CASES AND MATERIALS

ON

THE INTERNATIONAL LEGAL SYSTEM

FOURTH EDITION

By

COVEY T. OLIVER
Ferdinand Wakeman Hubbell Professor of Law Emeritus
University of Pennsylvania

EDWIN B. FIRMAGE
Samuel D. Thurman Professor of Law
University of Utah College of Law

CHRISTOPHER L. BLAKESLEY
J.Y. Sanders Professor of Law
Louisiana State University Law Center

RICHARD F. SCOTT
Professor of International Law
American University of Paris

SHARON A. WILLIAMS
Professor of International Law
Osgoode Hall Law School, York University

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Dedicated to our spouses:
Barbara H. Oliver, Suzy E. Blakesley,
Lorraine L. Scott, and Robert W. Cosman.

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PREFACE TO THE FOURTH EDITION

The Third Edition of THE INTERNATIONAL LEGAL SYSTEM went to press in August, 1988. Since then, quite recently, molar changes almost entirely unforeseen have occurred, altering the planetary societal environment that had developed after World War II. During the period covered by the first three editions of this work [1972–1988] major conditioning factors bearing on the status, effectiveness and growth of world legal order included Doomsday-like dangers of mass destruction, seemingly unbridgeable ideological conflicts between groups of nation–states, particularly the superpowers; and the division of the world between "Rich Nations — Poor Nations."

Perhaps the most significant, positive, legal development in this period was the rise of human rights as a law-involving development, albeit this being a partial and uncertain one. Unmet challenges included gridlock in the United Nations, resulting from the effect of the Cold War on the use of the veto power in the Security Council and the domination of the General Assembly by underdeveloped, often defensive and perturbed, countries. Judicial resolution of legal issues between states by the World Court was sporadic and halting; and a decade or so into the period the United States withdrew as defendant from an aggression complaint after it lost the first (jurisdictional) round, specifically impugning, in the process, the integrity of the Court itself. Despite the negative factors, however, scholarly attention to and student participation in "international legal studies" grew robustly, including oceans, atmosphere and space law; international trade, investment and financial law; international crime law; the legal philosophy of international law; "peace-keeping" by United Nations forces; and, as already mentioned, human rights.

Today, legal norms, principles, and structures are being subjected to stresses that may alter materially some of the contours of planetary legal order. Among these stressed areas are the territorial reach of state authority, individual and group human rights, access to and sharing of planetary resources, protection of the physical environment of a small planet, evermore heavily populated; and equilibrium between ethnicity and statehood. This edition gives attention to such areas, including an entirely new part on Environmental Law. We continue to draw cases and materials from other legal systems than that of the United States where we deem them useful. But the majority of users will remain American and we must continue to deal with some aspects of the foreign affairs law of the United States, such as the American way with treaties, immunity of foreign sovereignties, and separation of powers within the Federal triad.

Professors Leech and Sweeney, two of the originating editors, have chosen for personal reasons not to continue with this one; but their solid contributions to the earlier books continue to influence the tone and style of this edition, especially as to the encouragement of student interest and involvement.

PREFACE TO THE FOURTH EDITION

The focus described in the Preface to the First Edition and continued in the Second and Third has been well-received by both students and teachers. We of the Fourth Edition have tried to keep the "feel" of the earlier versions, despite the environment of change and new dimensions described above. We are highly pleased to have for this book Professor Sharon A. Williams, a colleague from Canada. Her association will assuredly bring new perspectives, worldwide as well as neighborly and hemispheric. Also, Professor Richard F. Scott, who teaches at Paris (France), and Christopher L. Blakesley who teaches International Criminal and "Civil Law" courses in Louisiana, one of the two United States "civil law" jurisdictions, and who often teaches and publishes in Europe, will ensure continuation of the linkages to European outlooks heretofore provided by Professor Sweeney. Edwin B. Firmage brings special expertise in U.S. Constitutional Law and its combination with International Law, human rights, and foreign affairs.

COVEY T. OLIVER
EDWIN B. FIRMAGE
CHRISTOPHER L. BLAKESLEY
RICHARD F. SCOTT
SHARON A. WILLIAMS

December 19, 1994

Oliver, Blakesley, etc. Cases & Materials on the International Legal System

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TABLE OF ABBREVIATIONS

The following are abbreviations that have been used by the editors in their citations to principal cases and major materials and in their notes.

A.B.A.J.	American Bar Association Journal
A.C.	Law Report series [British], House of Lords
ADIZ	Air Defense Identification Zone
All E.R.	All England Law Reports [1936–date]
A.J.I.L.	American Journal of International Law
A.S.I.L.	American Society of International Law
ANCOM	Andean Common Market
Ann.Dig.	Annual Digest and Reports of International Law Cases [title of Int'l Law Reports prior to 1953]
Brit.Y.B.Int'l L.	British Yearbook of International Law
C.A.	Law Report series, Court of Appeal
CACM	Central American Common Market
C.F.R.	Code of Federal Regulations
Cal.2d	California Reports, Second Series
CCH Trade Cases	Trade Regulation Reporter [Commerce Clearing House]
Ch.	Law Report series, Chancery [1891–date]
Common Mkt.L.R.	Common Market Law Reports
C.M.A.	Court of Military Appeals Reports
C.-M.Rep.	Court-Martial Reports
Cr.Cas.Res.	Law Report series, Crown Cases Reserved [1865–1875]
D.	Recueil Dalloz, [French Reporter]
Dall.	Dallas, United States Supreme Court Reports
DEWIZ	Distant Early Warning Identification Zone
E.C.	European Community
E.Comm.Ct.J.Rep.	European Community Court of Justice Reports
ECOSOC Off.Rec.	United Nations Economic and Social Council, Official Records
EEC	European Economic Community
EFTA	European Free Trade Association
F.2d	Federal Reporter, Second Series [1924–date]
F.R.D.	Federal Rules Decisions
F.Supp.	Federal Supplement
FCN	Friendship, Commerce and Navigation Treaties
FM	Department of the Army Field Manual
Ga.	Georgia Supreme Court Reports
G.A.Res.	General Assembly Resolution
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preference
Harv.Int'l L.J.	Harvard International Law Journal
IATA	International Air Transport Association

ICI	Imperial Chemical Industries, Ltd.
I.C.A.O.	International Civil Aviation Organization
I.C.J.Rep.	International Court of Justice Reports
ICSID	International Center for Settlement of Investment Disputes
Ill.Rev.Stat.	Illinois Revised Statutes
I.L.O.Off.Bull.	International Labour Office, Official Bulletin
Int'l & Comp.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
Int'l L.Rep.	International Law Reports
IMT	International Military Tribunal
K.B.	Law Report series, Kings Bench
LAFTA	Latin American Free Trade Association
L.Ed.2d	Lawyer's Editors, Second Series, United States Supreme Court Reporter
MFN	Most favored nation
M.I.T.I.	Ministry of International Trade and Industry
N.Y.Misc.2d	New York Miscellaneous, Second Series, [1955–date]
MNEs	Multinational enterprises
NATO	North Atlantic Treaty Organization
N.E.	North Eastern Reporter [1885–1936]
N.Y.	New York Reports
N.Y.S.2d	New York Supplement, Second Series [1937–date]
OECD	Organization for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation
P.	Law Report series, Probate, Divorce and Admiralty
P.2d	Pacific Reporter, Second Series
Pas.	Pasicrisie [Belgian Reporter]
P.C.I.J.	Permanent Court of International Justice
Q.B.	Law Report series, Queen's Bench
SALT I	Strategic Arms Limitation Talks I
S.Ct.	Supreme Court Reporter [U.S., 1882–date]
Sirey	Sirey, Recueil Général des Lois et des Arrêts [France]
S.E.	Southeastern Reporter
So.2d	Southern Reporter, Second Series [1941–date]
So.African L.Rep.	South African Law Reports
Stat.	Statutes at Large, United States
T.I.A.S.	Treaties and Other International Acts Series
U.N.Conf.Int'l Org.	United Nations Conference on International Organization [San Francisco Conference]
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

U.N.Doc.	United Nations Document
UNDOF	United Nations Disengagement Observer Force
UNIFIL	United Nations Interim Force in Lebanon
U.N.Gen.Ass.Off.Rec.	United Nations General Assembly, Official Records
U.N.Rep.Int'l Arb. Awards	United Nations Reports of International Arbitration Awards
U.N.Sec.Council Off.Rec.	United Nations Security Council, Official Records
U.N.T.S.	United Nations Treaty Series
U.Pa.L.Rev.	University of Pennsylvania Law Review
U.S.	United States Supreme Court Reports
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated
U.S.Dep't State Bull.	United States Department of State Bulletin
U.S.T.	U. S. Treaties and Other International Agreements
Va.J.Int'l L.	Virginia Journal of International Law
Weekly Comp.Pres.Doc.	Weekly Compilation of Presidential Documents
W.L.R.	Weekly Law Reports [England, 1953–date]
Western Weekly Rep.	Western Weekly Reports, New Series [Canada]

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create. Where this is done, innovation through treaty is protected, and a means for the development of international organization preserved.

The desire to innovate is driven by the perception that existing mechanisms do not fulfill the needs of the parties. To the parties, the various mechanisms are not separate doctrines but, rather, alternatives that should be measured against their needs. In this way, the parties' needs fuel the evolution of these mechanisms. Two particularly important dimensions to international dispute resolution in which innovation has occurred are the means of reviewing the validity of the result and the means of gaining enforcement of the result. The emergence of specific machinery such as the Tribunal and ICSID, and the increasing incidence of transnational litigation involving states and international commercial arbitration with state parties—all concurrent with an arguably decreasing need to rely on diplomatic protection—indicate that the various private, state and interstate mechanisms for the resolution of international disputes should not be viewed as operating in isolation, but as competing with, and evolving in response to, one another. To be sure, this evolving system is not the result of a master plan; rather, it is the Darwinian consequence of numerous separate demands. * * *

TREATY BETWEEN THE UNITED STATES AND THE RUSSIAN FEDERATION CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, APRIL 3, 1992, 31 I.L.M. 791 (1992).*

Article VII [a]

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Rules, except to the extent modified by the Parties, shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply to the appointment of the arbitral panel, except that the appointing authority referenced in those rules shall be the Secretary-General of the Permanent Court of Arbitration.

