question before us concerns the meaning of § 1608(a)(3), and in interpreting ***1056** that provision, "[w]e begin 'where all such inquiries must begin: with the language of the statute itself.' " *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412, 132 S.Ct. 1670, 182 L.Ed.2d 678 (2012) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). As noted, § 1608(a)(3) requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned."

[8] The most natural reading of this language is that service must be mailed directly to the foreign minister's office in the foreign state. Although this is not, we grant, the only plausible reading of the statutory text, it is the most natural one. See, *e.g.*, *United States v. Hohri*, 482 U.S. 64, 69–71, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987) (choosing the "more natural" reading of a statute); *ICC v. Texas*, 479 U.S. 450, 456–457, 107 S.Ct. 787, 93 L.Ed.2d 809 (1987) (same); see also *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 41, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008) (similar).

[9] [10] A key term in § 1608(a)(3) is the past participle "addressed." A letter or package is "addressed" to an intended recipient when his or her name and "address" is placed on the outside of the item to be sent. And the noun "address," in the sense relevant here, means "the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with." Webster's Third New International Dictionary 25 (1971) (Webster's Third); see also Webster's Second New International Dictionary 30 (1957) ("the name or description of a place of residence, business, etc., where a person may be found or communicated with");

Random House Dictionary of the English Language 17 (1966) ("the place or the name of the place where a person, organization, or the like is located or may be reached"); American Heritage Dictionary 15 (1969) ("[t]he location at which a particular organization or person may be found or reached"); Oxford English Dictionary 106 (1933) (OED) ("the name of the place to which any one's letters are directed"). Since a foreign nation's embassy in the United States is neither the residence nor the usual place of business of that nation's foreign minister and is not a place where the minister can customarily be found, the most common understanding of the minister's "address" is inconsistent with the interpretation of § 1608(a)(3) adopted by the court below and advanced by respondents.

We acknowledge that there are circumstances in which a mailing may be "addressed" to the intended recipient at a place other than the individual's residence or usual place of business. For example, if the person sending the mailing does not know the intended recipient's current home or business address, the sender might use the intended recipient's last known address in the hope that the mailing will be forwarded. Or a sender might send a mailing to a third party who is thought to be in a position to ensure that the mailing is ultimately received by the intended recipient. But in the great majority of cases, addressing a mailing to X means placing on the outside of the mailing both X's name and the address of X's residence or customary place of work.

[11] Section 1608(a)(3)'s use of the term "dispatched" points in the same direction. To "dispatch" a communication means "to send [it] off or away (as to a special destination) with promptness or speed often as a matter of official business." Webster's Third 653; see also OED ***1057** 478 ("To send off post-haste or with expedition or promptitude (a messenger, message, etc., having an express destination)"). A person who wishes to "dispatch" a letter to X will generally send it directly to X at a place where X is customarily found. The sender will not "dispatch" the letter in a roundabout way, such as by directing it to a third party who, it is hoped, will then send it on to the intended recipient.

[12] A few examples illustrate this point. Suppose that a person is instructed to "address" a letter to the Attorney General of the United States and "dispatch" the letter (*i.e.*, to "send [it] off post-haste") to the Attorney General. The person giving these instructions would likely be disappointed and probably annoyed to learn that the letter had been sent to, let us say, the office of the United States Attorney for the District of Idaho. And this would be so even though a U.S. Attorney's office is part of the Department headed by the Attorney General and even though such an office would very probably forward the letter to the Attorney General's office in Washington. Similarly, a person who instructs a subordinate to dispatch a letter to the CEO of a big corporation that owns retail outlets throughout the country would probably be irritated to learn that the letter had been mailed to one of those stores instead of corporate headquarters. To "dispatch" a letter to an addressee connotes sending it directly.

[13] A similar understanding underlies the venerable "mailbox rule." As first-year law students learn in their course on contracts, there is a presumption that a mailed acceptance of an offer is deemed operative when "dispatched" if it is "properly addressed." Restatement (Second) of Contracts § 66, p. 161 (1979) (Restatement); *Rosenthal v. Walker*, 111 U.S. 185, 193, 4 S.Ct. 382, 28 L.Ed. 395 (1884). But no acceptance would be deemed properly addressed and dispatched if it lacked, and thus was not sent to, the offeror's address (or an address that the offeror held out as the place for receipt of an acceptance). See Restatement § 66, Comment *b*.

It is also significant that service under § 1608(a)(3) requires a signed returned receipt, a standard method for ensuring delivery to the addressee. Cf. Black's Law Dictionary 1096 (10th ed. 2014) (defining "certified mail" as "[m]ail for which the sender requests proof of delivery in the form of a receipt signed by the addressee"). We assume that certified mail sent to a foreign minister will generally be signed for by a subordinate, but the person who signs for the minister's certified mail in the foreign ministry itself presumably has authority to receive mail on the minister's behalf and has been instructed on how that mail is to be handled. The same is much less likely to be true for an employee in the mailroom of an embassy.

For all these reasons, we think that the most natural reading of § 1608(a)(3) is that the service packet must bear the foreign minister's name and customary address and that it be sent to the minister in a direct and expeditious way. And the minister's customary office is the place where he or she generally works, not a farflung outpost that the minister may at most occasionally visit.

B

Several related provisions in § 1608 support this reading. See *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

***1058** 1

One such provision is § 1608(b)(3)(B). Section 1608(b) governs service on "an agency or instrumentality of a foreign state." And like § 1608(a)(3), § 1608(b)(3)(B) requires delivery of a service packet to the intended recipient "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court." But § 1608(b)(3)(B), unlike § 1608(a)(3), contains prefatory language saying that service by this method is permissible "if reasonably calculated to give actual notice."

Respondents read § 1608(a)(3) as embodying a similar requirement. See Brief for Respondents 34. At oral argument, respondents' counsel stressed this point, arguing that respondents' interpretation of § 1608(a)(3) "gives effect" to the "familiar" due process standard articulated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), which is "the notion that [service] must be reasonably calculated to give notice." Tr. of Oral Arg. 37–38.

[14] **[15]** **[16]** This argument runs up against two well-settled principles of statutory interpretation. First, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Security v. MacLean*, 574 U.S. ——, ——, 135 S.Ct. 913, 919, 190 L.Ed.2d 771 (2015). Because Congress included the "reasonably calculated to give actual notice" language only in § 1608(b), and not in § 1608(a), we resist the suggestion to read that language into § 1608(a). Second, "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). Here, respondents encounter a superfluity problem when they argue that the "addressed and dispatched" clause in § 1608(a)(3) gives effect to the *Mullane* due process standard. They fail to account for the fact that § 1608(b)(3)(B) contains *both* the "addressed and dispatched" and "reasonably calculated to give actual notice" requirements. If respondents were correct that "addressed and dispatched" means "reasonably calculated to give notice," then the phrase "reasonably calculated to give actual notice" in § 1608(b)(3) would be superfluous. Thus, as the dissent agrees, § 1608(a)(3) "does not deem a foreign state properly served solely because the service method is reasonably calculated to provide actual notice." *Post,* at ——(opinion of THOMAS, J.).

2

[17] Section 1608(b)(2) similarly supports our interpretation of § 1608(a)(3). Section 1608(b)(2) provides for delivery of a service packet to an officer or a managing or general agent of the agency or instrumentality of a foreign state or "to any other agent authorized by appointment or by law to receive service of process in the United States."

This language is significant for three reasons. First, it expressly allows service on an agent. Second, it specifies the particular individuals who are permitted to be served as agents of the recipient. Third, it makes clear that service on the agent may occur *in the United States* if an agent here falls within the provision's terms.

If Congress had contemplated anything similar under § 1608(a)(3), there is no apparent reason why it would not have included in that provision terms similar to those in § 1608(b)(2). Respondents would have us believe that Congress was content to have the courts read such terms into § 1608(a)(3). In view of § 1608(b)(2), this ***1059** seems unlikely.[2] See also *post,* at —— ("Nor does the FSIA authorize service on a foreign state by utilizing an agent designated to receive process for the state").

3

[18] **[19]** Section 1608(c) further buttresses our reading of § 1608(a)(3). Section 1608(c) sets out the rules for determining when service "shall be deemed to have been made." For the first three methods of service under § 1608(a), service is deemed to have occurred on the date indicated on "the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed." § 1608(c)(2). The sole exception is service under § 1608(a)(4), which requires the Secretary of State to transmit a service packet to the foreign state through diplomatic channels. Under

this method, once the Secretary has transmitted the packet, the Secretary must send to the clerk of the court "a certified copy of the diplomatic note indicating when the papers were transmitted." § 1608(a)(4). And when service is effected in this way, service is regarded as having occurred on the transmittal date shown on the certified copy of the diplomatic note. § 1608(c)(1).

[20] Under all these methods, service is deemed to have occurred only when there is a strong basis for concluding that the service packet will very shortly thereafter come into the hands of a foreign official who will know what needs to be done. Under § 1608(a)(4), where service is transmitted by the Secretary of State through diplomatic channels, there is presumably good reason to believe that the service packet will quickly come to the attention of a high-level foreign official, and thus service is regarded as having been completed on the date of transmittal. And under §§ 1608(a)(1), (2), and (3), where service is deemed to have occurred on the date shown on a document signed by the person who received it from the carrier, Congress presumably thought that the individuals who signed for the service packet could be trusted to ensure that the service packet is handled properly and expeditiously.

It is easy to see why Congress could take that view with respect to a person designated for the receipt of process in a "special arrangement for service between the plaintiff and the foreign state or political subdivision," § 1608(a)(1), and a person so designated under "an applicable international convention," § 1608(a)(2). But what about § 1608(a)(3), the provision now before us? Who is more comparable to those who sign for mail under §§ 1608(a)(1) and (2)? A person who works in the office of the foreign minister in the minister's home country and is authorized to receive and process the minister's mail? Or a mailroom employee in a foreign embassy? We think the answer is obvious, and therefore interpreting § 1608(a)(3) to require that a service packet be sent to a foreign minister's own office better harmonizes the rules for determining when service is deemed to have been made.

Respondents seek to soften the blow of an untimely delivery to the minister by noting that the foreign state can try to vacate a default judgment under Federal Rule of Civil Procedure 55(c). Brief for Respondents 27. But that is a poor substitute for sure and timely receipt of service, ***1060** since a foreign state would have to show "good cause" to vacate the judgment under that Rule. Here, as with the previously mentioned provisions in § 1608, giving § 1608(a)(3) its ordinary meaning better harmonizes the various provisions in § 1608 and avoids the oddities that respondents' interpretation would create.

C

The ordinary meaning of the "addressed and dispatched" requirement in § 1608(a)(3) also has the virtue of avoiding potential tension with the Federal Rules of Civil Procedure and the Vienna Convention on Diplomatic Relations.

1

Take the Federal Rules of Civil Procedure first. At the time of the FSIA's enactment, Rule 4(i), entitled "Alternative provisions for service in a foreign-country," set out certain permissible methods of service on "part[ies] in a foreign country." Fed. Rule Civ. Proc. 4(i)(1) (1976). One such method was "by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court *to the party to be served*." Rule 4(i)(1)(D) (emphasis added). Rule 4(i)(2) further provided that "proof of service" pursuant to that method "shall include a receipt *signed by the addressee* or other evidence of *delivery to the addressee* satisfactory to the court." (Emphasis added.) The current version of Rule 4 is similar. See Rules 4(f)(2)(C)(ii), 4(*l*)(2)(B).

The virtually identical methods of service outlined in Rule 4 and § 1608(a)(3) pose a problem for respondents' position: If mailing a service packet to a foreign state's embassy in the United States were sufficient for purposes of § 1608(a)(3), then it would appear to be easier to serve the foreign state than to serve a person in that foreign state. This is so because a receipt signed by an embassy employee would not necessarily satisfy Rule 4 since such a receipt would not bear the signature of the foreign minister and might not constitute evidence that is sufficient to show that the service packet had actually been delivered to the minister. It would be an odd state of affairs for a foreign state's inhabitants to enjoy more protections in federal courts than the foreign state itself, particularly given that the foreign state's immunity from suit is at stake. The natural reading of § 1608(a)(3) avoids that oddity.

2

[21] [22] Our interpretation of § 1608(a)(3) avoids concerns regarding the United States' obligations under

the Vienna Convention on Diplomatic Relations. We have previously noted that the State Department "helped to draft the FSIA's language," and we therefore pay "special attention" to the Department's views on sovereign immunity. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. ——, ——, 137 S.Ct. 1312, 1320, 197 L.Ed.2d 663 (2017). It is also "well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.' " *Abbott v. Abbott*, 560 U.S. 1, 15, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010) (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982)).

Article 22(1) of the Vienna Convention provides: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3237, T.I.A.S. No. 7502. Since at least 1974, the State Department has taken the position that Article 22(1)'s principle of inviolability precludes serving a foreign state by mailing process to the foreign state's embassy ***1061** in the United States. See Service of Legal Process by Mail on Foreign Governments in the United States, 71 Dept. State Bull. 458–459 (1974). In this case, the State Department has reiterated this view in *amicus curiae* briefs filed in this Court and in the Second Circuit. The Government also informs us that United States embassies do not accept service of process when the United States is sued in a foreign court, and the Government expresses concern that accepting respondents' interpretation of § 1608 might imperil this practice. Brief for United States as *Amicus Curiae* 25–26.

Contending that the State Department held a different view of Article 22(1) before 1974, respondents argue that the Department's interpretation of the Vienna Convention is wrong, but we need not decide this question. By giving § 1608(a)(3) its most natural reading, we avoid the potential international implications of a contrary interpretation.

III

Respondents' remaining arguments do not alter our conclusion. First, respondents contend that § 1608(a)(3) says nothing about where the service packet must be sent. See Brief for Respondents 22 ("the statute is silent as to the location *where* the service packet should be sent"). But while it is true that § 1608(a)(3) does not expressly provide where service must be sent, it is common ground that this provision must implicitly impose some requirement. Respondents acknowledge this when they argue that the provision demands that service be sent "to a location that is likely to have a direct line of communication to the foreign minister." *Id.*, at 34; cf. *post*, at —— (stating that sending a letter to a Washington-based embassy "with a direct line of communication" to the foreign minister seems as efficient as sending it to the minister's office in the foreign state). The question, then, is precisely what § 1608(a)(3) implicitly requires. Respondents assure us that a packet sent to "an embassy plainly would qualify," while a packet sent to "a tourism office plainly would not." Brief for Respondents 34. But if the test is whether "a location ... is likely to have a direct line of communication to the foreign minister," *ibid.*, it is not at all clear why service could not be sent to places in the United States other than a foreign state's embassy. Why not allow the packet to be sent, for example, to a consulate? The residence of the foreign state's ambassador? The foreign state's mission to the United Nations? Would the answer depend on the size or presumed expertise of the staff at the delivery location? The difficult line-drawing problems that flow from respondents' interpretation of § 1608(a)(3) counsel in favor of maintaining a clear, administrable rule: The service packet must be mailed directly to the foreign minister at the minister's office in the foreign state.

Second, respondents (and the dissent, see *post*, at —— – ——) contrast the language of § 1608(a)(3) with that of § 1608(a)(4), which says that service by this method requires that process be sent to the Secretary of State in "Washington, District of Columbia." If Congress wanted to require that process under § 1608(a)(3) be sent to a foreign minister's office in the minister's home country, respondents ask, why didn't Congress use a formulation similar to that in § 1608(a)(4)? This is respondents' strongest argument, and in the end, we see no entirely satisfactory response other than that § 1608(a) does not represent an example of perfect draftsmanship. We grant that the argument based on the contrasting language in § 1608(a)(4) cuts in respondents' favor, but it is outweighed in our judgment by the countervailing arguments already noted.

***1062** [23] Finally, respondents contend that it would be "the height of unfairness to throw out [their] judgment" based on the highly technical argument belatedly raised by petitioner. See Brief for Respondents 35. We understand respondents' exasperation and recognize that enforcing compliance with § 1608(a)(3) may seem like an empty formality in this particular case, which involves highly

publicized litigation of which the Government of Sudan may have been aware prior to entry of default judgment. But there are circumstances in which the rule of law demands adherence to strict requirements even when the equities of a particular case may seem to point in the opposite direction. The service rules set out in § 1608(a)(3), which apply to a category of cases with sensitive diplomatic implications, clearly fall into this category. Under those rules, all cases must be treated the same.

Moreover, as respondents' counsel acknowledged at oral argument, holding that Sudan was not properly served under § 1608(a)(3) is not the end of the road. Tr. of Oral Arg. 56. Respondents may attempt service once again under § 1608(a)(3), and if that attempt fails, they may turn to § 1608(a)(4). When asked at argument to provide examples of any problems with service under § 1608(a)(4), respondents' counsel stated that he was unaware of any cases where such service failed. *Id.*, at 59–62.

* * *

We interpret § 1608(a)(3) as it is most naturally understood: A service packet must be addressed and dispatched to the foreign minister at the minister's office in the foreign state. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, dissenting.

The Court holds that service on a foreign state by certified mail under the Foreign Sovereign Immunities Act (FSIA) is defective unless the packet is "addressed and dispatched to the foreign minister *at the minister's office in the foreign state*." *Ante*, at —— (emphasis added). This bright-line rule may be attractive from a policy perspective, but the FSIA neither specifies nor precludes the use of any particular address. Instead, the statute requires only that the packet be sent to a particular person—"the head of the ministry of foreign affairs." 28 U.S.C. § 1608(a)(3).

Given the unique role that embassies play in facilitating communications between states, a foreign state's embassy in Washington, D. C., is, absent an indication to the contrary, a place where a U.S. litigant can serve the state's foreign minister. Because there is no evidence in this case suggesting that Sudan's Embassy declined the service packet addressed to its foreign minister—as it was free to do—I would hold that respondents complied with the FSIA when they addressed and dispatched a service packet to Sudan's Minister of Foreign Affairs at Sudan's Embassy in Washington, D. C. Accordingly, I respectfully dissent.

I

To serve a foreign state by certified mail under the FSIA, the service packet must be "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." *Ibid.* In many respects, I approach this statutory text in the same way as the Court. I have no quarrel with the majority's definitions of the relevant statutory terms, *ante*, at ——– – ——, and I agree that the FSIA does not deem a ***1063** foreign state properly served solely because the service method is reasonably calculated to provide actual notice, *ante*, at ——– – ——, ——– – ——. Nor does the FSIA authorize service on a foreign state by utilizing an agent designated to receive process for the state. *Ante*, at ——– – ——. At the same time, the FSIA stops short of requiring that the foreign minister personally receive or sign for the service packet: As long as the service packet is "addressed and dispatched ... to" the foreign minister, § 1608(a)(3), the minister's subordinates may accept the packet and act appropriately on his behalf. *Ante*, at ——.

In short, I agree with the majority that § 1608(a)(3) requires that the service packet be dispatched to an address for the foreign minister. The relevant question, in my view, is whether a foreign state's embassy in the United States can serve as a place where the minister of foreign affairs may be reached by mail. Unlike the majority, I conclude that it can.

II

A foreign state's embassy in Washington, D. C., is generally a place where a U.S. court can communicate by mail with the state's foreign minister. Unless an embassy decides to decline packages containing judicial summonses—as it is free to do, both in individual cases or as a broader policy—a service packet addressed and dispatched to a foreign minister at the address of its embassy in the United States satisfies § 1608(a)(3).

Because embassies are "responsible for state-to-state relationships," Malone, The Modern Diplomatic Mission, in The Oxford Handbook of Modern Diplomacy 124 (A. Cooper, J. Heine, & R. Thakur eds. 2013), an important function of an embassy or other "diplomatic mission" is to "act as a permanent channel of communication between the sending state and the receiving state." G. Berridge & A. James, A Dictionary of Diplomacy 73 (2d ed. 2003). Embassies fulfill this function in numerous ways, including by using secure faxes, e-mails, or the "diplomatic bag" to transmit documents to the states they represent. A. Aust, Handbook of International Law 122 (2d ed. 2010); see *ibid.* (the diplomatic bag is a mailbag or freight container containing diplomatic documents or articles intended for official use). Thus, as one *amicus* brief aptly puts it, embassies "have direct lines of communications with the home country, and a pipeline to route communications to the proper offices and officials." Brief for Former U.S. Counterterrorism Officials et al. as *Amici Curiae* 29.