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a. Arbitration between a state party and a national or company of the other party is provided in Article VI. Arbitration of certain international law questions is provided in Article 5 of the Investment Incentive Agreement between the United States and the Russian Federation, April 3, 1992, 31 I.L.M. 777 (1992).

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses of the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

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3. COMPLIANCE WITH DECISIONS OF INTERNATIONAL TRIBUNALS

JUDGMENTS OF THE WORLD COURT

Anand, Studies in International Adjudication 274–275 (1969) *

* * * [T]he history of international adjudication since 1945 * * * clearly demonstrates that the execution of international judicial awards is not [a] negligible problem. There have been several cases, if not of open defiance, at least of disregard of the decisions of an international court. In the present tension-ridden, polarized world society, where even a small dispute can develop into a nuclear catastrophe, it may not be as prudent to use force to compel a State—even a small and weak State—to adhere to such a judgment as it was, perhaps, in earlier times. Albania can disregard the judgment in the Corfu Channel case with impunity. Haya de la Torre had to remain a virtual prisoner in the Colombian Embassy for almost three years after the Court's final decision. Thailand took upon itself to declare, though for a brief period, that it would not abide by an adverse decision; and it ultimately accepted the decision only under protest and with a reservation attached to its acceptance. Also, * * * none of these cases involved the vital interests of a nation. In any event, these cases do demonstrate that countries do not always accept an adverse decision.

* * * Advisory opinions of the International Court of Justice also have been disregarded at times. * * * In practice the * * * General Assembly, as well as other international organs which have requested advisory opinions, always have approved the opinions of the Court and have tried to adapt their future actions to accord with the advice given. Despite this formal approval of the opinions, however, several opinions of the Court have remained absolutely ineffective. Thus the Court's opinions in the Conditions of Admission of a State to Membership in the United Nations, the Interpretation of Peace Treaties (First Phase), and the International Status of South-West Africa case were conveniently disregarded by the States concerned. Non-acceptance of the opinion in the Certain Expenses case led to a crisis in the United Nations. Also, the order made by the Court in the Anglo-Iranian Oil Company case,

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indicating certain provisional measures for the preservation of the rights of the parties, was never accepted by Iran.

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1. ***Judgment concerning the release of American hostages in Teheran.*** The decision, which appears in Chapter 12, *infra,* ordered Iran to release the hostages immediately and make reparation to the United States in a form and amount to be settled, if necessary, by a subsequent procedure before the court. It was dated May 24, 1980.

The release of the hostages was eventually secured by the Declarations of January 19, 1981. In paragraph 11 of the first declaration, the United States agreed to withdraw promptly "all claims now pending before the International Court of Justice."

2. ***Role of the United Nations.*** Article 94 of the United Nations Charter provides:

> 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The Security Council * * * has never decided upon measures to be taken "to give effect to the judgment." Questions as yet undecided include the following: Does the Security Council have power under the Charter to order a state to comply with a judgment? Can the Security Council direct or authorize the use of force to enforce such an order? Is the council limited, in its use of force to enforce a judgment of the court, to those situations in which non-performance of an order of the court can be considered a threat to the peace, breach of the peace, or act of aggression under Article 39 of the Charter of the United Nations?

3. ***Awards of arbitral tribunals.*** The effectiveness of the awards of international arbitral tribunals depends upon the willingness of states to abide by their agreements to be bound by such awards. "It is a striking fact that states have seldom refused to carry out or abide by the decisions of international tribunals. * * * In the vast majority of instances in which positive action has been required, execution has followed as a matter of course." Hudson, International Tribunals 129 (1944). The statement is still generally valid today.

In some instances, however, disputes over the award have delayed final compliance or settlement for years.

They have Secretariats which correspond broadly to national civil services and are subject to institutional command. Organizations do enjoy international legal personality as required for the full and effective exercise of their functions. The comparison becomes blurred, however, when we look at the criterion of a "government" exercising independent (or "sovereign") control over the "population" and having effective power to engage in foreign relations. Some institutional elements analogous to government are present in international organizations, and they do carry out "foreign relations" in the regular use of diplomatic forms and in entering into binding treaty relations. In the U.N. system (as well as in other organizations) there are internal bodies fulfilling legislative-like functions, notably the U.N. Security Council and the General Assembly, but they are subject to the limitations set forth in the United Nations Charter. There is an "executive" in the Secretary-General and the Secretariat, again with limited although potentially far reaching powers and functions. There is also a judicial "branch", in the form of the International Court of Justice, but with the limitations on jurisdiction taken up in Chapter 1. Are the elements of statehood present in more than merely a formal or theoretical legal sense.

a. ***Legal Personality.*** Perhaps a threshold question is whether the U.N. enjoys the capacity to act as an institution in its own name through the device of international legal personality. Functional legal personality is provided clearly in Article 104 of the Charter: "in the territory of each of its Members," but the Charter is silent about the territory of non-Members and sheds little direct light on the question of the U.N.'s capacity to pursue international claims as states may do on behalf of themselves and their nationals. These questions were presented in one of the earliest advisory cases brought to the International Court of Justice. In reaching its conclusions favorable to United Nations powers, the Court considered some of the broader issues of the function and nature of the United Nations. *See,* the *Reparations Case,* below at p. 111.

If the United Nations enjoys sufficient international legal personality to pursue an international claim, the Organization also enjoys under the applicable texts the capacity to enter into contracts, to acquire and dispose of immovable property and movable property as well as to institute legal proceedings (see Section 1 of the Convention on the Privileges and Immunities of the United Nations, in the Documentary Supplement). On the international level, these are powers analogous to those of states which in fact enjoy more legal status than legal personality and capacity. Under the international law doctrine of sovereign immunity taken up in Chapter 7, states also enjoy effective immunity from the jurisdiction of other states. The United Nations and other organizations enjoy immunities similar in most respects to those applicable to states, perhaps even more expansive. *See,* Ch. 7, § B. Moreover, a House of Lords ruling emphasized that an international organization is not regarded as merely an unincorporated association of states in which the member states would be exposed to liability for debts of the organization in case of its insolvency; in Australia and New Zealand Banking Group Ltd. et al. v. Commonwealth of Australia and 23 others, [1989];

29 I.L.M. 670 (1990), the House of Lords rejected claims that the member states of the International Tin Council should be liable for the unsatisfied debts of the Council. Does this suggest an analogy with states?

Another question is whether, as legal entities separate from their member states, organizations are empowered to enter into international treaties. They do so regularly under powers specifically provided in their respective constituent treaties or inferred from Article 104 of the U.N. Charter, and similar provisions for other organizations. The treaty power is now clearly recognized in the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (25 I.L.M. 543 (1986); see Report of the International Law Commission on the Work of its Thirty-fourth Session, ORGA 34th Sess.Supp. No. 10, A/37/10). Is the treaty power another line of analogy?

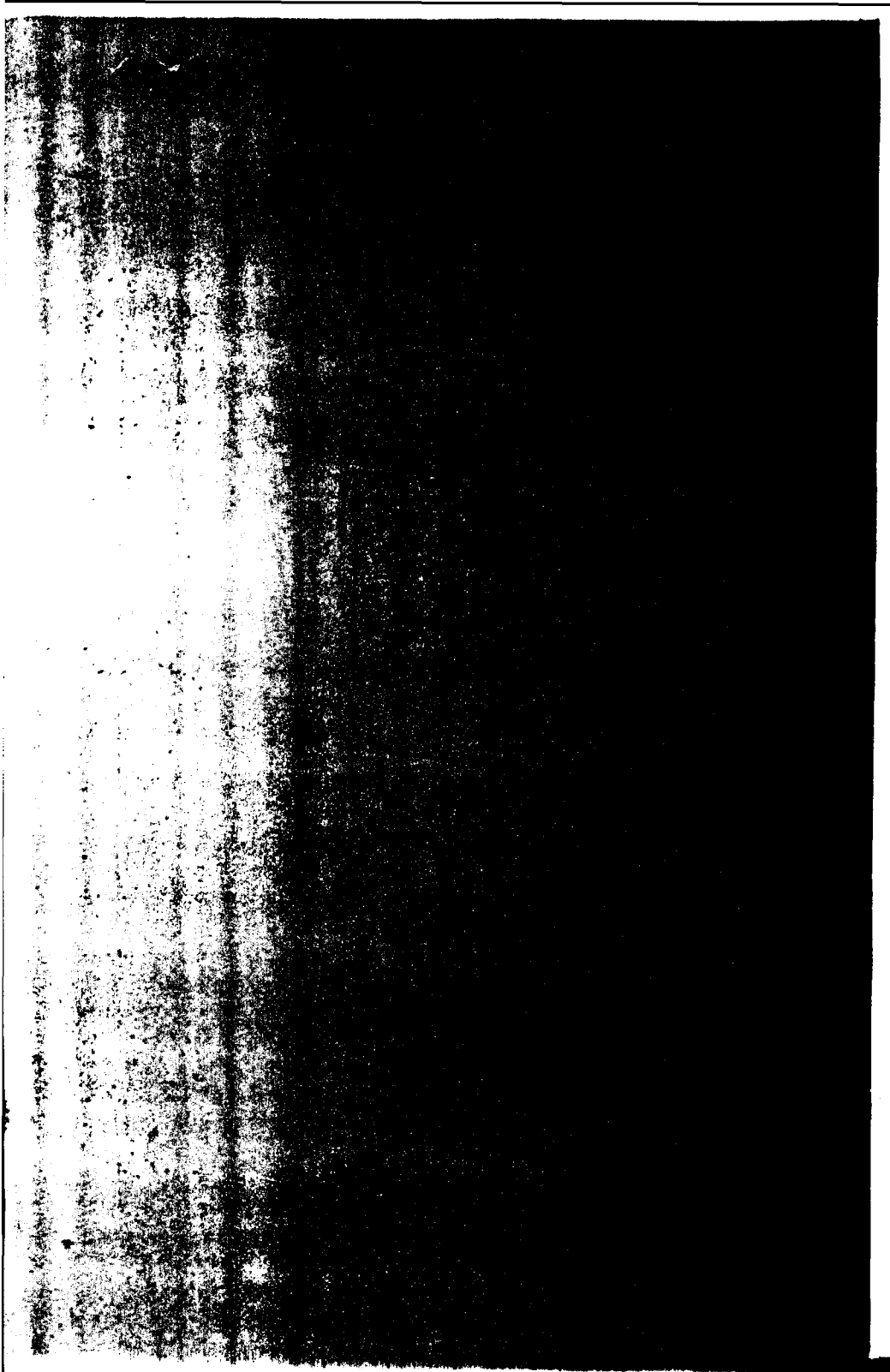
b. ***Legislative power.*** The United Nations' legislative power may also be compared to that of states, but here the differences are perhaps more striking. Chapter 16, below considers the several legislative measures adopted by the Security Council during the Persian Gulf Crisis. When framed in obligatory terms, those decisions are binding on the states to which they are addressed (Charter Articles 2.2 and 25), and may be acted upon as applicable to non-Members as well (Article 2.6). Are those institutional arrangements indicia of "government?"

But what about the effect of United Nations decisions on individuals? Are embargo decisions, for example, binding upon the individuals and companies in the member states? How does that compare with national legislative powers? Where does sovereignty lie with respect to embargo decisions? How may they be enforced? Viewing them from Saddam Hussein's perspective at the close of Desert Storm, would you expect him to have a different response from yours? From that of Presidents Bush or Clinton?

Is the U.N. a "Super-Legislature"? Would you consider it wise to have the U.N. be a Super-Legislature?

One other way of looking at legislative powers in the U.N. is that decisions are often made *by* the members and *for* the members themselves. These decisions are often made quite independently of the U.N. in the treaty process or by international custom. In acting through the U.N., rather than by direct diplomacy, have nations not merely changed place and procedure? At times that might be true, but would it be true when one third of the Members is outvoted in the General Assembly? Nine members of the Security Council, including the five permanent members, can legally bind the entire membership in the neighborhood of 180 states. Some non-members can be compelled to comply. Do these situations affect your assessment of the possible "sovereignty" of the United Nations? When a member or non-member refuses to comply and the U.N. does nothing, does that mean that the decision was non-binding?

c. ***Executive power.*** In the United Nations, the executive power is divided between the Secretary-General and the member states them-



selves. The powers of the Secretary-General as provided in Chapter XV of the Charter are largely dependant upon actions of the Security Council and the General Assembly. Enforcement actions are adopted by the Security Council under Chapter VII on Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression, (or possibly by the General Assembly under the Uniting for Peace Resolution), and are carried out by the Member States with quite far-reaching and powerful consequences, as will be seen in Chapter 16 below. In enforcement actions, the most consequential of all organization activities, there has always been a prior political decision to be taken. That carries the obvious advantage in a decentralized sanction system of requiring that the political will exists for the decision to be implemented but also the clear disadvantage of risking failure to take the decision and the loss of enforcement and deterrence when the political will is weak or entirely absent. How does this element of "government" compare to its national counterpart?

d. ***Judicial Institutions.*** International judicial institutions have been described in some detail in Chapter 1. Jurisdiction over responding parties and access by international organizations present some of the major difficulties. How would you compare the ICJ with a national sovereign's judicial jurisdiction over disputing citizens or institutions on the domestic scene? Organizations themselves suffer a serious infirmity with respect to contentious cases, by virtue of denial of their access to the Court under Article 36 of the Court's Statute, which admits only States. While the U.N. and Specialized Agencies are generally afforded access in *advisory* cases (only), even that avenue is shut off for other organizations, such as the Council of Europe, NATO, OECD and all others outside of the U.N. system. Action under Charter Article 94.2 to enforce an ICJ judgment requires a prior political decision in the Security Council. How does that compare to the enforcement of domestic court judgments under national sovereignties? Can the U.N. create an International Criminal Court? A War Crimes Tribunal? If so, by what authority? *See* discussion in Chapter 11.

e. ***Compulsory Funding.*** The organizations in the United Nations system are largely dependent upon the member states for financing of their operations; however, the decisions on budget levels and funding are made by the competent organ in each case. For the U.N. itself, the rules are contained in Article 17 of the Charter along lines which established the pattern for most other organizations both within and without the U.N. system. Article 17 provides that the General Assembly shall consider and approve the budget of the Organization. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

United Nations funding consists of assessed contributions of the members, voluntary contributions and income from sales and services. In adopting the budgets and fixing the assessed contributions of members,

Chapter 7

THE IMMUNITIES OF STATES AND INTERNATIONAL ORGANIZATIONS

SECTION A. THE IMMUNITY OF STATES

1. ABSOLUTE AND RESTRICTIVE PRINCIPLES

Modern doctrines of foreign sovereign immunities are a product of evolving customary international law influenced by new legislation and court decisions including Twentieth Century efforts to develop and codify by the treaty process. Immunity shields a foreign sovereign from the exercise of jurisdiction, principally from the jurisdiction of other states' courts in cases where the sovereign has not given consent to such jurisdiction. It allows a sovereign to act in his nation's best interest without fear that his actions will be subject of adjudication in another state. It also is to ensure that the public property of the foreign state remains available for public purposes, free from the constraints of the forum's powers of attachment and execution. Despite many cases over the past several centuries, the international legal rules on sovereign immunity still are not free from dispute and uncertainty. Immunity can be justified only on the basis of the most compelling considerations of public policy.

The classical formulation of the supporting reasons for sovereign immunity was stated by Chief Justice Marshall in 1812, in the *Schooner Exchange v. McFadden, supra*:

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under

certain circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

* * *

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights to its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

The concept of "perfect equality and absolute independence of sovereigns" arose in the 18th and 19th Centuries. It is not altogether forgotten today. The international system, however, has evolved toward a more realistic and pragmatic vision of the sovereign's status. Theoretically, since the American Revolution, the "people" are generally considered sovereign, rather than the head of State. More realistically, the "sovereign" may be a public trading institution or other subordinate governmental operating entity. Notions of sovereignty, equality and independence have become qualified, if not severely limited. The modern sovereign state's equality and independence are severely constrained in institutions like the U.N. or other international organizations. A sovereign can be subject to the most far-reaching and even humiliating formal condemnations, as occurred with Iraq in the Security Council actions taken in the course of the Persian Gulf Crisis in 1990–1991. Chief Justice Marshall's elegant formulations no longer fit either the appearances or reality of international relations. "Perfect equality" does not exist outside ideal abstraction. It is no wonder that the sovereign immunity doctrine has receded from its most extreme form, "*absolute immunity*" in many (but by no means all) countries. With the "absolute immunity" doctrine now finding only minority support, the system extends to accommodate problems in particular sectors and to find new applications and exceptions.

If the doctrine of equality, concerns about dignity, and avoidance of embarrassment no longer carry their former weight, there remain other considerations which explain the durability of the sovereign immunity doctrine. The judicial branch of government may be, or at least may feel, constrained. Judicial determinations rendered against a friendly foreign state or its sovereign leader can interfere with the conduct of foreign relations. Although this problem is sometimes exaggerated, a

serious problem could arise, if a court were to adopt a rule or apply a treaty interpretation at variance with the views of the forum executive, developed in negotiations with another state. Protecting a foreign state from nuisance cases or the abusive use of the courts as a negotiating tool or a "public forum" for political advantage presents another problem. The case for immunity is strong when judicial action may interfere with continuing or future governmental action. Concerns about protecting operations are particularly noteworthy in cases of attachment and execution affecting a foreign government's property situated in the forum state. The materials below cover many of these situations. The foregoing policy concerns may be seen as affecting the outcomes, particularly in view of the continuing uncertainty of the law.

In sum, the case for sovereign immunity, particularly in the traditional absolute sense, has become much more difficult to accommodate in the 20th Century. The practice is not uniform and uncertainty exists among and even within many countries. More erosion of the traditional doctrine may be reasonably foreseen. The former socialist countries of central and eastern Europe, among the last bastions of the absolute principle, may find that, as they move to market economies, they will have the same incentives as in traditional market economy countries to find ways of limiting sovereign immunity. They may adopt the "restrictive principle" which relaxes the immunity for commercial and a number of other specified activities.

ABSOLUTE THEORY OF IMMUNITY

Absolute sovereign immunity was articulated by Chief Justice Marshall in the famous *Schooner Exchange* Case, *quoted above*. *Cf., Aldona S. v. U.K.*, 90 J.Dr.Int'l 190 (1963) (Pol.S.Ct.1948). Absolute immunity was attacked in the early part of this century, often in cases in which foreign vessels were engaged in maritime commerce. The United States Supreme Court, however, refused to limit the scope of sovereignty, rejecting a District Court's decision below that Italy did not enjoy sovereign immunity. This, although the action related to a proceeding *in rem* to enforce a cargo damage claim against a merchant vessel owned and operated by Italy. "We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force." *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).

Some Substantive Exceptions. Forum state policy considerations have led to exceptions. These relate to rights in property situated in the forum state, when acquired by succession or gift, and to rights in immovable property there. These exceptions now appear in section 1605(4) of the United States Foreign Sovereign Immunities Act, set forth

in the Documentary Supplement. Another exception precludes sovereign immunity for war crimes. This exception appeared specifically in Article 7 of the Charter of the International Military Tribunal established for the Nuremberg Trials after World War II. A parallel exception was adopted by the United Nations Security Council in S/RES/827 (1993) in which an International Tribunal was established to prosecute crimes against humanity in the former Yugoslavia (see Chapter 11)). Article 7.2 of the Annex to that Resolution provides that: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

U.N. CONVENTION ON THE LAW OF THE SEA

See documentary supplement, focus especially on articles 30, 31, 32, 95 and 96.