Numerous provisions of the Vienna Convention on Diplomatic Relations (VCDR) confirm this reality, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502. Under the VCDR, an embassy "may employ all appropriate means" of communicating with the state whose interests it represents, Art. 27(1), including "modern means of communication such as (mobile) telecommunication, fax, and email," Wouters, Duquet, & Meuwissen, The Vienna Conventions on Diplomatic and Consular Relations, in The Oxford Handbook of Modern Diplomacy, *supra*, at 523. The VCDR provides substantial protections for the "official correspondence of the mission" and the diplomatic bag, which may include "diplomatic documents or articles intended for official use." Arts. 27(1)–(5); cf. Vienna Convention on Consular Relations, Arts. 3, 5(j), 35, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (recognizing that embassies may perform "[c]onsular functions," such as "transmitting judicial and extrajudicial documents," and affording protections to official communications).

The capability of an embassy to route service papers to the sending state is confirmed by the State Department regulation ***1064** implementing § 1608(a)(4), which provides for service on the foreign state through diplomatic channels. Under this regulation, the Department may deliver the service packet "to the embassy of the foreign state in the District of Columbia" "[i]f the foreign state so requests or if otherwise appropriate." 22 CFR § 93.1(c)(2) (2018). Although the service packet under § 1608(a)(4) need not be addressed and dispatched to the foreign minister, the regulation implementing it nevertheless demonstrates that embassies do in fact provide a channel of communication between the United States and foreign countries.

It was against this backdrop that respondents requested that their service packet be "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of [Sudan]," § 1608(a)(3), at the address of its embassy in Washington, D. C. Because an embassy serves as a channel through which the U.S. Government can communicate with the sending state's minister of foreign affairs, this method of service complied with the ordinary meaning of § 1608(a)(3) on this record. There is—and this is critical—no evidence in the record showing that Sudan's foreign minister could not be reached through the embassy. As the majority acknowledges, the clerk received a signed return receipt and a shipping confirmation stating that the package had been delivered. *Ante,* at ——. Nothing on the receipt or confirmation indicated that the package could not be delivered to its addressee, and both the clerk and the District Judge determined that service had been properly effectuated.

Of course, the FSIA does not impose a substantive obligation on the embassy to accept or transmit service of process directed to the attention of the foreign minister. A foreign state and its embassy are free to reject some or all packets addressed to the attention of the foreign minister. But, as detailed above, Sudan has pointed to nothing in the record suggesting that its embassy refused service, or that its embassy address was not a place at which its foreign minister could be reached. On these facts, I would hold that the service packet was properly "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs." § 1608(a)(3).

III

A

Instead of focusing on whether service at an embassy satisfies the FSIA, the Court articulates a bright-line rule: To comply with § 1608(a)(3), "[a] service packet must be addressed and dispatched to the foreign minister *at the minister's office in the foreign state*." *Ante,* at —— (emphasis added). Whatever virtues this rule possesses, the Court's interpretation is not the "most natural reading" of § 1608(a)(3), *ante,* at ——.

The Court focuses on the foreign minister's "customary office" or "place of work," *ante,* at ——, ——, but these terms appear nowhere in § 1608. The FSIA requires that the service packet be "addressed and dispatched" to a particular *person*—"the head of the ministry of foreign affairs." § 1608(a)(3). It does not further require that the package be addressed and dispatched to any particular *place*. While I agree with the Court that sending the service packet to the foreign ministry is one way to satisfy § 1608(a)(3), that is different from saying that § 1608(a)(3) requires service exclusively at that location.

The absence of a textual foundation for the majority's rule is only accentuated when § 1608(a)(3) is compared to § 1608(a)(4), the adjacent paragraph governing service through diplomatic channels. ***1065** Under that provision, the service packet must be "addressed and dispatched by the clerk of the court to the Secretary of State *in Washington, District of Columbia*, to the attention of the Director of Special Consular Services." § 1608(a)(4) (emphasis added); see 22 CFR § 93.1(c) (State Department regulation governing service under this provision). Unlike § 1608(a)(3), this provision specifies both the person to be served *and* the location of service. While not dispositive, the absence of a similar limitation in § 1608(a)(3) undermines the categorical rule adopted by the Court.

The Court offers three additional arguments in support of its position, but none justifies its bright-line rule.

First, the Court offers a series of hypotheticals to suggest that the term "dispatched" not only contemplates a prompt shipment, but also connotes sending the letter directly to a place where the person is likely to be physically located. *Ante,* at ——–——. In my opinion, these hypotheticals are inapt. The unique role of an embassy in facilitating communications between sovereign governments does not have an analog in the hypotheticals offered by the majority.[1] And to the extent the statute emphasizes speed and directness, as the majority suggests, dispatching a letter to a Washington-based embassy with a direct line of communication to the foreign minister—including the ability to communicate electronically—seems at least as efficient as dispatching the letter across the globe to a foreign country, particularly if that country has recently experienced armed conflict or political instability.

Second, the Court notes that, under its rule, the effective date of service under § 1608(c) will be closer in time to when the service packet reaches a foreign official who knows how to respond to the summons. *Ante,* at ——–——. That contention assumes embassy employees are less capable of responding to a summons than foreign-ministry employees. But even granting that premise, this argument falls short. An embassy is capable of quickly transmitting a summons to the foreign minister, whether electronically, by diplomatic bag, or by some other means. Any time lost in transmission is not significant enough to warrant the Court's departure from the text of the statute.

Third, the Court argues that allowing service at the embassy would make it easier to serve a foreign state than it is to serve a person in that foreign state under Federal Rule of Civil Procedure 4. *Ante,* at ——–——. I am not persuaded. Under the FSIA, service by mail is not effective until "the date of receipt indicated in the ... signed and returned postal receipt." § 1608(c)(2). That is no more generous than practice under Rule 4, especially since the foreign minister need not accept service. To the extent that embassies accept service of process directed to the foreign minister, it is that decision that eases the burden on the plaintiff, not § 1608(a)(3).

B

Sudan also argues that allowing service by mail at an embassy would violate Article ***1066** 22(1) of the VCDR. The Court does not adopt Sudan's argument, stating only that its decision has "the virtue of avoiding potential tension" with the VCDR. *Ante,* at 1060. But there is no tension between my reading of the FSIA and the VCDR.[2]

Article 22(1) of the VCDR provides that the premises of the mission—that is, "the buildings or parts of buildings and the land ancillary thereto ... used for the purposes of the mission," Art. 1(i)—"shall be inviolable." The VCDR consistently uses the word "inviolable" to protect against physical intrusions and similar types of interference, not the jurisdiction of a court. The concept of "inviolability" is used, for instance, to protect the mission's "premises," Art. 22(1); the "archives and documents of the mission," Art. 24; the "official correspondence of the mission," Art. 27(2); the "private residence of a diplomatic agent," Art. 30(1); and the diplomatic agent's "person," "papers, correspondence, and," with certain exceptions, "his property," Arts. 29, 30(2).

The provisions of the VCDR that protect against assertions of jurisdiction, by contrast, speak in terms of "immunity." Thus, in addition to physical inviolability, the premises of the mission (and "other property thereon") are separately

"immune from search, requisition, attachment or execution." Art. 22(3). And a diplomatic agent is separately "immun[e] from the criminal jurisdiction of the receiving State" and, generally, from "its civil and administrative jurisdiction." Art. 31(1). Several provisions of the VCDR distinguish between "immunity from jurisdiction, and inviolability." Art. 38(1); see Arts. 31(1), (3).

Given the VCDR's consistent use of "inviolability" to protect against physical intrusions and interference, and "immunity" to protect against judicial authority, Article 22(1)'s protection of the mission premises is best understood as a protection against the former. Thus, under the VCDR, the inviolability of the embassy's premises is not implicated by receipt of service papers to any greater degree than it is by receipt of other mail. Cf. *Reyes* v. *Al-Malki*, [2017] UKSC 61, ¶16 (holding that service via mail at the diplomatic residence—which is afforded the same level of protection as the mission premises under Article 30(1)—does not violate the VCDR).

* * *

Because the method of service employed by respondents here complied with the FSIA, I would affirm the judgment of the Second Circuit.

All Citations

139 S.Ct. 1048, 203 L.Ed.2d 433, 2019 A.M.C. 609, 19 Cal. Daily Op. Serv. 2571, 2019 Daily Journal D.A.R. 2410, 27 Fla. L. Weekly Fed. S 741

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Sudan questions whether respondents named the correct foreign minister and whether the Sudanese Embassy received the service packet. Because we find the service deficient in any event, we assume for the sake of argument that the correct name was used and that the Embassy did receive the packet.

2 Notably, the idea of treating someone at a foreign state's embassy as an agent for purposes of service on the foreign state was not unfamiliar to Congress. An earlier proposed version of the FSIA would have permitted service on a foreign state by sending the service packet "to the ambassador or chief of mission of the foreign state." See S. 566, 93d Cong., 1st Sess., § 1608, p. 6 (1973).

1 To the extent the relationship between a U.S. Attorney's office and the Attorney General is analogous, the majority correctly acknowledges that the office would "very probably forward" a letter directed to the attention of the Attorney General. *Ante*, at ——. The majority nevertheless believes that it would be improper or unusual to dispatch that letter to a local U.S. Attorney's office. I disagree. It seems entirely likely that a person residing in the District of Idaho would dispatch a letter to the Attorney General through the U.S. Attorney's office serving his District—even if it would be odd for a resident of the District of Columbia to use that Idaho address.

2 Even if there were, the FSIA postdates the VCDR and thus " 'renders the treaty null' " " 'to the extent of conflict.' " *Breard v. Greene*, 523 U.S. 371, 376, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (*per curiam*) (quoting *Reid v. Covert*, 354 U.S. 1, 18, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion)).

ANNEX 299

770 F.3d 207
United States Court of Appeals,
Second Circuit.

Jeannette Fuller HAUSLER, as Successor Personal Representative of The Estate of Robert Otis Fuller, Deceased, on behalf of Thomas Caskeyas Personal Representative of The Estate of Lynita Fuller Caskey surviving daughter of Robert Otis Fuller, and Jeannette Hausler, Plaintiff–Third–Party Defendants–Appellees,
Estate of Robert Otis Fuller, Frederick Fuller, Grace Lutes, Irene Moss, and Frances Fuller, Plaintiffs–Third–Party Defendants,
v.
JP MORGAN CHASE BANK, N.A., Citibank, N.A., Royal Bank of Scotland N.V., fka ABN Amro Bank N.V., Bank of America Corporation, UBS AG, and Bank of America N.A., Defendants–Garnishees–Third–Party Plaintiffs–Appellees,
Dresdner Lateinamerika AG, fka Dresdner Bank Lateinamerika AG, Abbott Laboratories, Inc., Petroleos De Venezuela, S.A., Fundacion Benfica Nicolas S. Acea, Pablo Alcazar, as trustee of Fundacion Benefica Nicolas S. Acea, Mayra Bustaments, and Rene Silva, Jr., as trustee of Fundacion Benefica Nicolas S. Acea, Third–Party Defendants,
Republic Of Cuba, Fidel Castro Ruz, Individually, As First Vice President of the Council of State and Council of Ministers and Head of the Cuban Revolutionary Armed Forces, Cuban Revolutionary Armed Forces, El Ministerio Del Interior, Defendants–Third–Party Defendants,
v.
LTU Lufttransportunternehmen, LTU Gmbh In Care Of Kirstein & Young PLLC 1750 K Street NW, Suite 200 Washington, DC 20006, Consolidated–Third–Party Defendant–Appellant,
Banco Bilbao Vizcaya Argentaria, S.A., Banco Bilbao Vizcaya Argentaria Panama, S.A., Claimants–Appellants,
Estudios Mercados y Suministros, S.L., Philips Mexicana S.A. DE C.V., Novafin Financiere, S.A., Respondents–Appellants,
Caja De Ahorros y Monte de Piedad de Madrid, Premuda S.P.A., Interpleaders–Appellants,
Shanghai Pudong Development Bank Co. Ltd., Third–Party Defendant–Appellant,
Aeroflot Russian Airlines, ADR Provider–Appellant,
Banco Santander S.A., Caja Madrid, Banco Espanol De Credito, Banco Santander Totta, S.A., Union Bancaire Privee, Banco Central De Venezuela, and Banco De Desarrollo Economico y Social De Venezuela, Respondents,
San Paolo Bank S.A. and ING Bank N.V., Claimants.*

Nos. 12–1264 (Lead), 12–1272(Con), 12–1384(Con), 12–1386(Con), 13–1463(Con), 12–1466(Con), 12–1945(Con).

Argued: Feb. 11, 2013.

Decided: Oct. 27, 2014.

Synopsis

Background: Family members or trustees of estates of victims of state-sponsored terrorism filed turnover petitions pursuant to Terrorism Risk Insurance Act (TRIA) to enforce default judgment entered by Florida court holding Republic of Cuba and Cuban officials liable for torture and extrajudicial killing by executing upon accounts created and maintained by garnishee banks as repositories for sums blocked in course of electronic funds transfers (EFT) involving judgment debtors or their agencies or instrumentalities. The United States District Court for the Southern District of New York, Marrero, J., 845 F.Supp.2d 553, entered summary judgment in plaintiffs' favor, and banks and adverse claimant respondents appealed.

Holding: The Court of Appeals held that EFTs were not subject to attachment while in possession of intermediary banks.

Reversed and remanded.

West Headnotes (1)

[1] **International Law** Persons and Property Subject; Immunity and Exceptions Thereto

Under New York law, electronic funds transfers (EFT) were neither property of originator nor beneficiary while briefly in intermediary bank's possession, and thus EFTs to Republic of Cuba and its agencies or instrumentalities were not subject to attachment as "property of a foreign state" or "property of an agency or instrumentality of such a state" pursuant to Foreign Sovereign Immunities Act (FSIA) or Cuban Assets Control Regulations while in possession of intermediary banks, where no Cuban entity transmitted blocked EFTs. 28 U.S.C.A. §§ 1605(a)(7), 1610(g); 31 C.F.R. § 515.311(a).

26 Cases that cite this headnote

Attorneys and Law Firms

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Before: HALL, LYNCH, and CARNEY, Circuit Judges.

Opinion

PER CURIAM:

Before us on appeal is a matter of first impression regarding the interpretation of ***210** § 201 of the Terrorism Risk Insurance Act of 2002 (codified at 28 U.S.C. § 1610 note) ("TRIA"). The plaintiffs-appellees (collectively "Hausler") are family members or trustees of the estates of victims of state-sponsored terrorism. They seek to enforce their 2009 Florida state court judgment ("the underlying judgment") obtained against, among others, the Republic of Cuba ("Cuba") by attaching the blocked assets of that state pursuant to TRIA § 201. Specifically, Hausler seeks to satisfy the underlying judgment from electronic fund transfers ("EFTs") blocked pursuant to the Cuban Assets Control Regulations, 31 C.F.R. Part 515.[1] The defendant-garnishee banks at which the EFTs are stopped pursuant to the block oppose turning over the value of the EFTs. The dispositive questions are whether and under what factual circumstances TRIA permits the attachment of mid-stream EFTs.

BACKGROUND

A. Underlying Judgment

The appellees are family members and estate representatives of Bobby Fuller, an American citizen who was arrested and executed by Cuban government forces on October 16, 1960. In 2005, the Hausler plaintiffs sued Cuba and others under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, in the Eleventh Judicial District, Miami–Dade County, Florida. Cuba did not appear and after conducting a hearing, the Florida state court awarded the Hausler plaintiffs $400,000,000 in combined compensatory and punitive damages. Cuba did not appeal this judgment. The judgment remains unsatisfied.

Since March 1, 1982, Cuba has been continuously designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 by the United States Department of State.

B. Judgment Collection and Proceedings Before the District Court

To enforce the judgment, Hausler sought in the Florida state courts writs of garnishment on United States companies which, according to Hausler, were indebted to Cuba. The garnishees removed the garnishment proceedings to the United States District Court for the Southern District of Florida, arguing that federal subject matter jurisdiction existed under 28 U.S.C. §§ 1330, 1332, and TRIA.

In a parallel action, Hausler sought a full faith and credit determination for the underlying state judgment in the United States District Court for the Southern District of Florida. That request was granted on August 20, 2008. The judgment was then registered in the United States District Court for the Southern District of New York, and Hausler commenced additional collection proceedings in that court. The Florida garnishment actions were (1) ultimately transferred to the Southern District of New York and consolidated with the actions there or (2) dismissed without prejudice to be pursued in the Southern District of New York along with the transferred and consolidated actions.

On July 6, 2010, Hausler filed three petitions (hereinafter petitions I, II, and III) under Fed.R.Civ.P. 69 and N.Y. C.P.L.R. § 5225(b) against the defendant-garnishee banks to turn over the value of the EFTs at issue in this case. The garnishee banks moved to dismiss turnover petition III, arguing, among other things, that Cuba had no property interest in the ***211** EFTs. The district court denied the motion, holding that TRIA preempted state law with respect to which entities had a property interest in mid-stream EFTs and that Cuba had a sufficient property interest in the EFTs for Hausler to execute upon them. The banks then commenced an interpleader action regarding Petitions I and III. Numerous adverse claimant respondents appeared (collectively "the ACRs"), each claiming to have an interest in the blocked EFTs superior to Hausler's. Hausler then moved for judgment on the pleadings or, in the alternative, summary judgment regarding Petitions I and III. The garnishee banks and ACRs cross-moved for summary judgment. The district court granted summary judgment in favor of Hausler for essentially the same reasons given in its earlier decision.[2] This appeal followed.

DISCUSSION

On appeal the garnishee-banks and ACRs argue that the blocked EFTs are not attachable "assets of" Cuba under TRIA § 201. We review *de novo* the "threshold issue of whether EFTs are ... property" of a particular party. *Calderon–Cardona v. JPMorgan Chase Bank, N.A.*, 770 F.3d 993, 1000 (2d Cir.2014) (quoting *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 66–67 (2d Cir.2009)).

In the ordinary case, a foreign state will be "immune from the jurisdiction of the courts of the United States and of the

States" pursuant to the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1604 (1988). Congress, however, has created terrorism-related exceptions to immunity under FSIA. *See Calderon–Cardona,* 770 F.3d at 998. One such exception is TRIA's authorization of the attachment of the property of terrorist parties and that of their agencies or instrumentalities to satisfy certain judgments issued against them. *See* TRIA § 201(a). In particular, TRIA provides that:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7)], the blocked *assets of that terrorist party* (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in the aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (emphasis supplied).

"[W]hether or not midstream EFTs may be attached or seized depends upon the nature and wording of the statute pursuant to which attachment and seizure is sought." *Export–Import Bank of U.S. v. Asia Pulp & Paper Co.,* 609 F.3d 111, 116 (2d Cir.2010). As with FSIA § 1610(g), Congress did not define the "type of property interests that may be subject to attachment under" TRIA § 201(a). *Calderon–Cardona,* 770 F.3d at 1001 (interpreting FSIA § 1610(g)). While the Cuban Assets Control Regulations, for purposes of those regulations, include a non-exhaustive list of types of property that may be attached, 31 C.F.R. § 515.311(a), EFTs involving a Cuban ***212** bank are not among the types of property identified. When Congress leaves a gap in a statute that "has not created any new property rights, but 'merely attaches consequences, federally defined, to rights created under state law,' we must look to state law to define the 'rights the judgment debtor has in the property the [creditor] seeks to reach.' " *Calderon–Cardona,* 770 F.3d at 1001 (quoting *Asia Pulp,* 609 F.3d at 117). Here, the banks at which the EFTs are blocked are in New York, so we look to New York property law to fill the gap.

We recently explained in *Calderon–Cardona* "that under New York law 'EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank.' " *Id.* at 1001 (quoting *Jaldhi,* 585 F.3d at 71). As such, "the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests." *Id.* at 1002. Thus, in order for an EFT to be a "blocked asset of" Cuba under TRIA § 201(a), either Cuba "itself or an agency or instrumentality thereof (such as a state-owned financial institution) [must have] transmitted the EFT directly to the bank where the EFT is held pursuant to the block." *Id.*

Unlike in *Calderon–Cardona,* where a remand was necessary to determine whether the EFTs at issue were attachable, it is undisputed that no Cuban entity transmitted any of the blocked EFTs in this case directly to the blocking bank. As a result, neither Cuba nor its agents or instrumentalities have any property interest in the EFTs that are blocked at the garnishee banks. Because no terrorist party or agency or instrumentality thereof has a property interest in the EFTs, they are not attachable under TRIA § 201.

CONCLUSION

We have reviewed the parties' additional arguments and find them unavailing. In light of the foregoing analysis, the judgment of the District Court is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

All Citations

770 F.3d 207

Footnotes

* The Clerk of Court is respectfully directed to amend the caption to conform to that above.

1 For a detailed explanation of how EFTs function, see *Shipping Corp. of India Ltd.v. Jaldhi Overseas Pte Ltd.,* 585 F.3d 58, 60 n. 1 (2d Cir.2009).

2 Judge Marrero also ruled on the priority of claims between the ACRs and Hausler. However, because this case can be resolved on the basis of whether the funds can be attached under TRIA at all, we do not reach those issues.

ANNEX 300

821 F.3d 196
United States Court of Appeals,
First Circuit.

Alfredo VILLOLDO, individually; Gustavo E. Villoldo, individually, and as Administrator, Executor and Personal Representative of the Estate of Gustavo Villoldo Argilagos, Plaintiffs–Appellants/Cross–Appellees,

v.

Fidel CASTRO RUZ, as an individual, and as an official, employee, or agent of The Republic of Cuba; Raul Castro Ruz, as an individual, and as an official, employee, or agent of The Republic of Cuba; The Ministry of Interior, an agency or instrumentality of The Republic of Cuba; The Army of the Republic of Cuba, an agency or instrumentality of The Republic of Cuba; The Republic of Cuba, a foreign state, Defendants–Appellees, Computershare, Inc., Trustee–Appellee/Cross–Appellant.

Nos. 15–1808, 15–2080.
|
May 12, 2016.

Synopsis

Background: Following entry of default judgment on wrongful death claim against Cuban government, judgment creditors brought action seeking turnover of 383 securities accounts allegedly held by Cuban citizens. The United States District Court for the District of Massachusetts, Timothy S. Hillman, J., 113 F.Supp.3d 435, dismissed the action and denied trustee's motion for attorneys' fees. Trustee and creditors appealed.

Holdings: The Court of Appeals, Barron, Circuit Judge, held that:

[1] under the extraterritorial exception to the act of state doctrine, confiscatory law enacted in Cuba that nationalized assets held abroad would not be given extraterritorial effect in the United States, so as to permit attachment in United States of securities accounts opened by Cuban nationals prior to the confiscatory law's enactment, and

[2] dismissal order was a separate document that triggered the 14–day clock for seeking attorneys' fees following entry of judgment.

Affirmed.

West Headnotes (14)

[1] **Federal Courts** Particular Issues

Turnover order in post-judgment collection proceeding was not a final judgment, and could be revisited by the district court, where the order did not resolve judgment creditors' claims against certificated shares in securities accounts controlled by trustee or their claim against any accounts owned by an objecting party. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

[2] **Federal Courts** Multiple claims

A trustee faced with a turnover order can move to have the order certified as final, even if the turnover of other assets remains to be adjudicated. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

[3] **International Law** Act-of-state doctrine

Under the "act of state doctrine," the act within its own boundaries of one sovereign State becomes a rule of decision for the courts of the United States.

[4] **International Law** Property and Confiscation Thereof

Under the "extraterritorial exception" to the act of state doctrine, when property confiscated is within the United States at the time of the attempted confiscation, United States courts will give effect to acts of state only if they are consistent with the policy and law of the United States.

2 Cases that cite this headnote

[5] **International Law** ⬰ Bank accounts and financial instruments

International Law ⬰ Nationalization of property

Under the extraterritorial exception to the act of state doctrine, confiscatory law enacted in Cuba that nationalized assets held abroad would not be given extraterritorial effect in the United States, so as to permit attachment in United States of securities accounts opened by Cuban nationals prior to the confiscatory law's enactment, where the United States government opposed giving the confiscatory law extraterritorial effect. 28 U.S.C.A. § 1604.

2 Cases that cite this headnote

[6] **International Law** ⬰ Property and Confiscation Thereof

Normally, United States courts will not give extraterritorial effect to a confiscatory decree of a foreign state, even where directed against its own nationals.

1 Cases that cite this headnote

[7] **International Law** ⬰ Act-of-state doctrine

As a general matter, courts are required to accord some deference to the executive's position concerning the application of the act of state doctrine.

[8] **International Law** ⬰ Property and Confiscation Thereof

International Law ⬰ Terrorism and related activity

Terrorism Risk Insurance Act (TRIA) only tells United States courts that property that is owned by a foreign state should be used to pay judgments held by victims of terrorism; nothing in the text or legislative history of TRIA suggests that the extraterritorial exception to the act of state doctrine should be disregarded so that certain assets become the property of the foreign country. 28 U.S.C.A. § 1610 note.

1 Cases that cite this headnote

[9] **Federal Civil Procedure** ⬰ Attorney fees

The 14-day clock for seeking an award of attorneys' fees begins to run when the separate document required for entry of judgment is issued. Fed.Rules Civ.Proc.Rules 54(d)(2)(B)(i), 58, 28 U.S.C.A.

[10] **Federal Civil Procedure** ⬰ Mode and sufficiency; separate document rule

Although the separate document rule does not require that a separate judgment use any particular words or form of words, the judgment should be self-sufficient, complete, and describe the parties and the relief to which the party is entitled. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

[11] **Federal Civil Procedure** ⬰ Mode and sufficiency; separate document rule

Dismissal order entered in turnover proceeding was a separate document that triggered the 14-day clock for seeking attorneys' fees following entry of judgment, although the order referred to a memorandum and order entered the same day, where the terms of the dismissal could be determined without referring to the memorandum and order, as the order made it clear on its face that the case was dismissed. Fed.Rules Civ.Proc.Rules 54(d)(2)(B)(i), 58, 28 U.S.C.A.

[12] **Creditors' Remedies** ⬰ Costs and fees

Following entry of order dismissing turnover proceeding, district court did not abuse its discretion by refusing to allow trustee to file a motion for attorneys' fees 10 days late, where only reason given by trustee for its lateness was the misunderstanding of its counsel. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

[13] **Costs** ⇐ Taxation of costs on appeal or error

On appeal from order dismissing turnover proceeding, trustee would not be permitted to file an application for its attorneys' fees incurred in district court, based on the Massachusetts trustee process statute, where trustee had not first made such a request to the district court, and did not purport to be appealing from the dismissal order on ground that district court erred in not ordering discharge as the trustee requested. M.G.L.A. c. 1, §§ 69, 70.

[14] **Federal Courts** ⇐ Briefs

New arguments may not be raised for the first time in a reply brief.

2 Cases that cite this headnote

Attorneys and Law Firms

***198** Andrew C. Hall, with whom Hall, Lamb and Hall, P.A. was on brief, for Plaintiffs–Appellants/Cross–Appellees.

Michael C. Gilleran, with whom Burns & Levinson, LLP was on brief, for Trustee–Appellee/Cross–Appellant.

Benjamin M. Shultz, Attorney, Appellate Staff Civil Division, United States Department of Justice, with whom Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Carmen M. Ortiz, United States Attorney, Sharon Swingle, Appellate Staff, Civil Division, United States Department of Justice, Lisa J. Grosh, Assistant Legal Advisor, Department of State, of counsel, were on brief, for The United States of America, amicus curiae.

Before THOMPSON, Circuit Judge, SOUTER, Associate Justice,* and BARRON, Circuit Judge.

Opinion

BARRON, Circuit Judge.

These cross-appeals arise from the ongoing efforts by two brothers to satisfy a multi-billion dollar judgment they won against the Republic of Cuba and other Cuban parties. In the appeal that the brothers bring, they challenge the District Court's ruling that certain assets they seek to attach to satisfy that judgment are not the property of the Cuban government and thus are not subject to attachment in satisfaction of their judgment. The cross-appeal is brought by the trustee who controls the assets in question. The trustee challenges the District Court's denial of its motion for attorneys' fees incurred in proceedings concerning whether it had to turn over the assets in question to the brothers. We affirm the District Court in both appeals.

I.

The primary legal dispute in this case concerns how the law of foreign relations ***199** affects the attempted satisfaction of a judgment. The judgment itself, however, is not at issue. Nevertheless, because the circuitous route that led from that judgment to these cross-appeals is relevant to the issues in dispute, we begin by briefly retracing how we got from there to here.

The brothers who are seeking to satisfy the judgment are Alfredo and Gustavo Villoldo, each of whom moved from Cuba to the United States in 1960. In 2008, they filed suit in Florida state court and named as defendants: Fidel Castro Ruz; Raul Castro Ruz; the Republic of Cuba; the Cuban Ministry of the Interior; and the Army of the Republic of Cuba (together, the "Cuban defendants").

The brothers' complaint alleged state-law causes of action for economic loss, intentional infliction of emotional distress, and wrongful death. The complaint alleged that after Fidel Castro assumed power, on January 1, 1959, his government began to target the Villoldos. In particular, the complaint alleged that the targeting involved the following actions. Cuban security forces threatened, beat, and arrested both brothers. Cuban officials threatened Gustavo Villoldo Argilagos, the brothers' father, and promised to kill the entire family unless the brothers' father committed suicide and turned his property over to the Cuban government. The Cuban government confiscated Gustavo Villoldo Argilagos's land,

company, and bank accounts after he was found dead on February 16, 1959, apparently having committed suicide. And the Cuban government continued to threaten the brothers with assassination even after they fled Cuba for the United States in 1960.

In 2011, a Florida court awarded the brothers a $2.79 billion judgment against the Cuban defendants on their state-law claims. The judgment followed the defendants' default and a bench trial on damages.

Soon thereafter, the brothers sued the Cuban defendants in the Southern District of New York, seeking recognition of the Florida judgment under the Full Faith and Credit Clause of the United States Constitution. U.S. Const. art. IV, § 1. The Cuban defendants defaulted again, and the Southern District of New York awarded the brothers a federal judgement in the amount of $2.79 billion, plus interest.

The brothers then sought to execute the federal judgment, including by pursuing assets located in Massachusetts and allegedly owned by the Cuban government. So, as part of that quest, on May 17, 2013, the brothers registered the New York federal judgment in the District of Massachusetts. And on June 6, 2013, the District Court authorized the brothers to seek attachment. The brothers then served a subpoena on Computershare, Inc., a transfer agent located in Canton, Massachusetts.

The subpoena sought information about any securities accounts controlled by Computershare that were blocked pursuant to the Cuban Assets Control Regulations, 31 C.F.R. Subt. B, ch. V, pt. 515, the Cuba sanctions regime. The brothers hoped to identify accounts that Cuba owns. Computershare produced a chart identifying 383 accounts that had been blocked by the Cuban sanctions regime, which had been opened by 70 different individuals.

Having received that information, the brothers, in December of 2013, filed an ex parte motion in the District Court for a turnover order against Computershare. The brothers' motion argued that the accounts identified by Computershare had been opened in the 1950s by Cuban nationals, but had since become the property of Cuba by operation of a Cuban confiscatory law. Thus, the brothers argued that the ***200** accounts are subject to attachment in light of the federal judgment from New York. The brothers requested that the District Court (a) find the accounts subject to attachment and execution; (b) allow the issuance of a trustee summons to Computershare; and (c) establish a procedure to notify potential parties in interest.

The District Court granted the motion, established a detailed notice protocol, and set January 31, 2014, as the deadline for any interested party to file an objection. The District Court also ordered Computershare to turn over the accounts of any non-objecting parties by February 7, 2014.

Following the District Court's ruling, the brothers served Computershare with a trustee summons. Computershare filed a trustee answer shortly afterwards. Computershare contended that the accounts at issue contained three different types of assets: shares of common stock held by physical stock certificates ("certificated shares"); shares of common stock held electronically ("book shares"); and cash. Computershare asserted that it could turn over the cash and the book shares but that it could hand over the certificated shares only if the brothers provided a surety bond and the Court made a finding that the original shares were deemed "lost, stolen or wrongfully taken."

Following the passing of the January 31, 2014 objection deadline—by which time only one objection had been filed—the District Court, on February 12, 2014, issued a follow-on turnover order. This order required Computershare to turn over the book and cash assets within 60 days. The order did not address the certificated shares. The order also stated that the District Court would set a briefing schedule for the objecting party.

Another flurry of motions followed the February 12 order. As relevant here, Computershare at this point argued for the first time—in its briefing regarding whether it should be given extra time to comply with the February 12 order—that the blocked accounts should not be considered the property of Cuba. The United States then filed a statement of interest that also argued that the accounts should not be considered the property of Cuba. The brothers responded that the February 12 turnover order was a final judgment and thus that the District Court lacked the authority to revisit it.

The District Court, however, determined that the February 12 order was not a final judgment. Then, on July 7, 2015, the District Court ruled that—contrary to the conclusion it had reached in its original turnover order—the blocked assets were not the property of the Cuban government, denied the brothers' pending motions, and dismissed the case.

That day, the District Court entered both its memorandum and order as well as a document entitled "Order of Dismissal," which read: "In accordance with the Court's Memorandum and Order dated 7/7/15, it is hereby ORDERED that the above-entitled action be and hereby is dismissed." Three days later, the brothers appealed from the dismissal.

On July 31, 2015—24 days after the dismissal—Computershare filed a motion seeking attorneys' fees. Computershare argued that the motion was timely because the July 7 "Order of Dismissal" did not satisfy the separate document requirement set forth in Federal Rule of Civil Procedure 58 and so had not started Federal Rule of Civil Procedure 54's 14–day clock for moving for attorneys' fees.

The District Court denied Computershare's motion. The District Court ruled that the July 7 order was a final judgment that satisfied Rule 58's separate document rule and that "Computershare ha[d] not ***201** shown good cause or excusable neglect for failing to make a fee request within the required period." Computershare cross-appeals from that denial.

II.

[1] The threshold issue is whether the District Court had the authority to revisit its initial determination that Cuba owned the assets subject to the February 12 turnover order. The parties agree that the District Court did have such authority if the February 12 order was not a final judgment. And so the dispute turns on whether it was. We conclude that it was not.

When "an action presents more than one claim for relief," or involves multiple parties, Rule 54(b) applies. Fed.R.Civ.P. 54(b). And, under that Rule, an order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." *Id.*

The February 12 turnover order did not resolve the brothers' claims against the certificated shares or the claim against any accounts owned by the objecting party. Therefore, under Rule 54(b), that order was not a final judgment.

The brothers make only one argument against this conclusion. They argue that Rule 54(b) should not apply to post-judgment collection proceedings such as this one. Otherwise, they contend, trustees may be forced to turn over assets before they would be able to appeal the turnover order.

[2] Notably, the trustee in this case does not argue that Rule 54(b) must be so read in order to protect the interests of trustees. And for good reason. Nothing in the text or history of Rule 54 supports the brothers' construction of the Rule. Nor, as far as we are aware, does any precedent. Moreover, the argument fails on its own terms. Under Rule 54(b), district courts "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties ... if the court expressly determines that there is no just reason for delay." Thus, a trustee faced with a turnover order can move to have the order certified as final, even if the turnover of other assets remains to be adjudicated. *See id.*

Because the February 12 turnover order was not a final judgment, the District Court was entitled to revisit it. We thus must address whether the District Court erred in dismissing the case on the ground that the accounts Computershare possessed were not owned by Cuba and so not subject to attachment in satisfaction of the New York judgment.

III.

There is no dispute that if the accounts subject to the initial turnover order are the property of Cuba, then they are subject to attachment, even though the Foreign Sovereign Immunity Act generally immunizes "foreign state[s]" in United States courts, 28 U.S.C. § 1604, and protects the property of foreign states from attachment and execution. *Id.* § 1609. The reason is that an exception to the general rule regarding foreign sovereign immunity applies to cases related to terrorism, *see id.* §§ 1605A; 1610(a)(7); *see also* Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107–297, 116 Stat. 2322, 2337 (codified in relevant part at 28 U.S.C. § 1610 note), and there is no dispute that this exception would apply here.

[3] Thus, the key question for us is whether the accounts are the property of ***202** Cuba. The answer depends on foreign relations law, and, in particular, the scope of what is known as the "act of state" doctrine. Under that doctrine, "the act within its own boundaries of one sovereign State becomes a rule of decision for the courts of this country." *W.S. Kirkpatrick & Co., Inc. v. Envir. Tectonics Corp., Int'l.*, 493 U.S. 400, 406, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990) (quoting *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 62 L.Ed. 733

(1918) (ellipses omitted)); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

[4] There is, however, "a well-established corollary to the act of state doctrine, the so-called 'extraterritorial exception.' " *Tchacosh Co., Ltd. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1336 (9th Cir.1985). Under that exception, "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.' " *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir.1965) (Friendly, J.).

[5] The brothers contend that the assets at issue are Cuba's —although the accounts were opened by individual Cuban nationals—by reason of a confiscatory law that Cuba enacted in September of 1959, Law 568.[1] The brothers contend that Law 568 requires Cuban nationals to repatriate to Cuba any assets held abroad and provides that failure to repatriate those assets results in nationalization of the assets. And the brothers contend that, under the act of state doctrine, Law 568 must be given effect, as that law, by its terms, confiscates the assets in question because they are located abroad. In consequence, the brothers argue that the blocked accounts are the property of the Cuban government.

We may assume the brothers' interpretation of Law 568 is sound—although the United States contends that it is not. And that is because we conclude that, in light of the extraterritorial exception to the act of state doctrine, Law 568 should not be given effect with respect to the assets at issue.

United States courts have often given effect under the act of state doctrine to foreign sovereigns' nationalizations of assets that are located within their own territories at the time of confiscation. *See, e.g., Sabbatino*, 376 U.S. at 417–18, 439, 84 S.Ct. 923. Indeed, "[a] confiscation decree ... is the very archetype of an act of state." *Republic of Iraq*, 353 F.2d at 50. But the rule is different when the nationalization purports to confiscate assets that are located in the United States at the time that they are putatively taken.

[6] Normally, "our courts will not give extraterritorial effect to a confiscatory decree of a foreign state, even where directed against its own nationals." *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir.1972) (internal quotation marks omitted, collecting cases). After all, United States law and policy—as evidenced by the Fifth Amendment of the United States Constitution—does not support the taking of private property without just compensation. *See e.g., Republic of Iraq*, 353 F.2d at 51–52.

There might be reason to make an exception to this exception if this were a case in which the executive branch was urging us to give extraterritorial effect in this ***203** country to the foreign nation's confiscatory law. *See, e.g., United States v. Pink*, 315 U.S. 203, 213–14, 234, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); *see also Republic of Iraq*, 353 F.2d at 52. But the government is not urging us to do so. Nor is the executive branch even simply silent on the matter. *Compare Banco Nacional de Cuba v. Chem. Bank of N.Y.*, 658 F.2d 903, 909 (2d Cir.1981) (giving effect to an extraterritorial taking when the United States apparently did not weigh in and no party asked the Court not to recognize the confiscation) *with Republic of Iraq*, 353 F.2d at 52 & n. 5 (declining to give effect to an extraterritorial taking even when the United States expressly disclaimed an interest in the case). Rather, the United States is urging us *not* to give extraterritorial effect to Law 568, and we are aware of no precedent for giving extraterritorial effect to a foreign nation's confiscatory law when our own government opposes doing so.

[7] As a general matter, we are required to accord some deference to the executive's position concerning the application of the act of state doctrine, *see First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764–67, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) (the opinions cumulatively reflecting eight votes indicate that the view of the executive is due substantial weight), especially given "[t]he Court's more recent justification for the doctrine," which emphasizes that it is "an expression of the domestic separation of powers." *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 340 n. 11 (1st Cir.2000) (citing *W.S. Kirkpatrick & Co. Inc.*, 493 U.S. at 404, 110 S.Ct. 701 (noting that the act of state doctrine reflects " 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs" (quoting *Sabbatino*, 376 U.S. at 423, 84 S.Ct. 923))). And here the government contends that adhering to the extraterritorial exception to the act of state doctrine furthers United States foreign policy interests by enabling the government to use the blocked assets at issue in connection with ongoing negotiations with Cuba on matters of foreign affairs. As the government points out, if we were to decline to adhere to the extraterritorial exception to the act of state doctrine, Cuba would gain the benefit—through the reduction

of the amount Cuba owes on the judgment against it—of assets of Cuban nationals that are located in the United States and that have been frozen by the executive branch pursuant to discretion granted by Congress to impose sanctions in order "to curtail the flow of hard currency to Cuba."[2] *See Regan v. Wald,* 468 U.S. 222, 243, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984).