In 1952, the U.S. Department of State indicated that it would follow the "*restrictive*" theory of sovereign immunity. This was incorporated in the *Foreign Sovereign Immunities Act of 1976*. A period of extensive *state* participation in commercial activity during the 19th century until the 1950's, precipitated the change.

UNITED STATES: LETTER FROM THE ACTING LEGAL ADVISER OF THE DEPARTMENT OF STATE TO THE DEPARTMENT OF JUSTICE, MAY 19, 1952 (THE FAMOUS "*TATE LETTER*")

26 United States Department of State Bulletin 984 (1952).

MY DEAR MR. ATTORNEY GENERAL:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property

excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under

which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

JACK B. TATE
Acting Legal Adviser

* * *

TESTIMONY OF THE LEGAL ADVISER OF THE DEPARTMENT OF STATE OF THE UNITED STATES ON THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 94th Cong., 2d Sess. 24, 26–27 (1976).

[Monroe Leigh, the Legal Adviser, testified]: The first objective is to vest sovereign immunity decisions exclusively in the courts. The bill would accomplish this by prescribing the standards the courts are to apply in deciding questions of sovereign immunity.

* * * [A]fter a foreign-state defendant raises the defense of sovereign immunity, it has an option: either the foreign state can litigate this legal defense entirely in court, or, as is more usually the case, it can make a formal diplomatic request to have the State Department decide the issue.

If it does the latter, and if the State Department believes that immunity is appropriate, the State Department asks the Department of Justice to file a "suggestion of immunity" with the court hearing the case. Under the Supreme Court's decision in Ex Parte Peru, which was decided in 1943, U.S. courts automatically defer to such suggestions of immunity from the executive branch.

In response to various developments in international law, the State Department in 1952 adopted its so-called *Tate letter*. Prior to the Tate letter, the Department of State, when called on to decide questions of immunity, followed the so-called absolute rule of sovereign immunity: a state was immune from suit irrespective of whether it was engaged in a government or a commercial act.

Under the Tate letter, the Department undertook to decide future sovereign immunity questions in accordance with the international legal principle which I have mentioned and which is known as the "restrictive theory"—namely, that a foreign state's immunity is "restricted" to cases based on its public acts, and does not extend to cases based on its commercial or private acts. The Tate letter was based on a realization that the prior absolute rule of sovereign immunity was no longer consistent with modern international law.

The Tate letter, however, has not been satisfactory. * * * From a legal standpoint, it poses a devil's choice. If the Department follows the Tate letter in a given case, it is in the incongruous position of a political institution trying to apply a legal standard to litigation already before the courts.

On the other hand, if forced to disregard the Tate letter in a given case, the Department is in the self-defeating position of abandoning the very international law principle it elsewhere espouses.

From a diplomatic standpoint, the Tate letter has continued to leave the diplomatic initiative to the foreign state. The foreign state chooses which case it will bring to the State Department and in which case it will try to raise diplomatic considerations.

Leaving the diplomatic initiative in such cases to the foreign state places the United States at a disadvantage. This is particularly true since the United States cannot itself obtain similar advantages in other countries. In virtually every other country in the world, sovereign immunity is a question of international law decided exclusively by the courts and not by institutions concerned with foreign affairs.

For this reason, when we and other foreign states are sued abroad, we realize that international law principles will be applied by the courts and that diplomatic relations will not be called into play.

Moreover, from the standpoint of the private citizen, the current system generates considerable commercial uncertainty. A private party who deals with a foreign government entity cannot be certain of having his day in court to resolve an ordinary legal dispute. He cannot be entirely certain that the ordinary legal dispute will not be artificially raised to the level of a diplomatic problem through the government's intercession with the State Department.

The purpose of sovereign immunity in modern international law is not to protect the sensitivities of 19th–century monarchs or the prerogatives of the 20th–century state. Rather, it is to promote the functioning of all governments by protecting a state from the burden of defending law suits abroad which are based on its public acts.

However, when the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause.

The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties. * * *

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1. ***Foreign Sovereign Immunities Act of 1976.*** The act (see Doc. Supp.) went into effect in January 1977. It incorporates the restrictive theory. As the Legal Adviser put it in * * * his testimony: "Under international law today, a foreign state is entitled to sovereign immunity only in the cases based on its 'public' acts. However, where a law suit is based on a commercial transaction or some other 'private' act of the foreign state, the foreign state is not entitled to sovereign immunity. The specific applications of this principle of international law are codified in * * * the proposed bill."

The *fundamental rule* is stated in Sec. 1604: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." Under those sections there are nine categories for which exceptions apply to section 1604:

(1) waiver of immunity

(2) commercial activity

(3) rights in property taken in violation of international law

(4) rights in property in the United States acquired by succession or gift or rights in immovable property in the United States

(5) money damage tort actions for personal injuries or death or damage to or loss of property

(6) enforcement of an arbitration agreement made by a foreign state with or for the benefit of a private party, in prescribed situations

(7) maritime liens against a vessel where the lien is based upon commercial activities

(8) foreclosure of a preferred mortgage under the Ship Mortgage Act of 1920

(9) counterclaims

In Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), the U.S. Supreme Court upheld the constitutional power of Congress to enact the legislation.

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2. ***United Kingdom: State Immunity Act of 1978.*** The United Kingdom became a signatory to the European Convention on State Immunity on May 16, 1972. That convention also incorporates the restrictive theory. Its text is in 11 International Legal Materials 470 (1972). It entered into force on June 11, 1976. To give effect to the convention, the United Kingdom enacted the State Immunity Act of 1978, found in 17 International Legal Materials 1123 (1978).

The 1987 Restatement noted that nearly all "non-Communist" states now accept the restrictive theory. Comment *a* to Section 451.

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3. ***International Agreements.*** Movement toward the "restrictive principle" is occurring as a function of a number of treaty provisions in force or under consideration and national legislation and judicial decisions (which may well be moving customary law in that direction by accretion). The first of these is the Brussels Convention of 1926. * * * It applied the restrictive principle to government owned or operated vessels involved in trade. *See also*, the 1982 U.N. Convention on the Law of the Sea provisions on the subject of vessels. The European Convention on State Immunity and Additional Protocol of May 16, 1972 adopted the restrictive principle on a broader basis, including the commercial exception as provided in Article 7.1:

> A Contracting state may not claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency, or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.

In 1991 the International Law Commission adopted "Draft Articles on Jurisdictional Immunities of States and their Property" (UN A/46/405, 11 September, 1991; 30 I.L.M. 1554, 1565) (in the Documentary Supplement). The Draft Articles contain in Article 5 the following

broad provision: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles." This is qualified by a number of exceptions, including: "express consent" (Article 7); proceedings initiated by the State invoking immunity (Articles 8 & 9); commercial transactions (Article 10); contracts of employment (Article 11); personal injuries and damage to property (Article 12); ownership, possession and use of property (Article 13); intellectual and industrial property (Article 14); participation in companies or other collective bodies (Article 15); ships owned or operated by a State for other than government non-commercial purposes (Article 16); and certain proceedings related to an arbitration to which the State had agreed in writing (Article 17).

State immunity from "measures of constraint" is governed by Articles 18 and 19. These provide for the immunity except in described cases of consent, allocation or earmarking of property for satisfaction of the claim, certain property in use or intended for use by the State for other than government non-commercial purposes. Moreover, specific categories of qualifying property may not be reached. These include property (bank accounts included) "used or intended for use for the purposes of the diplomatic mission of the State" (Article 19).

The discussion of the Draft Articles in the 1991 meeting of the Sixth Committee of the General Assembly, makes it clear that the Draft Articles do not yet attract a consensus. This is due to doctrinal disagreement as well as problems of detail and drafting (see U.N. A/CN.4/L. 456, February 6, 1991). The Draft Articles, nevertheless, currently represent the most advanced efforts to resolve the numerous uncertainties in the sovereign immunity arena.

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4. ***French administrative law concepts.*** After the French revolution of 1789, France established two parallel systems of courts: one judicial and the other administrative. For all practical purposes, they are equal in rank. The judicial system essentially was given jurisdiction over disputes between private parties, while the administrative system was given jurisdiction over disputes between private parties and the state. The administrative courts have developed—on a case by case basis—a body of administrative law which has no exact counterpart in England or the United States. This "case law" development has become the basis of administrative law in much of continental Europe and has influenced the administrative law of a number of states elsewhere.

It cannot be entirely an accident that states whose courts led the development of the restrictive theory, or eventually adopted it, are also, in the main, those which adopted or were influenced by French administrative law. For in the French system, a fundamental distinction is drawn between situations where the state exercises its public power, and those where the state acts in its private capacity. In the former, litigation authority belongs to the administrative courts. In the latter, it belongs to the judicial system. The distinction is elementary to civil law lawyers, even though it is subject in its application to exceptions,

qualifications and refinements as complex as those surrounding the application of the concept of due process in American courts.

Because of their experience with concepts of administrative law of the French type, the courts, by the turn of the century, of a number of civil law states were intellectually conditioned to engage in a critical analysis of the doctrine of sovereign immunity. They did not take it for granted that all acts of a foreign state were sovereign. The theory worked out to delimit acts of sovereignty entitled to immunity, and separate them from other acts not entitled to immunity, borrows the differentiation from French administrative law and uses it as the basis for determining immunity vel non.

Consider the following application of the distinction between public and private acts.

GEORGES DELAUME, CASE NOTE

SOCIÉTÉ IRANIENNE DU GAZ v. SOCIÉTÉ PIPELINE SERVICE

[NIGC] 80 Revue Critique de Droit International Privé 140 (1991).
French Court of Cassation, May 2, 1990.
85 American Journal of International Law 696 (1991) (reprinted by permission American Society of Int'l Law).