[8] The brothers do contend that TRIA—in making an exception to foreign sovereign immunity—embodies a policy in favor of allowing victims of terrorism to collect on judgments. But TRIA only tells us that the property that is owned by a foreign state should be used to pay such judgments. *See Heiser v. Islamic Republic of Iran,* 735 F.3d 934, 938–39 (D.C.Cir.2013). Nothing in the text or legislative history of TRIA suggests that the extraterritorial exception to the act of state doctrine should be disregarded so that certain assets become the property of the foreign country.[3] *See id.*

***204** We thus decline to deviate in this case from the general rule that United States courts will not give extraterritorial effect to a foreign state's confiscatory law. *See Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.,* 840 F.2d 72, 75 (D.C.Cir.1988); *United Bank Ltd. v. Cosmic Int'l, Inc.,* 542 F.2d 868, 872–877 (2d Cir.1976); *Menendez v. Saks & Co.,* 485 F.2d 1355, 1364 (2d Cir.1973), *rev'd on other grounds, Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); *Maltina,* 462 F.2d at 1027; *Republic of Iraq,* 353 F.2d at 51–52; *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.,* 392 F.2d 706, 716 (5th Cir.1968). We therefore affirm the District Court's ruling and dismissal of the case.[4]

IV.

We turn now to Computershare's cross-appeal. At issue is the District Court's denial of Computershare's motion to extend its time to file a motion for attorneys' fees.

[9] [10] Under Rule 54, a motion seeking an award of attorneys' fees must be made "no later than 14 days after the entry of judgment." Fed.R.Civ.P. 54(d)(2)(B)(i). And that clock begins to run when the separate document required by Rule 58 is issued. *See United Auto. Workers Local 259 Social Sec. Dept. v. Metro Auto Ctr.,* 501 F.3d 283, 287 (3d Cir.2007). "Although Rule 58 does not require that a separate judgment use any particular words or form of words.... the judgment should be self-sufficient, complete, and describe the parties and the relief to which the party is entitled." *Mullane v. Chambers,* 333 F.3d 322, 336 (1st Cir.2003).

As we have said, Computershare filed its motion for attorneys' fees on July 31, 2015—24 days after the order of dismissal was entered. For that reason, the District Court denied it as untimely.

Computershare argues on appeal that this denial was erroneous, because, Computershare contends, the 14–day clock never started running. Computershare contends that is so because the July 7 "Order of Dismissal" did not satisfy the separate document rule and thus did not start the clock for filing a motion for attorneys' fees. In the alternative, Computershare argues that the District Court abused its discretion by refusing to grant Computershare a ten-day extension to file its motion for attorneys' fees. Finally, Computershare separately argues that it should be able to request attorneys' fees now, as it does not ***205** have a judgment charging or discharging it as trustee, but will once this Court passes on the case. We address each of these arguments in turn.

A.

[11] Computershare first argues that the July 7 order was not a separate document under Rule 58—and thus did not trigger Rule 54's 14–day clock for seeking attorneys' fees—because the July 7 order was not labeled "judgment." But this Court has previously rejected the argument that an order must be so labelled to constitute a separate document under Rule 58, *see Mirpuri v. ACT Mfg., Inc.,* 212 F.3d 624, 628 (1st Cir.2000), and many other circuits have, too. *See LeBoon v. Lancaster Jewish Community Center Ass'n,* 503 F.3d 217, 224 (3d Cir.2007); *Bourg v. Continental Oil Co.,* 192 F.3d 127, 1999 WL 684161, at *2 (5th Cir.1999) (unpublished); *Grun v. Pneumo Abex Corp.,* 163 F.3d 411, 422 & n. 8 (7th Cir.1998).

Computershare also argues that the July 7 "Order of Dismissal" was not a separate document under Rule 58 because it was not "self-contained." Computershare rests this contention on the fact that the order referred to the District Court's Memorandum and Order entered the same day. But here, one need not refer to the Memorandum and Order to determine the terms of the dismissal, as the July 7 order on its face makes clear that the case is dismissed. Thus, the Seventh Circuit's decision in *Massey Ferguson Div. of Varity*

Corp. v. Gurley, 51 F.3d 102, 104–05 (7th Cir.1995), is of no help to Computershare. In that case, it was necessary to refer to the district court's related opinion to determine in which part the motion in question was granted and in which part it was denied. *Id.* The District Court thus correctly concluded that the July 7 "Order of Dismissal" constituted a separate document under Rule 58.

B.

[12] We turn then to Computershare's contention that—if the July 7 order was a separate document—the District Court abused its discretion by refusing to allow Computershare to file the motion for attorneys' fees ten days late. The District Court declined to allow the late filing because "Computershare ha[d] not shown good cause or excusable neglect for failing to make a fee request within the required period."

The only reason Computershare gives for its lateness here is the misunderstanding of its counsel. But, "[o]nly in 'rare cases' have we found that a district court abused its discretion in refusing to grant an extension of time." *Cortes–Rivera v. Dep't of Corrs. & Rehab. of Com. of P.R.,* 626 F.3d 21, 26 (1st Cir.2010) (quoting *Perez–Cordero v. Wal–Mart P.R.,* 440 F.3d 531, 534 (1st Cir.2006)). And generally those cases have involved circumstances in which "a litigant was 'reasonably surprised' by a court's deadline or 'the events leading to the contested decision were unfair.' " *Id.* (quoting *Perez–Cordero,* 440 F.3d at 534). We thus cannot say that the District Court abused its broad discretion by refusing to excuse Computershare's lateness on this ground. *Rivera–Almodovar v. Instituto Socioeconomico Comunitario, Inc.,* 730 F.3d 23, 27 (1st Cir.2013) ("[A] lawyer's 'inattention or carelessness,' without more, 'normally does not constitute excusable neglect.)' " (quoting *Dimmitt v. Ockenfels,* 407 F.3d 21, 24 (1st Cir.2005)).

C.

[13] Finally, Computershare asks for permission "to file a fee application with ***206** this Court for its fees incurred in the District Court." Computershare relies on the Massachusetts trustee process statute. Under that statute, a trustee process defendant (such as Computershare) is entitled to costs, including attorneys' fees, when it is "adjudged a trustee" (when it has assets subject to attachment) or "discharged" (when it does not). *See* Mass. Gen. Laws ch. 246 §§ 69, 70.

Computershare argues that the District Court's dismissal of the case did not itself "discharge" Computershare. Computershare thus argues that, because it has not yet been either adjudged a trustee or discharged, its request for attorneys' fees was "premature" and thus that it should be allowed to seek attorneys' fees now.

[14] This argument fails, however, on Computershare's own logic. Computershare has not explained how the affirmance of a judgment it agrees did not discharge it now would discharge it. Nor has Computershare explained how we, as an appellate court, could consider a request for discharge in the first instance, without such a request having been presented first to the District Court. And, finally, Computershare does not purport to be appealing from the District Court's dismissal order on the ground that the District Court erred in not ordering discharge as Computershare requested. Nor could Computershare do so, as it did not timely file a notice of appeal from the dismissal. *See* 28 U.S.C. § 2107; Fed. R.App. P. 4; *Bowles v. Russell,* 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) ("This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.' " (quoting *Griggs v. Provident Consumer Disc. Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curium))).[5]

V.

For the foregoing reasons, the District Court's order and judgment of dismissal and denial of Computershare's motion for attorneys' fees are ***affirmed.***

All Citations

821 F.3d 196, 94 Fed.R.Serv.3d 1378

Footnotes

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

1 The brothers cite both Law 567 and Law 568, but Law 567 appears to be of little relevance to this case.

2 The brothers argue that the Fifth Amendment does not apply to prevent foreign governments from taking the property of its own citizens, but that is beside the point. *See Republic of Iraq*, 353 F.2d at 52.

3 The brothers' reliance on the Supreme Court's recent decision in *Bank Markazi v. Peterson*, — U.S. —, 136 S.Ct. 1310, 194 L.Ed.2d 463 (2016), is misplaced. In that case, the Court upheld a statute, 22 U.S.C. § 8772, which Congress passed in order to make certain specific assets subject to attachment in order to satisfy terrorism related judgments against Iran, regardless of whether those same assets would have been attachable under TRIA. *Id.* at 1317. But neither the act of state doctrine, nor the extraterritorial exception to it, were at issue in that case, and nothing about the Court's decision upholding Congress's authority to make those assets attachable remotely suggests that TRIA itself reflects Congress's intent that an exception to the extraterritorial exception to the act of state doctrine should be created. If anything, the fact that Congress specifically intervened to make certain that the assets at issue in *Bank Markazi* could be attached cautions against reading TRIA itself to manifest a similarly specific intention regarding the assets at issue in this case.

4 Because we decide the case on this ground, we need not address the alternative argument made by Computershare and the United States that the "penal law rule" provides a separate ground for declining to give effect to Law 568. *See United States v. Federative Republic of Brazil*, 748 F.3d 86, 92 (2d Cir.2014).

5 In its cross-appeal reply brief Computershare argues in the alternative—and contrary to the position that it takes in its opening brief—that the District Court's dismissal of the case did "implicitly discharge[ ] Computershare." Computershare thus argues that it is due attorneys' fees even at this late date. Computershare makes no argument, however, that, if the District Court's order had discharged it, it was entitled to more than the 14 days Rule 54 provides to file its motion for attorneys' fees. And, in any event, new arguments may not be raised for the first time in a reply brief. *See Rivera–Muriente v. Agosto–Alicea*, 959 F.2d 349, 354 (1st Cir.1992).

End of Document

Annex 300

ANNEX 301

775 F.3d 419
United States Court of Appeals,
District of Columbia Circuit.

Nilo JEREZ, Appellant
v.
REPUBLIC OF CUBA, et al., Appellees.

No. 13–7141.
|
Argued Nov. 10, 2014.
|
Decided Dec. 30, 2014.
|
Rehearing En Banc Denied Jan. 28, 2015.

Synopsis
Background: After obtaining default judgment in a Florida state court against the Republic of Cuba, Cuban officials, and the Cuban armed forces, in his action, under the Torture Victim Protection Act (TVPA) and the Alien Tort Claim Act (ATCA), alleging that he had been subjected to torture while incarcerated in Cuba, judgment creditor brought action to enforce the judgment. The United States District Court for the Southern District of Florida awarded default judgment to creditor, and he registered the judgment and sought to attach certain patents and trademark registrations held by alleged agencies and instrumentalities of the Cuban government. Those alleged agencies and instrumentalities, along with the Cuban chamber of commerce, moved to vacate a writ of attachment that had been issued, and creditor cross-moved for order to show cause why a new writ of attachment should not issue. The United States District Court for the District of Columbia ruled, 964 F.Supp.2d 52, that the Florida courts had lacked jurisdiction, under the Foreign Sovereign Immunities Act (FSIA), to grant the default judgments, and creditor appealed.

Holdings: The Court of Appeals, Williams, Senior Circuit Judge, held that:

creditor's claims did not fall within scope of FSIA's non-commercial tort exception, and

claims did not fall within scope of FSIA's terrorism exception.

Affirmed.

***420** Appeal from the United States District Court for the District of Columbia (No. 1:09–mc–00466).

Attorneys and Law Firms

Richard J. Oparil argued the cause and filed the briefs for appellant.

***421** Michael R. Krinsky argued the cause for appellees. With him on the brief was David B. Goldstein.

Before: BROWN, Circuit Judge, and WILLIAMS and GINSBURG, Senior Circuit Judges.

Opinion

Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

WILLIAMS, Senior Circuit Judge:

****380** Nilo Jerez filed suit in Florida state court against the Republic of Cuba and various codefendants, including Fidel Castro and the " Cuban Revolutionary Armed Forces," alleging that he had suffered horrifying torture at their hands and continued to suffer the consequences. Having obtained a default judgment in state court, Jerez now seeks to execute that judgment on patents and trademarks held or managed by the appellees in this action, who are allegedly agents and instrumentalities of Cuba. Because the Florida state court lacked subject-matter jurisdiction to grant the default judgment, we affirm the district court's denial of Jerez's request.

* * *

In the 1960s and 1970s, while incarcerated in Cuba, Nilo Jerez allegedly endured unlawful incarceration and torture committed by the Cuban government and its codefendants. The torture allegedly included such features as having electricity run through his body causing loss of bodily functions and consciousness and being forced to live surrounded by his own urine and feces. Readers familiar with *Against All Hope,* Armando Valladares's account of his incarceration by the same parties, will find much of Jerez's treatment similar to that inflicted on

Valladares and depicted by him as having been extended to many of his fellow prisoners. In Jerez's case, he alleges, the defendants also purposefully injected him with the hepatitis C virus and subjected him to other conditions also causing hepatitis C, which has in turn caused him ongoing cirrhosis of the liver.

In 2005, years after arriving in the United States, Jerez sued the defendants for compensatory and punitive damages in Florida state court (specifically the Eleventh Judicial Circuit in and for Miami–Dade County, Florida). After the defendants failed to appear, the court found them liable under the Torture Victim Protection Act and granted Jerez a default judgment for $200 million. Although Jerez's complaint alluded to the Foreign Sovereign Immunities Act ("FSIA"), he claimed jurisdiction under the Alien Tort Claim Act, and the court found jurisdiction on that basis.

To enforce the default judgment, Jerez sued in the United States district court for the Southern District of Florida. The defendants again defaulted. The court granted full faith and credit to the Florida state court judgment and granted Jerez judgment for $200 million plus interest. The Florida district court made no mention of the basis for its jurisdiction.

Jerez registered the Florida district court's default judgment in the United States district court for the District of Columbia. He also applied for various writs of attachment on certain patents and trademark registrations held by alleged agencies and instrumentalities of Cuba; the latter, together with intervenor Camara de Comercio, manager of a trademark on Cuban cigars, are collectively the appellees in this action. The history of the successive writs is tangled and irrelevant to the outcome of the case.

The appellees moved to vacate a writ of attachment that had been issued, while Jerez cross-moved for an order to show cause why a new writ of attachment should not issue against them. A magistrate ****381 *422** judge found that the Florida state and district courts lacked jurisdiction under the FSIA to grant the default judgments, and accordingly granted the appellees' motions to vacate the writ. *Jerez v. Republic of Cuba*, 777 F.Supp.2d 6 (D.D.C.2011). The district judge overruled Jerez's objections to the magistrate judge's order, *Jerez v. Republic of Cuba*, 964 F.Supp.2d 52 (D.D.C.2013), and issued an order to that effect. We affirm the district court.

* * *

A default judgment rendered in excess of a court's jurisdiction is void. See *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1181 (D.C.Cir.2013). Thus, a court asked to enforce a default judgment must entertain an attack on the jurisdiction of the court that issued the judgment. If it finds that the issuing court lacked jurisdiction, it must vacate the judgment.

Then–Judge Ginsburg put the rules clearly and succinctly in *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C.Cir.1987):

> A defendant who knows of an action but believes the court lacks jurisdiction over his person or over the subject matter generally has an election. He may appear, raise the jurisdictional objection, and ultimately pursue it on direct appeal. If he so elects, he may not renew the jurisdictional objection in a collateral attack....
>
> Alternatively, the defendant may refrain from appearing, thereby exposing himself to the risk of a default judgment. When enforcement of the default judgment is attempted, however, he may assert his jurisdictional objection. If he prevails on the objection, the default judgment will be vacated.

Id. at 1547. See also *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); Restatement (Second) of Judgments § 65 cmt. b (1982).

Jerez points to *Insurance Corp. of Ireland*, where the Court said that "principles of res judicata apply to jurisdictional determinations." *Insurance Corp. of Ireland*, 456 U.S. at 702 n. 9, 102 S.Ct. 2099. He also cites language from a number of cases to the effect that a judgment rendered by a court assuming subject-matter jurisdiction is preclusive, even if the judgment was incorrect, as long as the court did not "plainly usurp jurisdiction." *Weininger v. Castro*, 462 F.Supp.2d 457, 475 (S.D.N.Y.2006) (citing *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 n. 2 (2d Cir.1996); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir.1986)). But those principles apply not to default judgments but only to *contested* cases, where the defendant "had an opportunity to litigate the question of subject-matter jurisdiction." *Insurance Corp. of Ireland*, 456 U.S. at 702 n. 9, 102 S.Ct. 2099. It is clear from the context of the Supreme Court and circuit court cases that "opportunity" means not only awareness of the litigation but the defendant's actually appearing in it. See *id.*; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376–78, 60 S.Ct. 317, 84 L.Ed. 329 (1940); *Nemaizer*, 793 F.2d at 65. In contrast, a defendant that has never appeared is always free under *Insurance Corp. of Ireland* and *Practical Concepts* to assert a jurisdictional attack later, in the court

where enforcement of the default judgment is sought, and to have its jurisdictional objections considered de novo. See *Practical Concepts,* 811 F.2d at 1547. To the extent that *Weininger* suggests the contrary, we respectfully disagree (and are in any event precluded from agreement by *Practical Concepts* and *Bell Helicopter*).

We would reach the same result if we approached the judgment of the ****382 *423** Florida state court through the lens of the Full Faith and Credit Act, 28 U.S.C. § 1738. Under the Act, federal courts are "to accept the rules chosen by the State from which the judgment is taken," including the rules with respect to jurisdiction. *Kremer v. Chem. Constr. Corp.,* 456 U.S. 461, 482, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); see also *Marrese v. Am. Acad. of Orthopaedic Surgeons,* 470 U.S. 373, 381, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). Florida law, like federal law, calls for a de novo examination of the Florida state court's jurisdiction: "A judgment entered by a court which lacks subject matter jurisdiction is void and subject to collateral attack under [Florida] rule 1.540 at any time." *McGhee v. Biggs,* 974 So.2d 524, 526 (Fla.Dist.Ct.App.2008). And if the issuing court "did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n,* 455 U.S. 691, 705, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982).

The FSIA contains a separate provision regarding default judgments, 28 U.S.C. § 1608(e), but it does not controvert the principles of *Practical Concepts.* The statute provides that no "judgment by default shall be entered by a court ... unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). This provides foreign sovereigns a special protection akin to that assured the federal government by Fed.R.Civ.P. 55(e). See *Commercial Bank of Kuwait v. Rafidain Bank,* 15 F.3d 238, 242 (2d Cir.1994); Restatement (Fourth) of The Foreign Relations Law of the United States § 463 reporters' note 2 (Preliminary Draft No. 2, 2014). The rationale for such extra protection of sovereigns is that "the government is sometimes slow to respond and that the public fisc should be protected from claims that are unfounded but would be granted solely because the government failed to make a timely response." *Marziliano v. Heckler,* 728 F.2d 151, 157–58 (2d Cir.1984). In providing this additional protection, Rule 55(e) obviously complements rather than replaces the res judicata principles governing a defendant's challenge to jurisdiction.

The process required by § 1608(e) is therefore a supplement to, not a substitute for, the right of a foreign sovereign defendant who has not appeared in the judgment-granting court to obtain de novo assessment of his jurisdictional objections. In *Commercial Bank of Kuwait,* for example, the court of appeals initially addressed jurisdiction independently, 15 F.3d at 241, and then reviewed the district court's application of § 1608(e), *id.* at 241–42. To the extent that the decision in *Weininger* rests on a view that the mandate of § 1608(e) is a substitute for the ordinary rules of res judicata, see 462 F.Supp.2d at 475, we again respectfully disagree.

Finally, the jurisdiction of the Florida district court, which issued a default judgment on the strength of the state court's judgment, is equally subject to de novo consideration here and presents no additional questions.

* * *

We turn now to a de novo assessment of the Florida state court's jurisdiction.

The FSIA, 28 U.S.C. §§ 1602–11, is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. If no exception applies, ****383 *424** then the court lacks subject-matter jurisdiction. *Mwani v. bin Laden,* 417 F.3d 1, 15 (D.C.Cir.2005).

Jerez argues that two statutory exceptions apply here: the non-commercial tort exception, 28 U.S.C. § 1605(a)(5), and the terrorism exception, which at the relevant time was codified as 28 U.S.C. § 1605(a)(7) (2006).

The non-commercial tort exception provides jurisdiction for cases alleging "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5). "[B]oth the tort and the injury must occur in the United States." *Persinger v. Islamic Republic of Iran,* 729 F.2d 835, 842 (D.C.Cir.1984). "Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Amerada Hess,* 488 U.S. at 439–40, 109 S.Ct. 683.

The problem for Jerez is that the defendants' alleged

tort—purposefully injecting him with hepatitis C, otherwise subjecting him to conditions that caused hepatitis C, and failing to warn him of the virus—occurred in Cuba. This is obvious as to the first two. As to the failure to warn, to the extent that such warnings might have had any value to Jerez after he reached the United States, the omissions might seem to have taken place in the United States. But none of the defendants sued here was within the United States, and we agree with the district court that under those circumstances the omissions cannot reasonably be said to have occurred within the United States. *Jerez,* 964 F.Supp.2d at 56–57. Jerez has suggested that unnamed representatives in the Cuba Interest Section in Washington similarly failed to warn him, but has afforded no reason to believe that these representatives were aware of any relevant information. *Id.* at 57.