In 1978 a French company (Pipeline) and the National Iranian Gas Company (NIGC) entered into a contract (governed by Iranian law) for the supply and erection of gas pipeline installations linking certain Iranian cities. Apparently not paid for its services, Pipeline brought an action in France against NIGC. NIGC's plea of immunity was denied by the Court of Appeal of Versailles, whose decision was reversed by the Court of Cassation.

From the decision of the Court of Cassation (which, as usual, is essentially abstract and does not supply detailed information on the facts of the case and the arguments of the parties), it appears that NIGC based its plea of immunity on the consideration that it was intimately linked to the Iranian Government and that its activities relating to gas transmission throughout Iran were intended to meet the needs of a "public service" (*service public*). The court of appeal had considered this line of argument irrelevant because the decisive factor in determining the issue of immunity was the nature of the transaction. In its view, under the French *lex fori*, the transaction fell within the category of a "public work subcontract," which should be characterized as a purely commercial transaction. The Court of Cassation disagreed with that characterization, stating: "Foreign states and instrumentalities acting under the direction or on behalf of states are entitled to immunity from suit not only in regard to governmental acts but also in respect of acts performed in furtherance of a public service." [1]

1. Judgment of May 2, 1990, Cass. civ. 80 Revue Critique De Droit International Privé [RCDIP] 140, 141.

This decision is surprising. It is contrary to a consistent line of cases in which the Court of Cassation has held that, for the implementation of immunity rules, the relevant factor is the nature of the transaction from which the dispute arises, rather than its purpose.[2] The nature of the transaction has been considered decisive in cases involving both immunity from suit and immunity from execution.

A return to the traditional test is apparent from another decision of the Court of Cassation rendered barely a few weeks after the *NIGC* case. The plaintiff, a British newspaperman, brought suit against the Kuwait News Agency following the agency's decision not to renew his contract. The agency pleaded immunity on the grounds that (1) it was an agency of Kuwait linked to the Ministry of Information; (2) its managing board was appointed by the Government; and (3) the contract of employment had a governmental character since the plaintiff's activities regarding the collection of information were carried out for the exclusive benefit of the Kuwaiti Government and, as such, should be regarded as directly related to the pursuit of a "public service." The plea was denied. Although the decision could have been based on the sole ground that the agency had an independent juridical personality and enjoyed financial autonomy, the Court went further and said that, even if the agency were in effect part of the Kuwaiti Government, the employment contract should be regarded as a commercial act with respect to which there was no immunity from suit.

Under the circumstances, the rationale of the *NIGC* decision is not readily apparent. It may be that the Court of Cassation was influenced by domestic administrative law concepts regarding the respective jurisdictions of the administrative and judicial courts. If that were the case, the *NIGC* decision would be a matter of concern because these concepts are not as clear as would be desirable. To project them into the international arena would inject unwarranted uncertainties into the implementation of immunity rules. Another possibility is that the Court may have been influenced by nonlegal considerations due to the improvement in the political climate between France and Iran. In any event, in light of the *Kuwait News Agency* decision, it is not clear whether the Court intended to signal a change in immunity rules in the *NIGC* case.

Questions: What are the conceptual differences between the approach of the Cour de Cassation in the NIGC and the Kuwait cases as described above? Can they be reconciled? Which would lead to the preferred policy result as you see it? Why?

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2. France long ago adopted the restrictive theory of sovereign immunity. * * * Under the "purpose" test, an act would be considered sovereign if performed for a public purpose. That test has been criticized on the ground that, literally applied, it would eviscerate the "restrictive" theory of immunity since all acts of the sovereign might be construed as having a public purpose. Victory Transport Inc. v. Comisaria General, 336 F.2d 354 (2d Cir.1964). In the United States, the "nature of the act" test was codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(d) (1988).

GENERAL RULE OF IMMUNITY

ARGENTINE REPUBLIC v. AMERADA HESS SHIPPING CORP.

United States Supreme Court, 1989.
488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818.

Chief Justice REHNQUIST delivered the opinion of the Court.

Two Liberian corporations sued the Argentine Republic in a United States District Court to recover damages for a tort allegedly committed by its armed forces on the high seas in violation of international law. We hold that the District Court correctly dismissed the action, because the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330 et seq., does not authorize jurisdiction over a foreign state in this situation.

Respondents alleged the following facts in their complaints. Respondent United Carriers, Inc., a Liberian corporation, chartered one of its oil tankers, the Hercules, to respondent Amerada Hess Shipping Corporation, also a Liberian corporation. The contract was executed in New York City. Amerada Hess used the Hercules to transport crude oil from the southern terminus of the Trans-Alaska Pipeline in Valdez, Alaska, around Cape Horn in South America, to the Hess refinery in the United States Virgin Islands. On May 25, 1982, the Hercules began a return voyage, without cargo but fully fueled, from the Virgin Islands to Alaska. At that time, Great Britain and petitioner Argentine Republic were at war over an archipelago of some 200 islands—the Falkland Islands to the British, and the Islas Malvinas to the Argentineans—in the South Atlantic off the Argentine coast. On June 3, United States officials informed the two belligerents of the location of United States vessels and Liberian tankers owned by United States interests then traversing the South Atlantic, including the Hercules, to avoid any attacks on neutral shipping.

By June 8, 1982, after a stop in Brazil, the Hercules was in international waters about 600 nautical miles from Argentina and 500 miles from the Falklands; she was outside the "war zones" designated by Britain and Argentina. At 12:15 Greenwich mean time, the ship's master made a routine report by radio to Argentine officials, providing the ship's name, international call sign, registry, position, course, speed, and voyage description. About 45 minutes later, an Argentine military aircraft began to circle the Hercules. The ship's master repeated his earlier message by radio to Argentine officials, who acknowledged receiving it. Six minutes later, without provocation, another Argentine military plane began to bomb the Hercules; the master immediately hoisted a white flag. A second bombing soon followed, and a third attack came about two hours later, when an Argentine jet struck the ship with an air-to-surface rocket. Disabled but not destroyed, the Hercules reversed course and sailed to Rio de Janeiro, the nearest safe port. At Rio de Janeiro, respondent United Carriers determined that the ship had suffered extensive deck and hull damage, and that an undetonated bomb remained lodged in her No. 2 tank. After an investigation by the

Brazilian Navy, United Carriers decided that it would be too hazardous to remove the undetonated bomb, and on July 20, 1978, the Hercules was scuttled 250 miles off the Brazilian coast. * * *

* * * In the FSIA, Congress added a new chapter 97 to Title 28 of the United States Code, 28 U.S.C. §§ 1602–1611, which is entitled "Jurisdictional Immunities of Foreign States." Section 1604 provides that "[s]ubject to existing international agreements to which the United States [was] a party at the time of the enactment of this Act[,] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." The FSIA also added § 1330(a) to Title 28; it provides that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state * * * as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605–1607 of this title or under any applicable international agreement." § 1330(a).

We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. Section 1604 and § 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity. As we said in *Verlinden*, the FSIA "must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983).

The Court of Appeals acknowledged that the FSIA's language and legislative history support the "general rule" that the Act governs the immunity of foreign states in federal court. The Court of Appeals, however, thought that the FSIA's "focus on commercial concerns" and Congress' failure to "repeal" the Alien Tort Statute indicated Congress' intention that federal courts continue to exercise jurisdiction over foreign states in suits alleging violations of international law outside the confines of the FSIA. The Court of Appeals also believed that to construe the FSIA to bar the instant suit would "fly in the face" of Congress' intention that the FSIA be interpreted pursuant to " 'standards recognized under international law.' " Ibid., * * *.

Taking the last of these points first, Congress had violations of international law by foreign states in mind when it enacted the FSIA. For example, the FSIA specifically denies foreign states immunity in suits "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). Congress also rested the FSIA in part on its power under Art. I, § 8, cl. 10, of the Constitution "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." From Congress' decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain implication that immunity is granted in those cases involving

alleged violations of international law that do not come within one of the FSIA's exceptions.

As to the other point made by the Court of Appeals, Congress' failure to enact a *pro tanto* repealer of the Alien Tort Statute when it passed the FSIA in 1976 may be explained at least in part by the lack of certainty as to whether the Alien Tort Statute conferred jurisdiction in suits against foreign states. Enacted by the First Congress in 1789, the Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Court of Appeals did not cite any decision in which a United States court exercised jurisdiction over a foreign state under the Alien Tort Statute, and only one such case has come to our attention—one which was decided after the enactment of the FSIA.

* * * [R]espondents argue that cases were brought under the Alien Tort Statute against foreign states for the unlawful taking of a prize during wartime. The Alien Tort Statute makes no mention of prize jurisdiction, and § 1333(2) now grants federal district courts exclusive jurisdiction over "all proceedings for the condemnation of property taken as a prize." In the Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353–354, 5 L.Ed. 454 (1822), we held that foreign states were not immune from the jurisdiction of United States courts in prize proceedings. That case, however, was not brought under the Alien Tort Statute but rather as a libel in admiralty. Thus there is a distinctly hypothetical case to the Court of Appeals' reliance on Congress' failure to repeal the Alien Tort Statute, and respondents' arguments in this Court based on the principle of statutory construction that repeals by implication are disfavored.

We think that Congress' failure in the FSIA to enact an express *pro tanto* repealer of the Alien Tort Statute speaks only faintly, if at all, to the issue involved in this case. In light of the comprehensiveness of the statutory scheme in the FSIA, we doubt that even the most meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the Alien Tort Statute and presumably such other grants of subject-matter jurisdiction in Title 28 as § 1331 (federal question), § 1333 (admiralty), § 1335 (interpleader), § 1337 (commerce and antitrust), and § 1338 (patents, copyrights, and trademarks). Congress provided in § 1602 of the FSIA that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter," and very likely it thought that should be sufficient. § 1602 (emphasis added); see also H.R.Rep., at 12; S.Rep., at 11 * * * (FSIA "intended to preempt any other State and Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns").