To overcome this difficulty, Jerez argues that the virus continues to replicate in his body even now, and that "each deployment (through such viral replication) of the biological agent is an independent event" and "a separate and distinct tort." But the continued replication of hepatitis C and Jerez's cirrhosis of the liver describe an ongoing *injury* that he suffers in the United States as a result of the defendants' acts in Cuba. The law is clear that "the entire tort"—including not only the injury but also the act precipitating that injury—must occur in the United States. *Asociacion de Reclamantes v. United Mexican States,* 735 F.2d 1517, 1525 (D.C.Cir.1984).

Jerez seeks to reinforce the redeployment analysis by analogizing the defendants' actions to a foreign agent's delivery into the United States of an anthrax package or a bomb. But here the defendants' infliction of injury on Jerez occurred entirely in Cuba, whereas the infliction of injury by the hypothetical anthrax package or bomb would occur entirely in the United States.

Jerez's invocation of the FSIA's terrorism exception is equally problematic. In the version operative when Jerez sued in Florida, the statute provided an exception to sovereign immunity for cases alleging "personal injury or death that was caused by an act of torture." 28 U.S.C. § 1605(a)(7) (2006). Jurisdiction is subject to two conditions: first, the state must have been "designated as a state sponsor of terrorism ... at the time the act occurred," or it must have been designated later because of the act in question; and ****384 *425** second, the claimant must have been "a national of the United States ... when the act upon which the claim is based occurred." *Id.* (That section has since been replaced by 28 U.S.C. § 1605A.)

Jerez fails to satisfy either of these two independent conditions. First, Cuba was not designated a state sponsor of terrorism until 1982, and the defendants subjected Jerez to torture in 1970 and 1971. Further, Cuba was designated a state sponsor not because of the torture inflicted on Jerez, but because of "support for acts of international terrorism" such as those committed by the terrorist group M–19. *Regulation Changes on Exports: Hearing Before the Subcomm. on Near E. & S. Asian Affairs of the S. Comm. on Foreign Relations,* 97th Cong. 13 (1982) (statement of Ernest Johnson, Jr., Deputy Assistant Secretary for Economic Affairs, Department of State).

Faced with these obstacles, Jerez again invokes the redeployment theory—that hepatitis C continues to replicate in his body, daily inflicting new acts of torture. Now that Cuba is designated as a state sponsor of terrorism and he is a citizen of the United States, he reasons, the continued replication of the virus in his body constitutes a stream of contemporaneous acts of torture and thus satisfies both requirements of the terrorism exception. But in ordinary language the ongoing replication of hepatitis C and the cirrhosis of the liver are the injuries that Jerez is suffering, not acts of torture. Those acts occurred in Cuba before 1982, before Jerez became a United States national and before Cuba was designated a state sponsor.

Because no statutory exception to sovereign immunity under the FSIA applies, the Florida state court and the Florida district court lacked subject-matter jurisdiction. See *Amerada Hess,* 488 U.S. at 433, 109 S.Ct. 683. Their default judgments are therefore void. As a result there is no legal basis for the writ of attachment that Jerez seeks and the appellees are entitled to grant of their motion to vacate the previously outstanding writ. See *Practical Concepts,* 811 F.2d at 1547. Accordingly we need not address the appellees' other arguments.

* * *

The judgment of the district court is

Affirmed.

All Citations

775 F.3d 419, 413 U.S.App.D.C. 378, 113 U.S.P.Q.2d 1517

ANNEX 302

Concise Oxford English Dictionary

ELEVENTH EDITION, REVISED

Edited by
Catherine Soanes
Angus Stevenson

OXFORD
UNIVERSITY PRESS

typically after being attacked or defeated.
– DERIVATIVES **regroupment** n.

regrow ■ v. (past **regrew**; past part. **regrown**) grow or cause to grow again.
– DERIVATIVES **regrowth** n.

Regt ■ abbrev. Regiment.

regular ■ adj. **1** arranged in a constant or definite pattern, especially with the same space between individual instances. **2** recurring at short uniform intervals: *a regular monthly check*. ➤ done or happening frequently. ➤ doing the same thing often or at uniform intervals: *regular worshippers*. **3** conforming to or governed by an accepted standard of procedure or convention. ➤ of or belonging to the permanent professional armed forces of a country. ➤ properly trained or qualified and pursuing a full-time occupation. ➤ Christian Church subject to or bound by religious rule. Contrasted with **SECULAR**. **4** usual or customary. ➤ chiefly N. Amer. of an ordinary kind. ➤ N. Amer. not pretentious or arrogant; ordinary and friendly: *a regular guy*. ➤ denoting merchandise of average size. **5** Grammar (of a word) following the normal pattern of inflection. **6** Geometry (of a figure) having all sides and all angles equal. ➤ (of a solid) bounded by a number of equal figures. **7** Botany (of a flower) having radial symmetry. ■ n. a regular customer, member of a team, etc. ➤ a regular member of the armed forces. ➤ one of the Christian regular clergy.
– DERIVATIVES **regularity** n. (pl. **regularities**). **regularization** or **regularisation** n. **regularize** or **regularise** v. **regularly** adv.
– ORIGIN ME: from OFr. *reguler*, from L. *regularis*, from *regula* 'rule'.

regular canon ■ n. see **CANON**².

regular expression ■ n. Computing a sequence of symbols and characters which uses syntax rules to express a string or pattern to be searched for within a list, piece of text, etc.

regulate ■ v. **1** control or maintain the rate or speed of (a machine or process). **2** control or supervise by means of rules and regulations.
– DERIVATIVES **regulable** adj. **regulative** adj. **regulator** n. **regulatory** adj.
– ORIGIN ME: from late L. *regulat-*, *regulare* 'direct, regulate', from L. *regula* 'rule'.

regulation ■ n. **1** a rule or directive made and maintained by an authority. ➤ [as modifier] informal of a familiar or predictable type. **2** the action or process of regulating or being regulated.

regulo /ˈrɛgjʊləʊ/ ■ n. Brit. trademark used before a numeral to denote a setting on a temperature scale in a gas oven.

regulus /ˈrɛgjʊləs/ ■ n. (pl. **reguluses** or **reguli** /-lʌɪ, -liː/) Chemistry, archaic a metallic form of a substance, obtained by smelting or reduction.
– ORIGIN C16: from L., dimin. of *rex*, *reg-* 'king'; orig. as *regulus of antimony*, appar. so named because of its readiness to combine with gold.

regurgitate /rɪˈgɔːdʒɪteɪt/ ■ v. **1** bring (swallowed food) up again to the mouth. **2** repeat (information) without analysing or comprehending it.
– DERIVATIVES **regurgitation** n.
– ORIGIN C16: from med. L. *regurgitat-*, *regurgitare*, from L. *re-* 'again' + *gurges*, *gurgit-* 'whirlpool'.

rehab /ˈriːhab/ informal ■ n. **1** rehabilitation. **2** US a building that has been rehabilitated. ■ v. (**rehabs**, **rehabbing**, **rehabbed**) N. Amer. rehabilitate.

rehabilitate ■ v. **1** restore to health or normal life by training and therapy after imprisonment, addiction, or illness. **2** restore the standing or reputation of. **3** restore to a former condition.
– DERIVATIVES **rehabilitation** n. **rehabilitative** adj.
– ORIGIN C16 (earlier (C15) as *rehabilitation*): from med. L. *rehabilitat-*, *rehabilitare* (see **RE-**, **HABILITATE**).

rehang ■ v. /rɪˈhaŋ/ (past and past part. **rehung**) hang (something) again or differently. ■ n. /ˈriːhaŋ/ an act of rehanging works of art in a gallery.

rehash ■ v. reuse (old ideas or material) without significant change or improvement. ■ n. an instance of rehashing.

rehear ■ v. (past and past part. **reheard**) hear or listen to again. ➤ Law [often as noun **rehearing**] hear (a case or plaintiff) in a court again.

rehearsal ■ n. a trial performance of a play or other work for later public performance. ➤ the action or process of rehearsing.

rehearse ■ v. **1** practise (a play, piece of music, or other work) for later public performance. **2** state (a list of points that have been made many times before).
– DERIVATIVES **rehearser** n.
– ORIGIN ME (in the sense 'repeat aloud'): from OFr. *rehercier*, perh. from *re-* 'again' + *hercer* 'to harrow' from *herse* (see **HEARSE**).

reheat ■ v. heat again. ■ n. the process of using the hot exhaust to burn extra fuel in a jet engine and produce extra power. ➤ an afterburner.
– DERIVATIVES **reheater** n.

rehire ■ v. hire (a former employee) again.

rehoboam ■ n. a wine bottle of about six times the standard size.
– ORIGIN C19: from *Rehoboam*, a king of ancient Israel.

rehome ■ v. find a new home for (a pet).

rehouse ■ v. provide with new housing.

rehung past and past participle of **REHANG**.

rehydrate ■ v. absorb or cause to absorb moisture after dehydration.
– DERIVATIVES **rehydratable** adj. **rehydration** n.

Reich /rʌɪk, -x/ ■ n. the former German state, most often used to refer to the **Third Reich** (the Nazi regime, 1933–45).
– ORIGIN Ger., lit. 'empire'.

Reichstag /ˈrʌɪksˌtɑːg, ˈrʌɪks/ ■ n. the main legislature of the German state under the Second and Third Reichs.
– ORIGIN Ger., from *Reichs* 'of the empire' + *Tag* 'assembly'.

reify /ˈriːɪfʌɪ, ˈreɪɪ-/ ■ v. (**reifies**, **reifying**, **reified**) formal make (something abstract) more concrete or real.
– DERIVATIVES **reification** n. **reificatory** adj.
– ORIGIN C19: from L. *res*, *re-* 'thing' + **-FY**.

reign ■ v. **1** rule as monarch. **2** [as adj. **reigning**] (of a sports player or team) currently holding a particular title. **3** prevail: *confusion reigned*. ■ n. **1** the period of rule of a monarch. **2** the period during which someone or something is predominant or pre-eminent.
– ORIGIN ME: from OFr. *reignier* 'to reign', *reigne* 'kingdom', from L. *regnum*.

USAGE

The correct phrase is **a free rein**, not **a free reign**.

reignite ■ v. ignite again.

reign of terror ■ n. a period of remorseless repression or bloodshed, in particular (**Reign of Terror**) the period of the Terror during the French Revolution.

reiki /ˈreɪkiː/ ■ n. a healing technique based on the principle that the therapist can channel energy into the patient by means of touch, to activate the natural healing processes of the patient's body.
– ORIGIN Japanese, lit. 'universal life energy'.

reimburse /ˌriːɪmˈbɔːs/ ■ v. repay (a person who has spent or lost money). ➤ repay (a sum of money that has been spent or lost).
– DERIVATIVES **reimbursable** adj. **reimbursement** n.
– ORIGIN C17: from **RE-** + obs. *imburse* 'put in a purse' from med. L. *imbursare*, based on late L. *bursa* 'purse'.

reimport ■ v. import (goods processed or made from exported materials). ■ n. the action of reimporting. ➤ a reimported item.
– DERIVATIVES **reimportation** n.

reimpose ■ v. impose (something, especially a law) again after a lapse.
– DERIVATIVES **reimposition** n.

rein ■ n. **1** a long, narrow strap attached at one end to a horse's bit, typically used in pairs to guide or check a horse in riding or driving. ➤ Brit. a pair of straps used to restrain a young child. **2** (**reins**) the power to direct and control: *a new manager soon take over the reins*. ■ v. **1** check or guide (a horse) by pulling on its reins. **2** (often **rein someone/thing in/back**) restrain.
– PHRASES **draw rein** Brit. stop one's horse. **(a) free rein** freedom of action or expression. **keep a tight rein on**

strict control over.
– ORIGIN ME: from OFr. *rene*, based on L. *retinere*.

USAGE

The phrase **a free rein**, which derives from the literal meaning of allowing a horse to move freely without being controlled by reins, is sometimes misinterpreted and wrongly written as **a free reign**.

reincarnate ■ v. /ˌriːɪnˈkɔːneɪt/ cause (someone) to undergo rebirth in another body. ■ adj. /ˌriːɪnˈkɑːnət/ [postpositive] reborn in another body.

reincarnation ■ n. the rebirth of a soul in a new body. ➤ a person or animal in whom a soul is believed to have been reborn.

reincorporate ■ v. make (something) a part of something else again.
– DERIVATIVES **reincorporation** n.

reindeer ■ n. (pl. same or **reindeers**) a deer with large branching antlers, native to the northern tundra and Arctic and domesticated in parts of Eurasia. [*Rangifer tarandus*.]
– ORIGIN ME: from ON *hreindýri*, from *hreinn* 'reindeer' + *dýr* 'deer'.

reindeer moss ■ n. a bluish-grey arctic lichen, eaten by reindeer in winter. [*Cladonia rangiferina*.]

reinfect ■ v. cause to become infected again.
– DERIVATIVES **reinfection** n.

reinflate ■ v. **1** fill (something, especially a tyre) with gas again. **2** cause inflation of (a currency) or in (an economy) again.
– DERIVATIVES **reinflatable** adj. **reinflation** n.

reinforce ■ v. strengthen or support; give added strength to. ➤ strengthen (a military force) with additional personnel or material.
– DERIVATIVES **reinforcement** n. **reinforcer** n.
– ORIGIN ME: from Fr. *renforcer*, influenced by *force*. Cf. obs. spelling of **ENFORCE**.

reinforced concrete ■ n. concrete in which metal bars or wire are embedded to strengthen it.

reinsert ■ v. place (something) back into its previous position.
– DERIVATIVES **reinsertion** n.

reinstall ■ v. (**reinstalls**, **reinstalling**, **reinstalled**) put in place or fix in position again. ➤ install (computer software) again. **2** reinstate in a position of authority.
– DERIVATIVES **reinstallation** n.

reinstate ■ v. restore to a former position or state.
– DERIVATIVES **reinstatement** n.

reinsure ■ v. (of an insurer) transfer (all or part of a risk) to another insurer to provide protection against the risk of the first insurance.
– DERIVATIVES **reinsurance** n. **reinsurer** n.

reintegrate ■ v. **1** restore (elements regarded as separate) to unity. **2** integrate back into society.
– DERIVATIVES **reintegration** n.

reinterpret ■ v. (**reinterprets**, **reinterpreting**, **reinterpreted**) interpret in a new or different light.
– DERIVATIVES **reinterpretation** n.

reintroduce ■ v. **1** bring (something, especially a law or system) into effect again. **2** put (a species of animal or plant) back into a former habitat.
– DERIVATIVES **reintroduction** n.

reinvent ■ v. change so much so as to appear entirely new.
– PHRASES **reinvent the wheel** waste time or effort in doing something that already exists.
– DERIVATIVES **reinvention** n.

reinvest ■ v. put (the profit on a previous investment) back into the same scheme.
– DERIVATIVES **reinvestment** n.

reinvigorate ■ v. give new energy or strength to.
– DERIVATIVES **reinvigoration** n.

reishi /ˈreɪʃiː/ ■ n. a mushroom found growing on dead or dying timber in Asia and North America, preparations made from which are credited with various health-giving properties. [*Ganoderma lucidum*.]
– ORIGIN Japanese.

reissue ■ v. (**reissues**, **reissuing**, **reissued**) make a new copy or different form of (a book, record, etc.) available for sale. ■ n. a new issue of such a product.

reiterate ■ v. say something again or repeatedly.
– DERIVATIVES **reiteration** n. **reiterative** adj.
– ORIGIN ME: from L. *reiterat-*, *reiterare* 'go over again'.

reive /riːv/ ■ v. (usu. as noun **reiving**) chiefly Scottish another term for **REAVE**.
– DERIVATIVES **reiver** n.
– ORIGIN ME: var. of **REAVE**; the usual spelling when referring to the former practice of cattle-raiding on the Scottish Borders.

reject ■ v. /rɪˈdʒɛkt/ **1** dismiss as inadequate or faulty. ➤ refuse to consider or agree to. **2** fail to show due affection or concern for. **3** Medicine show a damaging immune response to (a transplanted organ or tissue). ■ n. /ˈriːdʒɛkt/ a rejected person or thing.
– DERIVATIVES **rejection** n. **rejective** adj. (rare). **rejector** n.
– ORIGIN ME: from L. *reject-*, *reicere* 'throw back'.

rejectionist ■ n. an Arab who refuses to accept a negotiated peace with Israel.

rejig ■ v. (**rejigs**, **rejigging**, **rejigged**) Brit. **1** rearrange (something). **2** dated re-equip with machinery; refit.

rejigger ■ v. US term for **REJIG** (in sense 1).

rejoice ■ v. **1** feel or show great joy. ➤ archaic cause joy to. **2** (**rejoice in**) Brit. have (a strange or inappropriate name): *the guard rejoiced in the name of Blossom*.
– DERIVATIVES **rejoicer** n. **rejoicing** n. & adj. **rejoicingly** adv.
– ORIGIN ME: from OFr. *rejoiss-*, lengthened stem of *rejoir*, from *re-* + *joir* 'experience joy'.

rejoin¹ ■ v. **1** join together again. **2** return to.

rejoin² ■ v. say in reply; retort.
– ORIGIN ME (in the sense 'reply to a charge or pleading in a lawsuit'): from OFr. *rejoindre*, from *re-* 'again' + *joindre* 'to join'.

rejoinder ■ n. **1** a sharp or witty reply. **2** Law, dated a defendant's answer to the plaintiff's reply or replication.
– ORIGIN ME: from Anglo-Norman Fr. *rejoindre* (see **REJOIN**²).

rejuvenate /rɪˈdʒuːvəneɪt/ ■ v. **1** make or cause to appear younger or more vital. **2** [often as adj. **rejuvenated**] restore (a river or stream) to a condition characteristic of a younger landscape.
– DERIVATIVES **rejuvenation** n. **rejuvenator** n.
– ORIGIN C19: from **RE-** + L. *juvenis* 'young' + **-ATE**³.

rejuvenescence /rɪˌdʒuːvəˈnɛsəns/ ■ n. **1** the renewal of youth or vitality. **2** Biology the reactivation of vegetative cells, resulting in regrowth from old or injured parts.
– DERIVATIVES **rejuvenescent** adj.
– ORIGIN C17: from late L. *rejuvenescere* (from L. *re-* 'again' + *juvenis* 'young') + **-ENCE**.

rekey ■ v. (**rekeys**, **rekeying**, **rekeyed**) key (text or other data) again.

rekindle ■ v. **1** relight (a fire). **2** revive (something lapsed or lost).

-rel ■ suffix forming nouns with diminutive or derogatory force such as *cockerel* or *wastrel*.
– ORIGIN from OFr. *-erel(le)*.

relabel ■ v. (**relabels**, **relabelling**, **relabelled**; US **relabels**, **relabeling**, **relabeled**) label again or differently.

relaid past and past participle of **RELAY**².

relapse /rɪˈlaps/ ■ v. **1** (of a sick or injured person) deteriorate after a period of improvement. **2** (**relapse into**) return to (a worse or less active state). ■ n. /also ˈriːl-/ a deterioration in health after a temporary improvement.
– DERIVATIVES **relapser** n.
– ORIGIN ME: from L. *relaps-*, *relabi* 'slip back'.

relapsing fever ■ n. an infectious bacterial disease marked by recurrent fever.

relatable ■ adj. **1** enabling a person to feel that they can relate to someone or something: *Mary-Kate's problems make her more relatable*. **2** able to be related to something else.

relate ■ v. **1** give an account of. **2** (**be related**) be connected by blood or marriage. **3** make or show a connection between. ➤ (**relate to**) concern. **4** (**relate to**) feel sympathy for or identify with.
– DERIVATIVES **relatable** adj. **related** adj. **relatedness** n. **relater** (also **relator**) n.

members from workers and management, set up to settle disputes and regulate conditions of employment in certain industries.

trade book ■ n. a book published by a commercial publisher and intended for general readership.

trade deficit ■ n. the amount by which the cost of a country's imports exceeds the value of its exports.

trade discount ■ n. a discount on a retail price allowed or agreed between traders or to a retailer by a wholesaler.

traded option ■ n. an option on a stock exchange or futures exchange which can itself be bought and sold.

trade edition ■ n. an edition of a book intended for general sale rather than for book clubs or specialist suppliers.

trade gap ■ n. another term for **TRADE DEFICIT**.

trade-in ■ n. a used article accepted by a retailer in part payment for another.

trademark ■ n. **1** a symbol, word, or words legally registered or established by use as representing a company or product. **2** a distinctive characteristic or object. ■ v. [usu. as adj. **trademarked**] provide with a trademark.

trade name ■ n. **1** a name that has the status of a trademark. **2** a name by which something is known in a particular trade or profession.

trade-off ■ n. a balance achieved between two desirable but incompatible features; a compromise.

trade plates ■ pl. n. Brit. temporary number plates used by car dealers or manufacturers on unlicensed cars.

trade price ■ n. the price paid for goods by a retailer to a manufacturer or wholesaler.

trader ■ n. **1** a person who trades goods, currency, or shares. **2** a merchant ship.

tradescantia /ˌtradɪˈskantɪə/ ■ n. an American plant with triangular three-petalled flowers, often grown as a house plant. [Genus *Tradescantia*.]
- ORIGIN mod. L., named in honour of the English botanist John *Tradescant* (1570–1638).

trade secret ■ n. a secret device or technique used by a company in manufacturing its products.

tradesman ■ n. (pl. **tradesmen**) a person engaged in trading or a trade, typically on a relatively small scale.

tradespeople ■ pl. n. people engaged in trade.

trade surplus ■ n. the amount by which the value of a country's exports exceeds the cost of its imports.

trade union (Brit. also **trades union**) ■ n. an organized association of workers in a trade, group of trades, or profession, formed to protect and further their rights and interests.
- DERIVATIVES **trade unionism** n. **trade unionist** n.

trade-weighted ■ adj. (especially of exchange rates) weighted according to the importance of the trade with the various countries involved.

trade wind ■ n. a wind blowing steadily towards the equator from the north-east in the northern hemisphere or the south-east in the southern hemisphere, especially at sea.

HISTORY

Trade wind is first recorded from the mid 17th century, and comes from the obsolete phrase *blow trade* meaning 'blow steadily in the same direction'. Trade formerly meant 'course, direction' and 'track' before it acquired its modern meanings of 'an occupation' and 'buying and selling'. The importance of the trade winds to the transport of goods by sea misled 18th-century etymologists into connecting the word *trade* with 'commerce'.

trading card ■ n. each of a set of picture cards that are collected and traded, especially by children.

trading estate ■ n. Brit. an area designated for industrial and commercial use.

trading post ■ n. a store or small settlement established for trading, typically in a remote place.

tradition ■ n. **1** the transmission of customs or beliefs from generation to generation, or the fact of being passed on in this way. ➤ a long-established custom or belief passed on from one generation to another. **2** an artistic or literary method or style established by an artist, writer, or movement, and subsequently followed by others. **3** (in Christianity) doctrine not explicit in the Bible but held to derive from the oral teaching of Christ and the Apostles. ➤ (in Judaism) an ordinance of the oral law not in the Torah but held to have been given by God to Moses. ➤ (in Islam) a saying or act ascribed to the Prophet but not recorded in the Koran. See **HADITH**.
- DERIVATIVES **traditionary** adj. **traditionist** n. **traditionless** adj.
- ORIGIN ME: from OFr. *tradicion*, or from L. *traditio(n-)*, from *tradere* 'deliver, betray', from *trans-* 'across' + *dare* 'give'.

traditional ■ adj. **1** relating to or following tradition. **2** (of jazz) in the style of the early 20th century.
- DERIVATIVES **traditionally** adv.

traditionalism ■ n. **1** the upholding of tradition, especially so as to resist change. **2** chiefly historical the theory that all moral and religious truth comes from divine revelation passed on by tradition, human reason being incapable of attaining it.
- DERIVATIVES **traditionalist** n. & adj. **traditionalistic** adj.

traduce /trəˈdjuːs/ ■ v. speak badly of; tell lies about.
- DERIVATIVES **traducement** n. **traducer** n.
- ORIGIN C16: from L. *traducere* 'lead in front of others, expose to ridicule'.

traffic ■ n. **1** vehicles moving on a public highway. **2** the movement of ships, trains, or aircraft. **3** the commercial transportation of goods or passengers. **4** the messages or signals transmitted through a communications system. **5** the action of trafficking. **6** archaic dealings or communication between people. ■ v. (**traffics**, **trafficking**, **trafficked**) deal or trade in something illegal.
- DERIVATIVES **trafficker** n. **trafficless** adj.
- ORIGIN C16: from Fr. *trafique*, Sp. *tráfico*, or Ital. *traffico*, of unknown origin.

trafficator /ˈtrafɪkeɪtə/ ■ n. Brit. an obsolete kind of signalling device on the side of a motor vehicle, in the form of a small extendable illuminated pointer.
- ORIGIN 1930s: blend of **TRAFFIC** and **INDICATOR**.

traffic calming ■ n. the deliberate slowing of traffic in residential areas, by building road humps or other obstructions.

traffic circle ■ n. North American term for **ROUNDABOUT** (in sense 1).

traffic island ■ n. a small raised area in the middle of a road which provides a safe place for pedestrians to stand and divides two streams of traffic.

traffic jam ■ n. a line or lines of traffic at or virtually at a standstill.

traffic lights (also **traffic light** or **traffic signal**) ■ pl. n. a set of automatically operated coloured lights for controlling traffic at road junctions, pedestrian crossings, and roundabouts.

traffic warden ■ n. Brit. an official who locates and reports on infringements of parking regulations.

tragacanth /ˈtragəkanθ/ (also **gum tragacanth**) ■ n. a white or reddish gum obtained from a plant (*Astragalus gummifer*), used in the food, textile, and pharmaceutical industries.
- ORIGIN C16: from Fr. *tragacante*, via L. from Gk *tragakantha* (name of the plant, lit. 'goat's thorn').

tragedian /trəˈdʒiːdɪən/ ■ n. **1** (fem. **tragedienne** /trəˌdʒiːdɪˈɛn/) a tragic actor or actress. **2** a writer of tragedies.

tragedy ■ n. (pl. **tragedies**) **1** an event causing great suffering, destruction, and distress. **2** a serious play with an unhappy ending, especially one concerning the downfall of the main character.
- ORIGIN ME: from OFr. *tragedie*, via L. from Gk *tragōidia*, appar. from *tragos* 'goat' (the reason remains unexplained) + *ōidē* 'song, ode'.

tragic ■ adj. **1** extremely distressing or sad. ➤ suffering extreme distress or sadness. **2** relating to tragedy in a literary work.
- DERIVATIVES **tragical** adj. **tragically** adv.
- ORIGIN C16: from Fr. *tragique*, via L. from Gk *tragikos*, from *tragos* 'goat', but assoc. with *tragōidia* (see **TRAGEDY**).

tragic flaw ■ n. less technical term for **HAMARTIA**.

tragicomedy /ˌtradʒɪˈkɒmɪdɪ/ ■ n. (pl. **tragicomedies**) a play or novel containing elements of both comedy and tragedy.
- DERIVATIVES **tragicomic** adj. **tragicomically** adv.
- ORIGIN C16: from Fr. *tragicomédie* or Ital. *tragicomedia*, based on L. *tragicocomoedia*, from *tragicus* (see **TRAGIC**) + *comoedia* (see **COMEDY**).

tragopan /ˈtragəpan/ ■ n. an Asian pheasant, the male of which has fleshy horns on its head. [Genus *Tragopan*: several species.]
- ORIGIN mod. L., from Gk, the name of a horned bird, from *tragos* 'goat' + the name of the Greek god *Pan*.

tragus /ˈtreɪgəs/ ■ n. (pl. **tragi** /ˈtreɪgaɪ, ˈtreɪdʒaɪ/) Anatomy & Zoology a prominence on the inner side of the external ear, in front of and partly closing the passage to the organs of hearing.
- ORIGIN C17: from late L., via L. from Gk *tragos* 'goat' (with ref. to the characteristic tuft of hair resembling a goat's beard).

trahison des clercs /ˌtraːizɔ̃ deː ˈklɛːr/ ■ n. literary a betrayal of intellectual, artistic, or moral standards by writers, academics, or artists.
- ORIGIN Fr., lit. 'treason of the scholars', the title of a book by Julien Benda (1927).

trail ■ n. **1** a mark or a series of signs or objects left behind by the passage of someone or something. ➤ a track or scent used in following someone or hunting an animal. **2** a long thin part stretching behind or hanging down from something. **3** a beaten path through rough country. **4** a route planned or followed for a particular purpose: *the tourist trail*. **5** the rear end of a gun carriage, resting or sliding on the ground when the gun is unlimbered. ■ v. **1** draw or be drawn along behind. ➤ (of a plant) grow along the ground or so as to hang down. **2** walk or move slowly or wearily. ➤ (of the voice or a speaker) fade gradually before stopping. **3** follow the trail of. **4** be losing to an opponent in a game or contest. **5** advertise with a trailer. **6** apply (slip) through a nozzle or spout to decorate ceramic ware.
- PHRASES **at the trail** Military with a rifle hanging balanced in one hand and (in Britain) parallel to the ground. **trail arms** Military let a rifle hang in such a way. **trail one's coat** deliberately provoke a quarrel or fight.
- ORIGIN ME: from OFr. *traillier* 'to tow', or Mid. Low Ger. *treilen* 'haul a boat', based on L. *tragula* 'dragnet', from *trahere* 'to pull'.

trail bike ■ n. a light motorcycle for use in rough terrain.

trailblazer ■ n. **1** a person who makes a new track through wild country. **2** an innovator.
- DERIVATIVES **trailblazing** n. & adj.

trailer ■ n. **1** an unpowered vehicle towed by another. ➤ the rear section of an articulated truck. ➤ N. Amer. a caravan. **2** an extract from a film or programme used for advance advertising. **3** a trailing plant. ■ v. **1** advertise with a trailer. **2** transport by trailer.

trailer park ■ n. **1** N. Amer. a caravan site. **2** [as modifier] US lacking refinement, taste, or quality: *a trailer-park floozy*.

trailer trash ■ n. US informal, derogatory poor, lower-class white people, typified as living in mobile homes.

trailer truck ■ n. US an articulated truck.

trailing arbutus ■ n. a creeping North American plant of the heather family, with leathery evergreen leaves and clusters of pink or white flowers. [*Epigaea repens*.]

trailing edge ■ n. **1** the rear edge of a moving body, especially an aircraft wing or propeller blade. **2** Electronics the part of a pulse in which the amplitude diminishes.

trailing wheel ■ n. a wheel on a railway locomotive or other vehicle that is not given direct motive power.

trail mix ■ n. a mixture of dried fruit and nuts eaten as a snack.

train ■ v. **1** teach (a person or animal) a skill or type of behaviour through regular practice and instruction. ➤ be taught in such a way. **2** make or become physically fit through a course of exercise and diet. **3** (**train something on**) point or aim something at. **4** cause (a plant) to grow in a particular direction or into a required shape. **5** dated go by train. **6** archaic entice (someone). ■ n. **1** a series of railway carriages or wagons moved as a unit by a locomotive or by integral motors. **2** a number of vehicles or pack animals moving in a line. ➤ a retinue of attendants accompanying an important person. **3** a series of connected events or thoughts. **4** a long piece of trailing material attached to the back of a formal dress or robe. **5** a series of gears or other connected parts in machinery. **6** a trail of gunpowder for firing an explosive charge.
- PHRASES **in train** in progress. **in the train of** following behind. **in (or out of) training** undergoing (or no longer undergoing) physical training for a sporting event. ➤ physically fit (or unfit) as a result of this.
- DERIVATIVES **trainability** n. **trainable** adj. **training** n.
- **trainload** n.
- ORIGIN ME (as a noun in the sense 'delay'): from OFr. *train* (masc.), *traine* (fem.), from *trahiner* (v.), from L. *trahere* 'pull, draw'.

trainband ■ n. historical a division of civilian soldiers in London and other areas, especially in the Stuart period.

trainee ■ n. a person undergoing training for a particular job or profession.
- DERIVATIVES **traineeship** n.

trainer ■ n. **1** a person who trains people or animals. ➤ informal an aircraft or simulator used to train pilots. **2** Brit. a soft shoe, suitable for sports or casual wear.

training college ■ n. (in the UK) a college where people, especially prospective teachers, are trained.

training shoe ■ n. another term for **TRAINER** (in sense 2).

training wheels ■ pl. n. North American term for stabilizers (see **STABILIZER** sense 3).

train mile ■ n. one mile travelled by one train, as a unit of traffic.

train oil ■ n. chiefly historical oil obtained from the blubber of a whale, especially the right whale.
- ORIGIN C16: from obs. *train* 'train oil', from Mid. Low Ger. *trān*, MDu. *traen*, lit. 'tear' (because it was extracted in droplets).

train shed ■ n. a large structure providing a shelter over the tracks and platforms of a railway station.

trainspotter ■ n. Brit. **1** a person who collects locomotive numbers as a hobby. **2** often derogatory a person who obsessively studies the minutiae of any minority interest or specialized hobby.
- DERIVATIVES **trainspotting** n.

train wreck ■ n. informal a chaotic or disastrous situation that holds a ghoulish fascination for onlookers or observers: *his train wreck of a private life guaranteed front-page treatment*.

traipse /treɪps/ ■ v. walk or move wearily, reluctantly, or aimlessly. ■ n. **1** a tedious or tiring walk. **2** archaic a slovenly woman.
- ORIGIN C16: of unknown origin.

trait /treɪt, treɪ/ ■ n. a distinguishing quality or characteristic. ➤ a genetically determined characteristic.
- ORIGIN C16 (an early sense was 'stroke of the pen or pencil in a picture'): from Fr., from L. *tractus* (see **TRACT**[1]).

traiteur /treˈtəː/ ■ n. (in France or French speaking countries) a delicatessen.
- ORIGIN Fr., from *traiter* 'to treat'.

traitor ■ n. a person who betrays their country, a cause, a person, etc.
- DERIVATIVES **traitorous** adj. **traitorously** adv.
- ORIGIN ME: from OFr. *traitour*, from L. *traditor*, from *tradere* 'hand over'.

trajectory /trəˈdʒɛktɪ(ə)rɪ, ˈtradʒɪktɪ(ə)rɪ/ ■ n. (pl. **trajectories**) **1** the path described by a projectile flying or an object moving under the action of given forces. **2** Geometry a curve or surface cutting a family of curves or surfaces at a constant angle.
- ORIGIN C17: from mod. L. *trajectoria* (fem.), from L. *traject-*, *traicere* 'throw across'.

Trakehner /traˈkeɪnə/ ■ n. a saddle horse of a light breed first developed at the Trakehnen stud near

ANNEX 303

Provided further, That the instrument of conveyance shall reserve to the Carolina-Virginia Coastal Highway Corporation necessary rights-of-way and easements as may be required for the construction, maintenance, and repair of a toll road across the Currituck Beach Lighthouse Reservation: *Provided further*, That the instrument of conveyance shall reserve to the Virginia Electric and Power Company a perpetual easement and right-of-way across the Currituck Beach Lighthouse Reservation as may be required for an electric distribution line from Duck to Caffeys Inlet along the Great Barrier Reef located in Currituck and Dare Counties, together with such easement rights and privileges for construction, operation, and maintenance of such pole and wire lines across the said Currituck Beach Lighthouse Reservation.

Approved October 25, 1951.

[For additional Public Laws approved October 25, 1951, see Public Laws 219-221 on pages 655-657.]

Public Law 212 — CHAPTER 574

AN ACT

October 26, 1951
[H. R. 3987]

To amend the Act of June 28, 1948 (62 Stat. 1061), to provide for the operation, management, maintenance, and demolition of federally acquired properties following the acquisition of such properties and before the establishment of the Independence National Historical Park, and for other purposes.

Independence National Historical Park.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of June 28, 1948 (62 Stat. 1061), is hereby amended to add thereto the following section:

Administration, etc., of properties.

"SEC. 7. Following the acquisition by the Federal Government of properties pursuant to this Act and until such time as the buildings thereon are demolished or the properties and buildings thereon are devoted to purposes of the Independence National Historical Park as provided herein, the Secretary is authorized, with respect to the said properties, to administer, operate, manage, lease, and maintain such properties, and lease, demolish, or remove buildings, or space in buildings thereon, in such manner as he shall consider to be in the public interest. Any funds received from leasing the said properties, buildings thereon, or space in buildings thereon, shall be deposited to the credit of a special receipt account and expended for purposes of operating, maintaining, and managing the said properties and demolishing or removing the buildings thereon. The Secretary, in his discretion and notwithstanding other requirements of law, may exercise and carry out the functions authorized herein by entering into agreements or contracts with public or private agencies, corporations, or persons, upon such terms and conditions as he deems to be appropriate in carrying out the purposes of this Act."

Funds.

Contracts.

Approved October 26, 1951.

Public Law 213 — CHAPTER 575

AN ACT

October 26, 1951
[H. R. 4560]

To provide for the control by the United States and cooperating foreign nations of exports to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination, and for other purposes.

Mutual Defense Assistance Control Act of 1951.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Mutual Defense Assistance Control Act of 1951".

TITLE I—WAR MATERIALS

U. S. policy of embargo.

SEC. 101. The Congress of the United States, recognizing that in a world threatened by aggression the United States can best preserve and maintain peace by developing maximum national strength and by utilizing all of its resources in cooperation with other free nations, hereby declares it to be the policy of the United States to apply an embargo on the shipment of arms, ammunition, and implements of war, atomic energy materials, petroleum, transportation materials of strategic value, and items of primary strategic significance used in the production of arms, ammunition, and implements of war to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination, in order to (1) increase the national strength of the United States and of the cooperating nations; (2) impede the ability of nations threatening the security of the United States to conduct military operations; and (3) to assist the people of the nations under the domination of foreign aggressors to reestablish their freedom.

It is further declared to be the policy of the United States that no military, economic, or financial assistance shall be supplied to any nation unless it applies an embargo on such shipments to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination.

Administration of Act.

This Act shall be administered in such a way as to bring about the fullest support for any resolution of the General Assembly of the United Nations, supported by the United States, to prevent the shipment of certain commodities to areas under the control of governments engaged in hostilities in defiance of the United Nations.

Administrator.

SEC. 102. Responsibility for giving effect to the purposes of this Act shall be vested in the person occupying the senior position authorized by subsection (e) of section 406 of the Mutual Defense Assistance Act of 1949, as amended, or in any person who may hereafter be charged with principal responsibility for the administration of the provisions of the Mutual Defense Assistance Act of 1949. Such person is hereinafter referred to as the "Administrator".

63 Stat. 719.
22 U. S. C. § 1577.

Determination of items to be embargoed.

SEC. 103. (a) The Administrator is hereby authorized and directed to determine within thirty days after enactment of this Act after full and complete consideration of the views of the Departments of State, Defense, and Commerce; the Economic Cooperation Administration; and any other appropriate agencies, and notwithstanding the provisions of any other law, which items are, for the purpose of this Act, arms, ammunition, and implements of war, atomic energy materials, petroleum, transportation materials of strategic value, and those items of primary strategic significance used in the production of arms, ammunition, and implements of war which should be embargoed to effectuate the purposes of this Act: *Provided*, That such determinations shall be continuously adjusted to current conditions on the basis of investigation and consultation, and that all nations receiving United States military, economic, or financial assistance shall be kept informed of such determinations.

Adjustments.

Information to nations receiving U. S. assistance.

Termination of assistance.

(b) All military, economic, or financial assistance to any nation shall, upon the recommendation of the Administrator, be terminated forthwith if such nation after sixty days from the date of a determination under section 103 (a) knowingly permits the shipment to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination, of any item which he has determined under section 103 (a) after a full and complete investigation to be

included in any of the following categories: Arms, ammunition, and implements of war, atomic energy materials, petroleum, transportation materials of strategic value, and items of primary strategic significance used in the production of arms, ammunition, and implements of war: *Provided*, That the President after receiving the advice of the Administrator and after taking into account the contribution of such country to the mutual security of the free world, the importance of such assistance to the security of the United States, the strategic importance of imports received from countries of the Soviet bloc, and the adequacy of such country's controls over the export to the Soviet bloc of items of strategic importance, may direct the continuance of such assistance to a country which permits shipments of items other than arms, ammunition, implements of war, and atomic energy materials when unusual circumstances indicate that the cessation of aid would clearly be detrimental to the security of the United States: *Provided further*, That the President shall immediately report any determination made pursuant to the first proviso of this section with reasons therefor to the Appropriations and Armed Services Committees of the Senate and of the House of Representatives, the Committee on Foreign Relations of the Senate, and the Committee on Foreign Affairs of the House of Representatives, and the President shall at least once each quarter review all determinations made previously and shall report his conclusions to the foregoing committees of the House and Senate, which reports shall contain an analysis of the trade with the Soviet bloc of countries for which determinations have been made.

Continuance of assistance by direction of President.

Reports to Congress.