Having determined that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here. These exceptions include cases involving the waiver of immunity, § 1605(a)(1), commercial activities occurring in the United States or causing a direct

effect in this country, § 1605(a)(2), property expropriated in violation of international law, § 1605(a)(3), real estate, inherited, or gift property located in the United States, § 1605(a)(4), non-commercial torts occurring in the United States, § 1605(a)(5), and maritime liens, § 1605(b). We agree with the District Court that none of the FSIA's exceptions applies on these facts.

Respondents assert that the FSIA exception for noncommercial torts, § 1605(a)(5), is most in point. This provision denies immunity in a case

> "in which money damages are sought against a foreign state for 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).

Section 1605(a)(5) is limited by its terms, however, to those cases in which the damage to or loss of property occurs *in the United States.* 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. See H.R.Rep., at 14, 20–21. * * *

In this case, the injury to respondents' ship occurred on the high seas some 5,000 miles off the nearest shores of the United States * * *.

* * *

The result * * * is not altered by the fact that petitioner's alleged tort may have had effects in the United States. Respondents state, for example, that the Hercules was transporting oil intended for use in this country and that the loss of the ship disrupted contractual payments due in New York. Under the commercial activity exception to the FSIA, § 1605(a)(2), a foreign state may be liable for its commercial activities "outside the territory of the United States" having a "direct effect" inside the United States. But the noncommercial tort exception, § 1605(a)(5), upon which respondents rely, makes no mention of "territory outside the United States" or of "direct effects" in the United States. Congress' decision to use explicit language in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States. Respondents do not claim that § 1605(a)(2) covers these facts.

We also disagree with respondents' claim that certain international agreements entered into by petitioner and by the United States create an exception to the FSIA here. As noted, the FSIA was adopted "[s]ubject to international agreements to which the United States [was] a party at the time of [its] enactment." § 1604. This exception applies when international agreements "expressly conflic[t]" with the immunity provisions of the FSIA, H.R.Rep., at 17; S.Rep., at 17, hardly the circumstances in this case. Respondents point to the Geneva Convention on the High Seas, Apr. 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200,

and the Pan American Maritime Neutrality Convention, Feb. 20, 1928, 47 Stat. 1989, 1990–1991, T.S. No. 845. These conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts. Cf. Head Money Cases, 112 U.S. 580, 598–599 (1884); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). Nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States. We find similarly unpersuasive the argument of respondents and *Amicus Curiae* Republic of Liberia that the Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States–Liberia, 54 Stat. 1739, T.S. No. 956, carves out an exception to the FSIA. Article I of this Treaty provides, in pertinent part, that the nationals of the United States and Liberia "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws." The FSIA is clearly one of the "local laws" to which respondents must "conform" before bringing suit in United States courts.

We hold that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country, and that none of the enumerated exceptions to the Act applies to the facts of this case. The judgment of the Court of Appeals is therefore

REVERSED.

Questions: Were the U.S. contacts and interests in this case sufficiently strong for U.S. courts to take jurisdiction, compared, for example, to the courts of the United Kingdom or Liberia? What *harm* might be done if U.S. courts were to take jurisdiction in such cases? Would a decision taking jurisdiction have carried the risk that U.S. courts might become a world judiciary in actions grounded on international law violations of foreign governments? What remedies remained for Amerada Hess after this proceeding was concluded against it?

Note: *Gould Inc. v. Mitsui Min. & Smelting Co.,* 750 F.Supp. 838 (N.D.Ohio 1990), involved issues of trade secret misappropriation sufficient to amount to a "pattern of racketeering (per RICO)". The action was dismissed because the predicate acts of "mail and wire fraud" were insufficiently alleged. Gould alleged that some of its trade secrets were transferred to foreign companies and that a plant was built in France based at least partly upon the trade secrets. Defendants argued that, at the time of the alleged predicate acts, they were owned by France and that the FSIA, therefore, applied. They claimed that the FSIA was the only basis of jurisdiction and that a foreign sovereign is not subject to U.S. criminal jurisdiction, hence, the concomitant RICO claim falls. Plaintiff countered that the FSIA applies only to civil actions and that RICO was irrelevant. The Court held that the language of RICO suggests that the kind of fraud which may be a "predicate act" may only

be criminal fraud. Hence, it may function only when the defendant is subject to being prosecuted. Sovereigns, not being subject to prosecution, are not jurisdiction. *See,* 18 U.S.C. § 1961(1)(B); 18 U.S.C. §§ 1341, 1343. As an interesting aside, the law firm which represented plaintiff also ended up representing defendant (in patent matters), due to the merger of law firms.

* * *

Question: Why do you think that the criminal nature of the RICO proceeding figured so prominently in this case?

2. APPLICATIONS OF RESTRICTIVE PRINCIPLE TO COMMERCIAL AND OTHER ACTIVITIES

REPUBLIC OF ARGENTINA AND BANCO CENTRAL DE LA REPUBLICA ARGENTINA, PETITIONERS v. WELTOVER, INC., ET AL.

United States Supreme Court, 1992.
112 S.Ct. 2160, 119 L.Ed.2d 394.

Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Republic of Argentina's default on certain bonds issued as part of a plan to stabilize its currency was an act taken "in connection with a commercial activity" that had a "direct effect in the United States" so as to subject Argentina to suit in an American court under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 et seq.

I

* * * Argentina's currency is not one of the mediums of exchange accepted on the international market. Argentine businesses engaging in foreign transactions must pay in U.S. dollars or some other internationally accepted currency. [It has been] difficult for Argentine borrowers to obtain such funds, principally because of the instability of the Argentine currency. To address these problems, petitioners, the Republic of Argentina and its central bank, Banco Central (collectively Argentina), in 1981 instituted a foreign exchange insurance contract program (FEIC), under which Argentina effectively agreed to assume the risk of currency depreciation in cross-border transactions involving Argentine borrowers. This was accomplished by Argentina's agreeing to sell to domestic borrowers, in exchange for a contractually predetermined amount of local currency, the necessary U.S. dollars to repay their foreign debts when they matured, irrespective of intervening devaluations.

* * * Argentina did not possess sufficient reserves of U.S. dollars to cover the FEIC contracts as they became due in 1982. The Argentine government thereupon adopted certain emergency measures, including refinancing of the FEIC-backed debts by issuing to the creditors government bonds. These bonds, called "Bonods," provide for payment of interest and principal in U.S. dollars; payment may be made through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor. [T]he foreign creditor had the option of either

accepting the Bonods in satisfaction of the initial debt, thereby substituting the Argentine government for the private debtor, or maintaining the debtor/creditor relationship with the private borrower and accepting the Argentine government as guarantor.

When the Bonods began to mature in May 1986, Argentina concluded that it lacked sufficient foreign exchange to retire them. Pursuant to a Presidential Decree, Argentina unilaterally extended the time for payment, and offered bondholders substitute instruments as a means of rescheduling the debts. [Three creditors] refused to accept the rescheduling, and insisted on full payment, specifying New York as the place where payment should be made. Argentina did not pay, and respondents then brought this breach-of-contract action, * * * relying on the Foreign Sovereign Immunities Act of 1976 as the basis for jurisdiction. * * *

II

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq., establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state. Under the Act, a "foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the States" unless one of several statutorily defined exceptions applies. § 1604 (emphasis added). The FSIA thus provides the "sole basis" for obtaining jurisdiction over a foreign sovereign in the United States. See Argentine Republic v. Amerada Hess [supra.] The most significant of the FSIA's exceptions—and the one at issue in this case—is the "commercial" exception of § 1605(a)(2). * * *

In the proceedings below, respondents relied only on the third clause of § 1605(a)(2) to establish jurisdiction and our analysis is therefore limited to considering whether this lawsuit is (1) "based * * * upon an act outside the territory of the United States"; (2) that was taken "in connection with a commercial activity" of Argentina outside this country; and (3) that "cause[d] a direct effect in the United States." The complaint in this case alleges only one cause of action on behalf of each of the respondents, viz., a breach-of-contract claim based on Argentina's attempt to refinance the Bonods rather than to pay them according to their terms. The fact that the cause of action is in compliance with the first of the three requirements—that it is "based upon an act outside the territory of the United States" (presumably Argentina's unilateral extension)—is uncontested. The dispute pertains to whether the unilateral refinancing of the Bonods was taken "in connection with a commercial activity" of Argentina, and whether it had a "direct effect in the United States." We address these issues in turn.

A

Respondents and their *amicus,* the United States, contend that Argentina's issuance of, and continued liability under, the Bonods constitute a "commercial activity" and that the extension of the payment schedules was taken "in connection with" that activity. The latter point is obvious enough, and Argentina does not contest it; the key question is

We hold that the relationship of an international organization with its internal administrative staff is noncommercial, and, absent waiver, activities defining or arising out of that relationship may not be the basis of an action against the organization—regardless of whether international organizations enjoy absolute or restrictive immunity.

D. The Activities at Issue Here

The appellants were staff members of the General Secretariat of the OAS. Their appointments, terms of employment, salaries and allowances, and the termination of employment were governed by detailed "Staff Rules of the General Secretariat" promulgated by the OAS. The Staff Rules further establish an elaborate grievance procedure within the OAS, with ultimate appeal to the Administrative Tribunal of the OAS.

The Tribunal is competent to determine the lawfulness of an employee's termination of employment. If an employee has been wrongfully discharged, the Tribunal may order reinstatement. If reinstatement is ordered, the Tribunal may also establish an indemnity to be paid to the employee in the event the Secretary General exercises his authority to indemnify the employee rather than effect the reinstatement.

The employment disputes between the appellants and OAS were disputes concerning the internal administrative staff of the Organization. The internal administration of the OAS is a non-commercial activity shielded by the doctrine of immunity. There was no waiver, and accordingly the appellant's action had to be dismissed.

Affirmed.