Resumption of assistance.

SEC. 104. Whenever military, economic, or financial assistance has been terminated as provided in this Act, such assistance can be resumed only upon determination by the President that adequate measures have been taken by the nation concerned to assure full compliance with the provisions of this Act.

"Assistance" activities not included.

SEC. 105. For the purposes of this Act the term "assistance" does not include activities carried on for the purpose of facilitating the procurement of materials in which the United States is deficient.

TITLE II—OTHER MATERIALS

Regulation of exports.

SEC. 201. The Congress of the United States further declares it to be the policy of the United States to regulate the export of commodities other than those specified in title I of this Act to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination, in order to strengthen the United States and other cooperating nations of the free world and to oppose and offset by nonmilitary action acts which threaten the security of the United States and the peace of the world.

Negotiations with recipient countries for controlling certain exports.

Ante, p. 645.

SEC. 202. The United States shall negotiate with any country receiving military, economic, or financial assistance arrangements for the recipient country to undertake a program for controlling exports of items not subject to embargo under title I of this Act, but which in the judgment of the Administrator should be controlled to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination.

Termination of assistance.

SEC. 203. All military, economic, and financial assistance shall be terminated when the President determines that the recipient country (1) is not effectively cooperating with the United States pursuant to this title, or (2) is failing to furnish to the United States information

sufficient for the President to determine that the recipient country is effectively cooperating with the United States.

TITLE III—GENERAL PROVISIONS

Cooperation of non-recipient countries.

SEC. 301. All other nations (those not receiving United States military, economic, or financial assistance) shall be invited by the President to cooperate jointly in a group or groups or on an individual basis in controlling the export of the commodities referred to in title I and title II of this Act to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination.

Ante, pp. 645, 646.

Duties of Administrator.

SEC. 302. The Administrator with regard to all titles of this Act shall—

(a) coordinate those activities of the various United States departments and agencies which are concerned with security controls over exports from other countries;

(b) make a continuing study of the administration of export control measures undertaken by foreign governments in accordance with the provisions of this Act, and shall report to the Congress from time to time but not less than once every six months recommending action where appropriate; and

(c) make available technical advice and assistance on export control procedures to any nation desiring such cooperation.

Applicability of designated provisions.

SEC. 303. The provisions of subsection (a) of section 403, of section 404, and of subsections (c) and (d) of section 406 of the Mutual Defense Assistance Act of 1949 (Public Law 329, Eighty-first Congress), as amended, insofar as they are consistent with this Act, shall be applicable to this Act. Funds made available for the Mutual Defense Assistance Act of 1949, as amended, shall be available for carrying out this Act in such amounts as the President shall direct.

63 Stat. 717.
22 U. S. C. §§ 1574, 1576, 1577.

Availability of funds.

Expenses chargeable to local currency funds.

SEC. 304. In every recipient country where local currency is made available for local currency expenses of the United States in connection with assistance furnished by the United States, the local currency administrative and operating expenses incurred in the administration of this Act shall be charged to such local currency funds to the extent available.

Repeals.

SEC. 305. Subsection (d) of section 117 of the Foreign Assistance Act of 1948 (Public Law 472, Eightieth Congress), as amended, and subsection (a) of section 1302 of the Third Supplemental Appropriation Act, 1951 (Public Law 45, Eighty-second Congress), are repealed.

62 Stat. 154.
22 U. S. C. § 1515.

Ante, p. 63.

Approved October 26, 1951.

Public Law 214 — CHAPTER 577

AN ACT

October 26, 1951
[S. 2244]

To amend certain housing legislation to grant preferences to veterans of the Korean conflict.

Korean veterans, etc.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (14) of section 2 of the United States Housing Act of 1937 (50 Stat. 888, as amended; 42 U. S. C. 1402) is amended to read as follows:

Housing preferences.
63 Stat. 426

"Veteran."

"(14) The term 'veteran' shall mean a person who has served in the active military or naval service of the United States at any time (i) on or after September 16, 1940, and prior to July 26,

ANNEX 304

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UNITED STATES EXPORT CONTROLS—PAST, PRESENT, AND FUTURE

Introduction

Traditionally, the United States Government has restricted exports only in time of war or in special emergency situations.[1] With the end of World War II, however, drastic wartime controls over exports were continued from ***792** year to year until February 28, 1949,[2] when the Export Control Act[3] was enacted, the first comprehensive system of export controls ever adopted by the Congress in peace time. Even that Act was initially conceived as a temporary measure, and might well have been allowed to lapse in 1951 but for the Korean War. The Export Control Act was renewed in 1951, and again in 1953, 1956, 1958, 1960, 1962, and 1965. It is due to come before the Congress again in 1969.[4]

Probably no single piece of legislation gives more power to the President to control American commerce. Subject to only the vaguest standards of "foreign policy" and "national security and welfare," he has authority to cut off the entire export trade of the United States, or any part of it, or to deny "export privileges" to any or all persons. Moreover, the procedures for implementing this power are left almost entirely to his discretion, and at the same time heavy administrative and criminal sanctions may be imposed for violation of any export regulations he may introduce.

Under the Export Control Act, the Executive regulates all exports from the United States regardless of destination. In addition, he may invoke the Trading With the Enemy Act of 1917 against designated countries.[5] That Act was employed by the President in December 1950, following the entrance of ***793** Communist Chinese forces into Korea, as the basis for the issuance of regulations designed to prevent virtually all economic dealings (including imports and financial transactions, as well as exports) with Communist China and North Korea.[6] In 1953, another set of regulations was also issued under the Trading With the Enemy Act, controlling exports to Communist countries by persons subject to the jurisdiction of the United States, of goods produced outside the United States.[7] In 1961, the Trading With the Enemy Act also provided the foundation for the imposition of controls on economic dealings with Cuba similar to (though not quite as severe as) those previously made applicable to China.[8]

The Export Control Act is administered by the Commerce Department. The three sets of regulations issued under the Trading With the Enemy Act are administered by the Treasury Department. In addition, the State Department administers a licensing system regulating the export of arms, ammunition, and other implements of war, and technical data relating thereto, under the Mutual Security Act of 1954.[9] These are the most important—although by no means the only[10]—governmental controls over exports.

The time has come to re-examine seriously both the Export Control Act and the Treasury Regulations issued under the Trading With the Enemy Act. ***794** The question must be asked: Can methods of export control which were adopted initially as a temporary wartime expedient serve adequately for the indefinite future? We must also ask whether, if export licensing has in fact become a permanent part of our economic and legal order, it is wise to divide the main burden of administering it between three different departments of the Government. Closely related to the question of methods of control is the question of criteria for granting or denying license applications; these criteria must be analyzed in order to determine whether they in fact promote

the aims of national security and foreign policy which the Export Control Act affirms. Finally, we must ask to what extent the United States, by "going it alone" in many of its export control policies, is adversely affecting the competitive interests of American exporters and of the American economy, and is also risking American leadership in the international community.

While we mean to answer these questions as impartially as possible, we do not wish to conceal our conviction—which is perhaps apparent from the questions themselves—that our system of export controls needs a drastic revision. We believe that the methods of administering export controls are in many respects arbitrary; that the existing division of controls among three different departments is unwise, and at times bureaucratic and oppressive; and that some of the criteria for granting or denying license applications are specious. Moreover, we are convinced that the United States, by refusing to adapt its export controls to those of the countries of Western Europe, is doing a disservice to American exporters, who are thus deprived of markets; to the American economy, whose balance of payments thereby suffers; and to American leadership in the world, which incurs the charge that it lacks both realism and idealism—the realism to recognize that one can trade even with one's enemies on the basis of mutual advantage, and the idealism that places the long-range development of an international economic and legal order ahead of short-range national political interests.

I. The Legislative History of the Export Control Act of 1949

Although most other special wartime controls withered away in the period from 1945 to 1947 with the transition to a peacetime economy,[11] it was necessary to continue to restrict exports for two main reasons: first, our domestic economy was faced with world-wide shortages of critical items such as steel, chemicals, drugs, and building supplies, and thus, in the absence of controls, exports could have drained away—or bid up the price of—many goods vitally needed at home; and second, our policy of aiding the post-war recovery of the ***795** European economies—symbolized in the Marshall Plan—required the channelling of particular goods to particular countries on a priority basis. In addition, there was a third reason—which ultimately became the main reason for continuing the controls, but which in the period of 1945-1947 was considered only a subsidiary reason: the need for close scrutiny over shipments to the USSR and other Communist countries of industrial materials which might have military significance. In this connection it should be noted that in 1947 it was still open to the Soviet Union to join the Marshall Plan; that the Communist victory in China was secured only in 1948 and 1949; and that the phrase "Cold War" was only beginning to penetrate our national consciousness.

In 1948 it was apparent that the repeated annual extensions of the 1940 law authorizing export controls were meeting congressional opposition, and that new legislation was required which would more adequately reflect the post-war situation. A Senate investigation in 1948 disclosed substantial weaknesses in the administrative system of export controls, and made several recommendations, some of which were of a restrictive character (a greater degree of consultation by the Commerce Department's Office of International Trade, which was administering the controls, with other executive departments and with private traders) and some of which involved an expansion of administrative rule-making power (the authority to promulgate regulations applicable to financing, transporting, and other servicing of exports).[12] In addition, the officials of the Office of International Trade wished to be expressly relieved by statute from the requirements of the Administrative Procedure Act, especially section 4 thereof requiring hearings on proposed regulations.[13]

A. *The Congressional Hearings*

The major reason advanced by the Administration for the extension of export controls was that certain goods continued to be in short supply throughout the world and that, in the absence of controls, exports of these scarce commodities would be greatly increased to the detriment both of our national economy and of our obligations to aid European recovery. Given existing scarcities, Secretary of Commerce Sawyer stated, exports must be channelled to countries "where our foreign-policy interest would be served best," namely to Western Europe.[14] By the end of 1948, however, high levels of United States production had overcome most shortages, even in the light of European ***796** demand.[15] Indeed, at the time that the Export Control Act was

passed, shortages of supply accounted for only about one-third of the export licensing activities of the Office of International Trade.[16]

It seems clear that the Administration exaggerated the dimensions of the short supply situation and that, notwithstanding State Department controls over exports of military goods, the Administration was most concerned to exercise, in the words of the statute, "the necessary vigilance over exports from the standpoint of their significance to the national security." As early as March 1, 1948—shortly after the Communist coup in Czechoslovakia—the Department of Commerce had placed under licensing control most exports to the Soviet Union and the countries of Eastern Europe. And in the same month, Congress enacted an amendment to the pending Marshall Plan bill which directed the President "to refuse delivery insofar as practicable to [Marshall Plan participants] of commodities which go into the production of any commodity for delivery to any nonparticipating European country which commodity would be refused export licenses to those countries by the United States in the interest of national security."[17] In December 1948 a Senate committee investigating the administration of export controls reported that "The national security aspects of our export control program are of transcendent importance, particularly in view of the present activities of the Soviet Union and its satellites."[18] Thus, in the period March 1948 to February 1949 (when the Export Control Act was passed), so-called security controls replaced short supply controls as the principal regulator of the American export trade. At the same time, however, the Administration was hopeful that export controls might no longer be needed by June 30, 1951—the expiration date of the new legislation.

Apart from the reasons for the extension of export controls, the congressional hearings focused on three questions: (1) the licensing policies of the Office of International Trade, (2) the effect of excluding the operation of section 4 of the Administrative Procedure Act, and (3) the criminal penalties for violation of regulations under the Act.

1. *The Licensing Policies of the Office of International Trade.* The business community generally, and the small merchant exporters in particular, were especially concerned with the licensing policies of the Office of International Trade. The most general complaint was that there was no equitable or systematic method of granting licenses in most commodity branches; witnesses testified that applications to export similar goods were treated unequally, that is, that some licenses were approved while others were denied ***797** and that export quotas were not evenly or fairly divided. Several representatives of the business community urged that the Office of International Trade establish and follow workable and uniform standards in the issuance of export licenses and, in addition, that the Congress define more sharply its policy in sections 1 and 2 of the Act and thereby place express restraints on the limits of the Office of International Trade's authority. "All we ask for," said one lawyer, "is that we have a little more definitive language in the statute. With that definitive language we can then go to the officials who may be trampling on the intent of the statute and point out this language."[19] Unfortunately, no way was found to satisfy these complaints.

In addition, the merchant exporters were concerned with licensing practices which discriminated in favor of the manufacturers. They charged that Office of International Trade officials were trying to eliminate the "middleman" from the export business.[20] As a result of such devices as "price criterion" as a factor in licensing, a "historical" method of licensing for basic goods (which discriminated against export houses whose principals had served in the war as well as against newcomers), and a "letter of commitment" procedure by which an exporter holding firm orders could not get an export license without a letter of commitment from a supplier (who, in turn, would not furnish such a letter without presentation of an export license), the merchant exporters were effectively precluded from a large part of the export business. On the other hand, by reserving even a small share of the available quotas to merchant exporters, the Office of International Trade may in fact have secured for some of them a larger volume of export sales than they might have been able to make in an uncontrolled market. The congressional remedy for this dilemma was a directive in section 4(b) of the Act that "insofar as practicable" consideration be given "to the interests of small business, merchant exporters as well as producers, and established and new exporters," and that provisions "be made for representative trade consultation to that end."[21]

2. *Section 4 of the Administrative Procedure Act.*[22] Section 2 of the Administrative Procedure Act provides that that Act shall not apply to activities of an emergency character, except for section 3 thereof, which requires publication of information, rules,

opinions, orders and public records. The Commerce Department contended that since the Office of International Trade was a "temporary emergency agency,"[23] it should be exempt from the ***798** operation of the Administrative Procedure Act altogether (except for section 3). The business community generally urged that it *not* be exempted from section 4, which requires notice and public hearing on agency rule-making activities but which does not apply to interpretive rules, general statements of policy, or to any situation in which the agency for good cause finds that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Business representatives agreed with the Office of International Trade that the voluminous applications for export licenses made it impracticable to hold hearing procedures on individual license applications but they did argue forcefully that the Office should not be exempt from "notice and hearing on substantive and legislative rules to be promulgated which may effectively curtail the right to remain in business."[24] The Senate Report, adopting the Administration's view, concluded that only section 3 of the Administrative Procedure Act should be applicable to the export control program "in view of the temporary character of this legislation and its intimate relation to foreign policy and national security."[25] Other temporary regulatory activities had been granted comparable exemptions, including the Sugar Control Extension Act of 1947,[26] the Housing and Rent Act of 1947,[27] the Veterans Emergency Housing Act of 1946,[28] and the War Housing Insurance Act.[29] Section 7 of the Export Control Act embodied the Senate recommendation.[30]

3. *Criminal Penalties*. The Administration proposed, and the Congress accepted, a change in the criminal sanctions of the export control law of 1940, which had provided a maximum penalty of $10,000 and two years in prison for "the violation of any provision of any proclamation, or of any rule, or regulation issued hereunder."[31] Section 5 of the 1949 Act reduced the maximum sentence to one year and thus changed the nature of the offense, under federal criminal law, from a felony to a misdemeanor.[32] This was done in order to eliminate the requirement of a grand jury indictment and thus to expedite prosecution of violators. Neither the Senate nor the House hearings give any indication as to whether the omission—as in the 1940 law—of words relative to intent or negligence on the part of the violator serves to eliminate the requirement thereof.

To facilitate both criminal and administrative proceedings, section 6 of the Act grants to the Executive the power to conduct investigations, to issue ***799** subpoenas, and to require testimony under oath. Such powers were lacking in the pre-existing law. The Senate Committee considered that:

> [a]mple safeguards against administrative misuse of these enforcement powers [were] provided [(a)] by the requirement that they be utilized solely "to the extent necessary or appropriate to the enforcement of this act...;" [(b)] by the intervention of the United States district courts in any proposed enforcement of a subpoena; [(c)] by the inclusion of the standard immunity provisions of the Compulsory Testimony Act of 1893 ...; and [(d)] by the prohibition against disclosure of confidential information furnished.[33]

B. ***Extensions and Amendments of the Export Control Act***

Whatever doubts may have been entertained in 1948-1949 about the propriety and wisdom of maintaining a comprehensive system of export controls were dispelled by the outbreak of armed conflict in Korea in June 1950. When the Export Control Act came up for renewal in June 1951, shortages of goods had become more acute, and national security required an even more careful scrutiny of exports to the Communist countries allied with North Korea. Nevertheless, the Administration was still willing to treat the Export Control Act as a temporary measure and frequently declared its intention to eliminate controls under it at the earliest possible moment. Congress also insisted on periodic review of the Act, which was extended—without amendment—first to 1953, then to 1956, then to 1958, then to 1960, and again to 1962.[34]

With the end of the Korean War in 1953, however, the reasons for maintaining export controls under the Act changed substantially. Short supply controls were progressively eliminated; by 1956, only eight items were controlled for reasons of

scarcity, and in 1960 there were none. Indeed, it is doubtful that the domestic supply situation at any time warranted the application of controls as comprehensive in scope as those imposed by the Office of International Trade (or by its successors, the Office of Export Supply and the Office of Export Control).[35] Moreover, considerations of national security also became less important: on the one hand, Stalin's successors in the Soviet Union—first Malenkov and then Khrushchev—adopted a more friendly posture toward Western Europe and the United States, and the possibility of a European War, though always present, appeared to be greatly reduced; on the other hand, in view of the economic recovery of the countries of Western Europe, and their declared policy to expand trade with Eastern Europe and the Soviet Union, American restrictions became less and less effective from a security standpoint. Under these circumstances, the continuation ***800** of controls under the Export Control Act came to be justified almost wholly in terms of foreign policy, and their severity fluctuated with successive international crises and accommodations. Throughout the 1950's, the Administration spoke of a "Sino-Soviet bloc" and of a "Sino-Soviet policy" which, with respect to trade, consisted of a complete embargo on all economic dealings with Communist China, North Korea, and North Vietnam, and selective controls on shipments to the USSR and Eastern Europe (excluding Yugoslavia). From 1957 on, Poland was accorded special treatment.

During the 1950's and early 1960's there was little if any substantial opposition to the systematic use of export controls as a foreign policy weapon, either in the Congress or in the business community. Whatever congressional debate accompanied the successive extensions of the Export Control Act was directed largely to the Administration's failure to secure a greater degree of cooperation from friendly foreign nations in the implementation of multilateral trade controls.

1. *The 1962 Amendments*. In June 1962 the Administration sought a single change in the existing law, namely, the repeal of section 12, establishing a date for the expiration of the Act. The Commerce Department strongly urged that Congress make the Act permanent, instead of following the previous practice of two-year or three-year extensions. The reasons given for permanence were (a) that there was no substantial likelihood that the Act would not be needed in the foreseeable future, (b) that the establishment of a permanent system of controls would make it easier to persuade other friendly countries to maintain their own export controls at an appropriate level, and (c) that temporary extensions create difficulties in obtaining qualified employees to administer the Act. This was the first such request by the Administration in the history of the Act. The Senate bill adopted the Administration's request, but the House bill granted only a three-year extension, and the conference substitute, subsequently enacted, followed the House amendment.

At the same time Congress on its own initiative introduced certain changes in the language of the Act which in terms substantially broadened the scope of the controls, though in fact the changes only reflected previous licensing practices. An amendment to section 1(b) set forth the finding of Congress that "unrestricted export of materials without regard to their potential military *and economic* significance [and not only, as before, their potential military significance] may adversely affect the national security of the United States";[36] and an addition to section 3(a), sponsored by the Chairman of the House Select Committee on Export Control, Paul Kitchin, provided for the denial of any license to export any item "to any nation or combination of nations threatening the national security of the United States, ***801** if the President shall determine that such export makes a significant contribution to the military *or economic* potential of such nation or nations which would prove detrimental to the national security *and welfare* of the United States."[37]

These amendments, which were opposed by the Administration, underscored the broad economic aspects of what had come to be called "strategic," in contradistinction to military, controls and reflected a widespread sentiment that exports of nonmilitary items which might assist the industrial development of the Soviet Union would be detrimental to the national security of the United States.[38]

Congress also amended the Act in order to confront the problems created by the fact that the less restrictive policies of other non-Communist countries toward trade with Communist countries were frustrating United States controls. Senator Jacob K. Javits of New York sponsored an addition to section 2 which, as finally adopted, declared it to be the policy of the United States "to formulate, reformulate, and apply such controls to the maximum extent possible in cooperation with all nations with which

the United States has defense treaty commitments, and to formulate a unified commercial and trading policy to be observed by the non-Communist-dominated nations or areas in their dealings with the Communist-dominated nations."[39] In the words of Senator Javits, "the line of economic action must run along the outside boundary of the community of industrialized nations."[40]

There is, of course, a glaring ambiguity here which was not resolved in the language of the amended section 2. A "unified commercial and trading policy" could be achieved either by inducing the European countries to raise their restrictions to the level of ours or by reducing American restrictions to the lower European levels. Nothing said by Senator Javits in support of the amendment suggested that he intended the second of these two alternatives. In its published interpretation of the amendment, the Department of Commerce stated that it was formulating, reformulating, and applying U.S. export controls as much as possible to accord with the multilateral agreement level, "subject, of course, to one major qualification.... that the United States should *not* refrain from exercising control over any item or toward any country, which is regarded as important to U.S. national security or foreign policy, merely because multilateral agreement cannot be obtained."[41] Thus ***802** the Javits amendment merely has the effect of declaring a new policy for other countries rather than a new policy for the United States.

The 1962 amendments also included a declaration of the policy of the United States "to use its economic resources and advantages in trade with Communist-dominated nations to further the national security and foreign policy objectives of the United States."[42] The Department of Commerce—which did not seek this amendment—has given it the following interpretation:

> ... Having in mind that the economic resources and advantages in trade possessed by the United States obviously includes much more than the power to impose export controls, the Department construes the scope of this amendment as transcending the preexisting statutory authority and responsibility vested in the Department under the act .... [T]he Department construes this amendment as providing congressional policy authorization to vary the scope and severity of export control to particular countries, from time to time, as national security and foreign policy interests require ....[43]

Clearly, however, the new language of "economic resources and advantages" was not needed to give the Department flexible power "to vary the scope and severity of export control to particular countries ... as ... foreign policy interests require." In the first place, the inherent difficulties of classifying goods for strategic purposes are so great, and the standards so obscure, that Department officials had always been able to vary the scope and severity of export control towards individual Communist nations. The Department of Commerce has always treated Yugoslavia—since it asserted its independence from the USSR—as a Western European nation and, as early as August 1957, the Department of Commerce initiated a more liberal export policy with regard to Poland, in recognition of various changes in Poland's domestic and foreign policy. More recently—since July 1964—the Department has accorded Rumania more favorable treatment than the other "Soviet bloc" countries (except Poland). The congressional amendment implies that American economic resources and advantages in trade can be used as a bargaining instrument to influence the internal evolution and external behavior of Communist countries and, in particular, to encourage the movement toward greater national independence in Eastern Europe.

Finally, the Export Control Act was amended in 1962 to increase the maximum penalty for a second and subsequent violation to three times the value of the exports involved or $20,000, or five years' imprisonment, or both;[44] and also to impose a maximum penalty of five times the value of the exports involved or $20,000, or five years' imprisonment, or both, for a "wilful exportation" made "with knowledge that such exports will be used for the benefit of any Communist-dominated nation."[45] Previously there had ***803** been no provision for increased penalties in case of repeated violations, and no provision relating to wilful violations.

2. *The 1965 Amendments*. In 1965 as in 1962, the Administration sought the indefinite extension of the Act by the repeal of section 12 thereof. Congress again rejected this proposal. It did, however, extend the expiration date for four years—the longest in the history of the Act—to June 30, 1969.[46]

The Administration bill also sought the amendment of section 5 to authorize the administrative imposition of a civil penalty not exceeding $1000 for a violation of any regulation, order, or license issued under it. The Administration's reason, as expressed by Secretary of Commerce Connor, was that "license revocation or denial in many cases is too much a punishment for the crime."[47]

The final amendment—sections 5(c)-(g)[48]—differs from the bill originally proposed by the Department of Commerce in two major respects. First, the proposed bill would have given to the Commerce Department, by implication, the power to withhold or suspend export licenses or privileges until the civil penalty was paid. The Senate decided that this was too important a feature of the statutory scheme to be left to implication. Congress therefore limited to a maximum of one year the period for which export privileges may be withheld as a means of inducing payment of a penalty.[49] In addition, the amendment as finally adopted clarifies the rights of persons who wish to contest in court the imposition of any civil penalty. In the case of a person who does not pay the penalty, the revised amendment provides that the Government may collect it only by bringing a civil action, in which the court is to determine de novo all issues necessary to the establishment of liability.[50] However, in order to preclude the possibility that an offender may pay the fine in order not to lose his export privileges and then sue for a refund of the fine, the amendment provides that no suit for refund may be brought in any court.[51] Thus the administrative character of the penalty is preserved, and an exporter who chooses to challenge it in court must risk the cessation of his export business for one year.

The amendment does not prescribe any period following an offense within which the civil penalty must be imposed. The Senate Report, however, states that the general five-year limitation imposed by 28 U.S.C. § 2462 shall govern both administrative and judicial proceedings.[52]

The Act was further amended by the addition of a new paragraph stating ***804** that it is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States and to encourage domestic export firms to refuse to take any action which has the effect of furthering such restrictive trade practices or boycotts.[53] This amendment, which was proposed in various forms in both the Senate and the House, was directed exclusively against the Arab boycott of American firms doing business with Israel. To effectuate the boycott, the League of Arab States sends questionnaires to American firms, and it was the object of the various bills presented on this subject to require the Department of Commerce to issue regulations prohibiting American exporters from responding to such questionnaires. The proposed amendments were vigorously opposed by the Department of State and the Department of Commerce and the final version merely "encourages" and "requests" exporters to refuse to furnish such information as will assist the boycott practices. Although one may sympathize with the objectives of the proponents of the amendment, it may be seriously questioned whether the export control law is the proper means to implement them. This was the first amendment in the history of the Act which introduced provisions wholly outside the scope of export controls.

Finally, the President's authority under section 3(a) of the Act to prohibit or curtail exportations from the United States was extended to cover "any other information" (in addition to technical data).[54] The Senate Banking and Currency Committee Report states that the new term was added "in connection with the new policy provision relating to boycotts, since controls over furnishing of information may be deemed appropriate as a part of the regulations issued in connection with this new policy provision."[55]

II. The Administrative Structure of Export Controls

It was easy enough for Congress to give the President virtually unlimited power to prohibit or curtail exports; it proved more difficult for him to create a rational administrative structure for exercising that enormous power— involving, as it now does, the control of some $30 billion worth of exports to all countries of the world.

***805** The Export Control Act does not indicate what department of the Executive branch shall administer export controls. It merely states that "the President may delegate the power, authority, and discretion conferred upon him by this Act to such departments, agencies, or offcials of the Government as he may deem appropriate";[56] and that the "department, agency, or official" charged with determining what exports shall be controlled, and to what extent, "shall seek information and advice from the several executive departments and independent agencies concerned with aspects of our domestic and foreign policies and operations having an important bearing on exports."[57]

These provisions of the Export Control Act, which have remained unchanged since 1949, hardly disclose the actual structure of controls. In fact from the early 1940's on, the day-to-day regulation of exports has been in the hands of a relatively autonomous body of administrators, relatively constant in personnel, now called the Office of Export Control, formerly the Office of Export Supply, before that the Office of International Trade, and at one time the Board of Economic Warfare. During the period from 1940 to 1945, economic defense and economic warfare were vested in an Administrator of Export Control and successive independent agencies.[58] In 1945, export controls were transferred to the jurisdiction of the Secretary of Commerce,[59] where they have been ever since—under a succession of bureaus (Bureau of Foreign and Domestic Commerce, Bureau of Foreign Commerce, Bureau of International Programs, and now Bureau of International Commerce)[60] responsible to the Assistant Secretary of Commerce for Domestic and International Business. However, whatever the name of its superior agency within the Commerce Department, the Office of Export Control is bound to feel a certain lack of congeniality in its surroundings, since the main purpose of export controls is to restrict exports, whereas a primary function of the Department of Commerce as a whole is to foster, promote, and develop exports.[61] Indeed, in 1949 Secretary of Commerce Sawyer frankly said of export control that "[i]t is a rather difficult and somewhat unpleasant task," ***806** and that "I would be very glad if some other department would take it all over."[62]

The principal tasks of the Office of Export Control are to issue export regulations, to grant or deny applications for export licenses, and to investigate violations of the Export Control Act and of its own regulations thereunder. The Office of Export Control has four licensing divisions—for Technical Data and Services, Scientific and Electronic Equipment, Production Materials and Consumer Products, and Capital Goods, respectively.[63] In addition, an Operations Division is responsible for the mechanical processing of license applications and for maintaining liaison with the Customs Bureau, the Post Office, and the Bureau of the Budget, An Investigation Division cooperates with the General Counsel of the Department of Commerce in the prosecution of violations. Finally, a Policy Planning Division reviews all license applications forwarded to it by the four licensing divisions, and prepares documentation on those applications to be forwarded to higher reviewing bodies; also the Policy Planning Division classifies commodities and technical data and reviews the items on the various strategic lists.[64]

Although the Office of Export Control is located within the Commerce Department's Bureau of International Commerce, it is advised by a three-tier hierarchy of interdepartmental committees, on which are represented the Departments of Commerce, State, Defense, and Treasury, in conjunction with that amorphous body known as the "intelligence community." Each of the three committees is chaired by a Commerce Department official. Also, representatives of the Departments of Agriculture and Interior, as well as of various administrative agencies (the Federal Aviation Agency, the National Aeronautical and Space Agency, the Atomic Energy Commission, the Office of Emergency Planning), occasionally serve on these committees in an ad hoc capacity.[65]

At the first level of interdepartmental review stands the Operating Committee, which is consulted in determining what items shall be controlled and the extent to which exports thereof shall be limited. The Operating Committee considers all matters referred to it by the Policy Planning Division of the Office of Export Control (license applications, licensing requirements, programs affecting particular countries or areas); in addition, each of the permanent representatives on the Operating Committee may bring policy ***807** matters directly to it for consideration. Ad hoc representatives may bring before the Operating Committee license applications relating to their special interests or expertise. The recommendations of the Operating Committee are supposed to be based on the policies and guidelines set down by the higher level interdepartmental committees.[66]

When unanimity is not reached in the Operating Committee—whether on specific license applications or on general policy matters—the subject is pushed up to the Advisory Committee on Export Policy, which consists of interdepartmental representatives at the Assistant Secretary level and which is chaired by the Assistant Secretary of Commerce for Domestic and International Affairs.[67] Presumably because of disagreements within the Advisory Committee, or dissatisfaction with some of its decisions, or both, President Kennedy in 1961 established a still higher committee, the Export Control Review Board, consisting of the Secretaries of Defense, State, and Commerce, and chaired by the latter, to assure the highest level consideration of trade control policies and actions and to obtain, as far as possible, agreed action among the departments chiefly concerned with advising the Secretary of Commerce in accordance with section 4(a) of the Export Control Act.[68] The Export Control Review Board is, of course, subject to major policy decisions established on the cabinet level or by the President himself.

Thus section 4(a) of the Act, which provides that the department, agency, or official in charge of export controls "shall seek information and advice" from other departments and agencies, has served as a basis for integrating the work of the Office of Export Control with that of governmental bodies other than the Department of Commerce. Indeed, it is sometimes said that the Office of Export Control could be shifted from Commerce to State, or even to Treasury, without substantially affecting its operations. Yet there are sound technical and policy reasons for continuing export controls in the Department of Commerce, since this ensures that at higher levels above the Office of Export Control there will be officials who are involved in the promotion, and not merely the restriction, of exports. In addition, the Office of Export Control must have access to the expertise of Commerce Department desk officers for each basic commodity (copper, steel, sugar, etc.), who are also concerned with the promotion of exports.[69]

***808** The work of the Office of Export Control and of its superior interdepartmental committees is made still more complex by the necessity of relating controls under the Export Control Act to export controls under two other pieces of legislation: the Mutual Security Act of 1954,[70] which created an office of Munitions Control in the Department of State, and the Trading With the Enemy Act of 1917,[71] pursuant to which the Treasury Department in 1950 created an Office of Foreign Assets Control. The regulations and controls administered by these two offices are intimately—though in quite different ways—connected with controls under the Export Control Act.

The State Department's Office of Munitions Control, in administering the United States Munitions Fist, licenses the export and import of arms, ammunition, and implements of war, and also technical data relating thereto, as well as classified technical data.[72] However, items on the Munitions List sometimes overlap with items on the Commodity Control List[73] administered by the Office of Export Control. For example, while the Office of Export Control regulates the shipment of wooden gun stock blanks, the Office of Munitions Control licenses the export of all firearms and firearms silencers. And while the Commodity Control List includes sidearms, not elsewhere classified, and parts, export authorization is required from the Department of State for bayonets and parts. So too, parts and components for ammunition fall within the licensing jurisdiction of the Office of Export Control but cartridge cases, powder bags, and shells fall within the licensing jurisdiction of the Office of Munitions Control.

The Treasury Department's Office of Foreign Assets Control licenses (1) commercial transactions by United States persons or firms (including foreign affiliates or subsidiaries of United States persons or firms) with the government or nationals of Communist China, North Korea, North Vietnam,[74] ***809** and Cuba,[75] and (2) exports of strategic materials by foreign affiliates or subsidiaries or United States persons or firms to the Soviet Union and all the countries of Eastern Europe (excluding Yugoslavia).[76] To the extent that these regulations overlap Commerce Department controls over exports from the United States, the Office of Foreign Assets Control has created a general license under which exports to Communist China, North Vietnam, North Korea, and Cuba which have been licensed by the Office of Export Control are automatically licensed by the Office of Foreign Assets Control.[77] However, if an export is made to some other country under authority of a Commerce Department license, and it is thereafter desired to re-export the goods to one of the four designated countries, the general license exemption

does not apply and a specific Treasury Department license is required.[78] For all practical purposes, then, the Treasury's export control authority is restricted to exports made by foreign subsidiaries or affiliates of United States firms.

Until April 1, 1964, the Foreign Assets Control Regulations and the Transaction Control Regulations of the Office of Foreign Assets Control were applicable to patent and know-how licensing agreements with foreign firms. On that date control of exports of technical data from the United States (but not of exports of technical data by foreign subsidiaries of United States firms) was transferred to the Department of Commerce. As a result of this change, the Treasury exercises no control over patent or technical data licensing agreements entered into by United States firms on or after April 1, 1964, but pre-April 1 agreements are still subject to the previous Treasury restrictions unless the agreement has been brought under the new Commerce Regulations by the voluntary execution on the part of the foreign licensee of a new (Commerce) undertaking in substitution for the pre-existing (Treasury) undertaking.[79] However, these changes in the field of technical data in ***810** no way alter Treasury's controls affecting foreign firms which are subsidiaries of, or are otherwise controlled by, Americans.[80]

If the tasks of the Office of Export Control are made more complex by the necessity of relating its functions to those of the Office of Munitions Control and the Office of Foreign Assets Control,[81] the real burden of these overlapping controls must nevertheless fall on the United States exporter. Although the rules and regulations promulgated by these several agencies have been coordinated to a considerable degree, nevertheless the businessman or lawyer who seeks to comprehend the relation between one set of regulations and another is sometimes confronted with gaps and ambiguities. For example, there are situations in which an exporter would have very great difficulty in determining whether a proposed exportation of technical data falls under State, Commerce, or Treasury controls—each of which apply different criteria and impose different sanctions for violations. Further, the Office of Munitions Control, the Office of Foreign Assets Control, and the Office of Export Control carry on a measure of secret interdepartmental consultation which may work to the disadvantage of the would-be exporter. For example, wholly apart from the published "black list" of the Office of Export Control,[82] the Departments of State, Treasury, and Commerce collectively maintain a confidential list of importing firms in friendly foreign countries, known as the "Economic Defense List" or "gray list"; the listing of a firm in this document means that there is some question about the propriety of granting a license in any transaction in which the listed firm might be involved, presumably because it has engaged in illicit transactions with Communist countries. It appears that the list is made up by an inter-agency committee; however, the committee as a whole does not make any collective decision as to whether a particular firm should be listed, but instead lists firms at the request of any one of the member agencies. Even if one could determine that a particular firm is on the list—perhaps through the inadvertence of a government official—there may be no forum in which to seek redress since there is no way of knowing which agency or department was responsible for putting the particular firm on the ***811** list. In most cases, any of the agencies would presumably be willing to undertake a review of a listing action, alone or in concert with other interested agencies. Nevertheless, if the "gray list" were the exclusive preserve of the Office of Export Control, for example, there might be greater possibilities for remedial action, as well as more likelihood of a uniform standard for listing.

Finally, in analyzing the administrative structure of export controls, mention must be made of the Mutual Defense Assistance Control Act of 1951,[83] commonly called the Battle Act, which is designed in part to secure the cooperation of friendly foreign nations in the maintenance of a multilateral embargo on strategic exports to Communist countries. The Battle Act Administrator, appointed within the State Department,[84] proclaims an internationally agreed upon list of embargoed items and in addition draws up a secret list of items of "lesser strategic significance," export of which to Communist countries is unilaterally prohibited by the United States.[85] Licensing of exports of Battle Act items is vested chiefly in the Office of Export Control.[86] Since the Battle Act Administrator does not himself license exports, no additional overlapping of administrative controls is involved.

Although the Office of Export Control could conceivably be crushed by the weight of its superior committees and by the overlapping controls of other departments, it has in fact developed a high degree of autonomy and maintains a fairly smooth operation. It has been estimated that about 12% of the total volume of United States export shipments (some $3 billion annually) moves out under specific (*i.e.*, "validated") licenses.[87] In 1966, fewer than 270 employees were processing more than 3,000

license applications each week,[88] and over 90% of all applications were being processed within 5 days of receipt, and 98% within 10 days.[89] The Office of Export Control is staffed with highly experienced personnel, most of whom have been with the Office for ten to fifteen years. They have evolved a sophisticated and effective licensing system, certainly more responsive to the needs of the business community than the controls administered by the Departments of State and Treasury.

The self-restraint and the expertise of American exporters also contribute ***812** to the overall efficiency of export licensing, and these qualities are encouraged by the educational activities of the Office of Export Control. In accordance with section 4(b) of the Export Control Act,[90] which provides for representative trade consultation, the Office of Export Control has followed the practice of its predecessor agencies in organizing commodity advisory panels to give advice and make recommendations on export licensing policies and procedures affecting various parts of the export trade. Members of panels or committees are selected by the Office of Export Control: the committees are "formed of the minimum number of persons necessary to represent a fair cross-section of the trade" in a given commodity or group of commodities.[91] The meetings are called and conducted by officials of the Office of Export Control but a meeting of a panel or committee may be proposed by any three of its members.[92] Meetings are called prior to the promulgation of new licensing policies or procedures "except where the necessary timing or other public exigency does not permit such prior consultation."[93] Unfortunately, however, a "public exigency" often precludes prior consultation,[94] and in fact the commodity advisory panels are not used nearly as much as the length of the regulations relating thereto might suggest. The Office of Export Control does, however, consult frequently with various other representative exporter groups.

Perhaps the chief reason, however, for the relative smoothness of export licensing is that exporters generally have become attuned to the harshness of licensing standards and have developed some skill at predicting the course of export applications. During the calendar year 1965, the total value of all exports to the USSR and Eastern Europe for which licenses were sought amounted to only $150.1 million; $95^{1}/_{2\%}$ (in value) of these license applications were approved—amounting to less than $143.4 million.[95] This fact suggests that exporters do not submit license applications unless they are reasonably confident that the licenses will be approved. It also indicates that the actual operation of export controls is in the hands of a fairly independent body of experienced bureaucrats who are able to exert a very strong influence on the volume and direction of exports through their relations with potential exporters. By the same token, however, the Office of Export Control may be to some extent insulated, both by its independence and by its contact with ***813** the exporting community, from shifts in policy at the higher levels of Government.

III. The Export Regulations[96]

To implement the broad political, economic, and strategic objectives of the Export Control Act, as it has been interpreted by the complex interagency structure established to supervise its administration, the Office of Export Control has created a veritable labyrinth of regulations concerning what may be exported to what countries under what conditions and by what procedures.

A. *General and Validated Licenses*

The enormous complexity of the regulations is due to several factors, the first of which is that the United States exerts a substantially greater degree of. control over exports to Communist countries than that exercised by any other government. As a result, the United States must guard against the possibility that goods or technical data permitted to be shipped to "friendly" countries may be transshipped from those countries to "unfriendly" (or less friendly) countries. As long as it is forbidden to ship even chewing gum to Communist China, or Cuba, some care must be taken to see that chewing gum exported to England or Switzerland will not be diverted from those countries to Peking or Havana. Even more care must be taken if the product is not chewing gum but machinery, and it is to be prevented from going not only to China or Cuba but also to Eastern Europe or