Note on Broadbent: The uncertainty about whether international organizations enjoy absolute immunity under the IOIA or restricted immunity as provided in the FSIA has remained unsettled. See Tuck v. Pan American Health Organization, 668 F.2d 547 (D.C.Cir.1981); Mendaro v. World Bank, 717 F.2d 610 (D.C.Cir.1983); Morgan v. International Bank for Reconstruction and Development, 752 F.Supp 492 (D.D.C.1990).

Convention on the Privileges and Immunities of the Specialized Agencies. (The text of which is at 33 U.N.T.S. 261). States, in acceding to this convention indicate to which of the specialized agencies they choose to apply it. The United States is not a party, although, pursuant to the International Organization Immunities Act, 22 U.S.C. § 288, the President of the United States has designated virtually all U.N. agencies as entitled to the benefits of the act.

Question: What is the argument for maintaining the immunity for international organizations? Purely textual? See a Food & Agriculture Org. v. INPDAI, 87 I.L.R. 1 (1992) (Italy Cour de Cass.).

Chapter 8

THE ACT OF STATE DOCTRINE

Perspective. The subject matter of this Chapter, together with some aspects of the preceding one, influenced us to call this book "The International Legal System," rather than one on international public law. What is analyzed here involves treatment in national legal systems of matters that are not as yet governed by widely-accepted rules of international public law, but which do, nonetheless, involve legal issues that connect with the interests and attitudes of other states. These issues are usually ignored in courses on domestic law, such as Conflicts of Law. Note that the resulting issue is not necessarily one of illegality under international public law. Sections 443 and 444 of the 1987 Restatement of the Foreign Relations Law, especially the Reporters' Notes, are helpful in understanding the setting tersely stated here.

The act of state doctrine presented here arises in a litigation context. It involves the question whether an otherwise governing foreign dispositive legal principle is to be invalidated by a "municipal" court. It does not arise in a purely foreign relations context, as where the foreign office of State A should reject official conduct of State B, either in a diplomatic protection case (refer to Chapters 9 and 15–B). A foreign ministry might assert that the foreign state's conduct violates international law, and it might even try to proceed in an international tribunal, where official conduct and major policy are concerned. But no state sues another in its own courts to invalidate official conduct of the latter, especially that taken in that state's territory. True, in the leading U.S. case, *Banco Nacional de Cuba v. Sabbatino,* the plaintiff was an agency of Cuba, but you will understand how it came to be the plaintiff shortly. In all other act of state cases in American courts the

plaintiffs are private parties who have taken the initiative to bring cases, but whether the act of a foreign state is legitimate becomes the dispositive issue, this is usually at the defendant's initiative.

* * * The act of state doctrine is a judicially-created limitation on the exercise of federal adjudicatory jurisdiction. It is not a jurisdictional bar, but is a mechanism of judicial abstention to allow the judiciary prudentially to avoid litigating a foreign sovereign's public conduct committed within its own territory. The judiciary avoids being enmeshed in matters of foreign affairs which could risk embarrassment to the executive. Most of the Supreme Court decisions have related to expropriation of private property, or political crises in foreign countries. Questions of civil damages for loss of consortium or for "*Foreign Corrupt Practices*" relating to alleged bribery of foreign officials by a U.S. contractor have also recently been at issue.

The act of state doctrine is not part of the Foreign Sovereign Immunities Act and is governed by different variables as to application, *vel non*, although it will cause a plaintiff to lose in a similar fashion. Such a case could be dealt with as an ordinary, strictly judicial, conflicts of law case. The choice of law would be to apply that of the foreign state, unless the plaintiff could convince the court that the foreign law should be rejected as fundamentally and inherently contrary to the law and policy of the forum. But major act of state cases did not take this approach. Why? Simply put: it is because non-judicial issues arise, including issues of concern to the executive and the legislative branches.

The title of Section A is accurate: the Supreme Court has been the major actor in the fashioning of the American version of act of state. Why? Should it have been? Should it continue to take the lead in fashioning the Doctrine? If so, along what lines? Should Congress enact, on the model of the Foreign Sovereign Immunities Act, an "act of state" Act?

As to the use by courts in Britain of the principle of non-examination of the acts of a foreign state, *see* the United States Supreme Court's note 21 to its opinion in *Banco Nacional de Cuba v. Sabbatino, Receiver*, page 627 herein, citing the classic case of Luther v. Sagor & Co., [1921] 3 K.B. 532. For House of Lords decisions in 1981 and 1986 adopting the American view of act of state and declaring a change of title by nationalization of property in a foreign state non-reviewable, see Reporters' Note 12 to Section 443 of the 1987 Restatement. The United States Supreme Court also makes brief reference in its note 21 to the manner in which tribunals in civil law systems use the principle against examination of the legitimacy of an otherwise applicable foreign legal rule. The term act of state, however, is rarely used.

* * * Civil law systems will not apply an otherwise applicable foreign rule that is violative of the public order of the forum state. The notion of public order is not the same as that in a common law court. The civilian doctrine of *ordre public* concerns itself only with exceptional or highly significant manifestations of foreign sovereign will. The issue is whether in certain situations that will clash with an equally highly

held principle of proper governance and national interest in the forum state.

Is it possible to argue today, on re-examination of state consent, that an abuse of jurisdiction [unreasonable exercise of jurisdiction] arises under customary international law where a court of one state reviews and invalidates the governmental act of another state as to non-immune persons, relationships, and assets localized in its territory?

SECTION A. THE BASIC COURT-MADE DOCTRINE IN THE UNITED STATES

The American act of state doctrine and political crises in foreign relations. The American act of state doctrine is closely linked to political crises abroad in the course of which officials of a foreign government take actions harmful or outrageous to a person who, later, seeks redress by bringing a suit in the United States.

In the agreement for the release of American hostages in Teheran in 1981, the United States undertook to bar the hostages from prosecuting claims against Iran for their seizure and detention. Suppose, however, the United States had not done so and some of hostages were able to find and serve in the United States former officials of the government in control in Iran at the time it violated the diplomatic immunity and human dignity of the plaintiffs. The defendants would plead that under the law of the United States governing its foreign relations, their conduct was an Iranian act of state. It would be beyond review by American courts.

The link to political crises abroad is apparent, startlingly so in retrospect, in the extensive history of the doctrine given in the majority opinion of the Supreme Court in the *Sabbatino* case, infra p. 627. The first case it cites, *Underhill v. Hernandez*, involved an insurgent general in Venezuela in the 1890s who mounted a successful coup, and was recognized as the head of government, but later fell from power. He came to the United States, only to find himself sued for mistreating the plaintiff in Venezuela during the insurgency. The chronology of the cases after *Underhill* takes the doctrine through the Mexican revolution of 1910–21, the outrages of Nazi Germany, the crisis between the United States and Castro's Cuba, a relatively recent dictatorship in Venezuela and the overthrow of the king of Libya by the military regime of Colonel Qadhafi.

A troublesome aspect of the doctrine is that it tends to keep the courts from serving justice. The point is dramatically made in two suits brought by a former German, Bernstein, a Jewish person whose ships, while he was still a German citizen, were seized by the Nazi government and sold for value to purchasers with notice. In the first, Judge Learned

Hand reluctantly applied the act of state doctrine and threw the case out of court. In the second, the Legal Adviser of the Department of State informed the court by letter that it would be contrary to the policy of the United States towards occupied Germany to recognize as valid the title to ships acquired by the purchaser under the notorious racial laws of Hitlerian Germany. The court gave effect to this view and did not apply the act of state doctrine.

As a result of the second case, the way was open for efforts, through legislation and executive action, to require that the act of state doctrine not apply unless the Department of State says it should. The justification for side-tracking the doctrine is that the courts should be allowed in less sensitive cases to do justice for plaintiffs in some cases who are victims of governmental acts of foreign states even though done in their own territories. But are we to assume that the courts, if left alone by Congress and the executive branch, would continue to apply the doctrine, no matter how brutal or uncivilized the conduct of the state involved? What happens to justice when the Executive or the Congress intervene in support of one outcome or the other as to the rejection or acceptance of the foreign act of state? The potential separation-of-powers problem is obvious. *Should the Supreme Court be the final arbiter? Cf. Baker v. Carr*, 369 U.S. 186 (1962). *Should the trial court solicit the foreign policy view of the Department of State on the matter? Should the court be required to follow the view of the Department of State position?* Should either the court or the Department of State (or any other executive department) make its choice on the basis of whether the foreign state is "liberal" (in the broad sense of a general political similarity to to the United States) or "nonliberal" (e.g., patently adverse to the American value system)? For analytical, inter-disciplinary speculation on this question and detailed analysis of American cases on Act of State, see *Burley, Law Among Liberal States: Liberal Internationalism and The Act of State Doctrine*, 92 Columbia L.Rev. 1907 (1992). Very generally, the writer's conclusion is that if the state whose act is in question is a "liberal" state, all three branches of the United States Government should accept that the case be decided by the courts on normal conflict of laws grounds, including, judicial authority to reject an otherwise applicable foreign law on the standard conflicts ground of fundamental incompatibility with the law of the forum. If the foreign state is "nonliberal," the issue becomes a "political question." The courts should defer to the political branches.

Where is the determination of "liberal" vs. "non-liberal" state to be made? By the federal judiciary? By the Department of State? * * * Of course, the Department of State and the Senate when it gives its "Advice & Consent" to our extradition treaties, currently make such a decision. They do the same when they eliminate the political offense exception, for relative political offenses. E.g., U.S.-U.K. Treaty; the *U.S.-German Extradition Treaty*, where former Department of State Legal Adviser, Judge Abraham Soafer, stated that we would only provide such a clause in treaties with our "liberal" democratic allies. It is said that we actually had negotiated a similar exception to the political offense exception in a proposed treaty with Marcos's Philippines. The latter treaty was never sent over for the advice and consent of the Senate.[1] Consider that possibility after you read Justice Scalia's opinion for a unanimous Supreme Court in the Kirkpatrick Case, p. 638 *infra*.

In the matter of American business investment abroad the customary tensions escalated into crises when Castro nationalized American private property in Cuba in retaliation for United States actions such as Congressional suspension of the Cuban sugar quota. Later, Allende in Chile nationalized what had already been reduced to minority American interests in Chilean copper mining companies. He evaded paying compensation by inducing the enactment of a retroactive excess profits tax that exceeded the compensation claim. In Peru, elements of the military overthrew an elected president who tried to settle a long-smouldering controversy about sub-surface oil and gas rights and had trumped up a claim for bad faith extraction that washed out compensation. Qadhafi cancelled some (but not all) oil concessions that had been made by the deposed king of Libya, without compensation.

Earlier, in 1951, Tories in Britain were narrowly prevented from gunboat diplomacy when Mosadegh, an austere traditional in Iranian politics, badly miscast by the West as a leftist, nationalized the Anglo-Iranian Oil Company, with an undertaking to compensate. Instead of force, Britain ultimately evolved the hot product doctrine, exemplified in the favorable (to dispossessed investors) decision of the Supreme Court of the then-British protectorate of Aden. This pioneering effort spawned a whole series of instances, including that in Sabbatino, where (ignored in the Aden decision, see p. 665 act of state loomed as an obstacle in limine to vindication of dispossessed investors in municipal judicial systems of other states.

Most recently courts have had to face the question whether an officially-directed act of torture or other outrage—historically and tragically a most classic act of state—is beyond scrutiny in non-international courts of states other than the acting state. (See, inter alia the *Filartiga* case infra, chapter 10 (Human Rights).

BANCO NACIONAL DE CUBA v. SABBATINO, RECEIVER

United States Supreme Court, 1964.
376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804.[a]

Mr. Justice HARLAN delivered the opinion of the Court.

The question which brought this case here, and is now found to be the dispositive issue, is whether the so-called act of state doctrine serves to sustain petitioner's claims in this litigation. Such claims are ultimately founded on a decree of the Government of Cuba expropriating certain property, the right to the proceeds of which is here in controver-

1. Republic of the Philippines v. Marcos, 862 F.2d 1355, 1368–69 (9th Cir.1988).

a. See Chapter 12, Section A, for that part of the opinion which declares irrelevant the fact that the United States had severed diplomatic relations with Cuba.

sy. The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.

[In 1960, the U.S. Congress reduced the import quota for Cuban sugar. The Cuban government characterized the reduction as "aggression" and retaliated by nationalizing the sugar industry, expropriating many U.S. owned companies or companies in which Americans held significant interests. Farr Whitlock, an American commodities broker had entered into a contract to buy a shipload of C.A.V. (*Compañia Azucarera Vertientes*, one of the U.S. companies) sugar. Farr Whitlock entered into a new agreement to buy the shipload of sugar from the Cuban government, turned the proceeds over to *C.A.V.*, instead of Cuba. Farr Whitlock had arranged for indemnification, and assigned the bills of lading to the *Banco National de Cuba*. When Farr Whitlock negotiated the shipping documents to its clients, *Banco National* sued them for conversion. It also attempted to enjoin *Sabbatino*, the temporary receiver of C.A.V.'s assets, from taking any action in regard to the money that might result in its removal from New York. Farr Whitlock's defense was that title to the sugar never actually passed to Cuba, because the expropriation violated international law].

* * *

The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674, and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries, see e.g., Ware v. Hylton, 3 Dall. 199, 230; The Santissima Trinidad, 7 Wheat. 283, 336, is found in Underhill v. Hernandez, where Chief Justice Fuller said for a unanimous Court: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." Following this precept the Court in that case refused to inquire into acts of Hernandez, a revolutionary Venezuelan military commander whose government had been later recognized by the United States, which were made the basis of a damage action in this country by Underhill, an American citizen, who claimed that he had been unlawfully assaulted, coerced, and detained in Venezuela by Hernandez.

None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from Underhill. * * * On the contrary in two of these cases, Oetjen and Ricaud, the doctrine as announced in Underhill was reaffirmed in unequivocal terms.

* * *

The Court of Appeals relied in part upon an exception to the unqualified teachings of Underhill, Oetjen, and Ricaud which that court had earlier indicated. In Bernstein v. Van Heyghen Freres Société Anonyme, suit was brought to recover from an assignee property alleged-

ly taken, in effect, by the Nazi Government because plaintiff was Jewish. Recognizing the odious nature of this act of state, the court, through Judge Learned Hand, nonetheless refused to consider it invalid on that ground. Rather, it looked to see if the Executive had acted in any manner that would indicate that United States Courts should refuse to give effect to such a foreign decree. Finding no such evidence, the court sustained dismissal of the complaint. In a later case involving similar facts the same court again assumed examination of the German acts improper, Bernstein v. N.V. Nederlandsche–Amerikaansche Stoomvaart–Maatschappij, 2 Cir., but, quite evidently following the implications of Judge Hand's opinion in the earlier case, amended its mandate to permit evidence of alleged invalidity, subsequent to receipt by plaintiff's attorney of a letter from the Acting Legal Adviser to the State Department written for the purpose of relieving the court from any constraint upon the exercise of its jurisdiction to pass on that question.

This Court has never had occasion to pass upon the so-called Bernstein exception, nor need it do so now. For whatever ambiguity may be thought to exist in the two letters from State Department officials on which the Court of Appeals relied, is now removed by the position which the Executive has taken in this Court on the act of state claim; respondents do not indeed contest the view that these letters were intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation.

The outcome of this case, therefore, turns upon whether any of the contentions urged by respondents against the application of the act of state doctrine in the premises is acceptable: (1) that the doctrine does not apply to acts of state which violate international law, as is claimed to be the case here; (2) that the doctrine is inapplicable unless the Executive specifically interposes it in a particular case; and (3) that, in any event, the doctrine may not be invoked by a foreign government plaintiff in our courts.

Preliminarily, we discuss the foundations on which we deem the act of state doctrine to rest, and more particularly the question of whether state or federal law governs its application in a federal diversity case.

We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, see Underhill, supra; American Banana, supra; Oetjen, supra, or by some principle of international law. If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it. The refusal of one country to enforce the penal laws of another * * * is a typical example of an instance when a court will not entertain a cause of action arising in another jurisdiction. While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence.

That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering

decisions on the subject fail to follow the rule rigidly. No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments and apparently no claim has ever been raised before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation. If international law does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law. The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal. Although it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances. The Paquete Habana, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.

Despite the broad statement in Oetjen that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative * * * Departments," it cannot of course be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance." The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.

The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses 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 rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. Many commentators disagree with this view; they have striven by means of distinguishing and limiting past decisions and by advancing various considerations of policy to stimulate a narrowing of the apparent scope of the rule. Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

We could perhaps in this diversity action avoid the question of deciding whether federal or state law is applicable to this aspect of the litigation. New York has enunciated the act of state doctrine in terms that echo those of federal decisions decided during the reign of Swift v. Tyson, 16 Pet. 1. In Hatch v. Baez, 7 Hun. 596, 599 (N.Y.Sup.Ct.),

Underhill was foreshadowed by the words, "the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory." More recently, the Court of Appeals in Salimoff & Co. v. Standard Oil Co., has declared, "The courts of one independent government will not sit in judgment upon the validity of the acts of another done within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries." Thus our conclusions might well be the same whether we dealt with this problem as one of state law, see Erie R. Co. v. Tompkins, [supra].

However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided Erie R. Co. v. Tompkins. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were Erie extended to legal problems affecting international relations.[24] He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.

The Court in the pre-Erie act of state cases, although not burdened by the problem of the source of applicable law, used language sufficiently strong and broad-sweeping to suggest that state courts were not left free to develop their own doctrines (as they would have been had this Court merely been interpreting common law under Swift v. Tyson).

* * *

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the Bernstein case, for the political interest of this country may, as a result,

24. The Doctrine of Erie Railroad v. Tompkins Applied to International Law, 33 Am.J.Int'l L. 740 (1939).

be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.

* * *

The possible adverse consequences of a conclusion to the contrary of that implicit in these cases is highlighted by contrasting the practices of the political branch with the limitations of the judicial process in matters of this kind. Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able, either by bilateral or multilateral talks, by submission to the United Nations, or by the employment of economic and political sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country. Such decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. * * *

The dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law. If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law, would greatly strengthen

the bargaining hand of the other state with consequent detriment to American interests.

Even if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time, almost always well after the taking, when such an impact would be contrary to our national interest. Considerably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns. In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided.

* * *

Another serious consequence of the exception pressed by respondents would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade. If the attitude of the United States courts were unclear, one buying expropriated goods would not know if he could safely import them into this country. Even were takings known to be invalid, one would have difficulty determining after goods had changed hands several times whether the particular articles in question were the product of an ineffective state act.

Against the force of such considerations, we find respondents' countervailing arguments quite unpersuasive. Their basic contention is that United States courts could make a significant contribution to the growth of international law, a contribution whose importance, it is said, would be magnified by the relative paucity of decisional law by international bodies. But given the fluidity of present world conditions, the effectiveness of such a patchwork approach toward the formulation of an acceptable body of law concerning state responsibility for expropriations, is, to say the least, highly conjectural. Moreover, it rests upon the sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies.

* * *

Respondents claim that the economic pressure resulting from the proposed exception to the act of state doctrine will materially add to the protection of United States investors. We are not convinced, even assuming the relevance of this contention. * * *

It is suggested that if the act of state doctrine is applicable to violations of international law, it should only be so when the Executive Branch expressly stipulates that it does not wish the courts to pass on

the question of validity. We should be slow to reject the representations of the Government that such a reversal of the Bernstein principle would work serious inroads on the maximum effectiveness of United States diplomacy. Often the State Department will wish to refrain from taking an official position particularly at a moment that would be dictated by the developing of private litigation but might be inopportune diplomatically. Adverse domestic consequences might flow from an official stand which could be assuaged, if at all, only by revealing matters best kept secret. Of course, a relevant consideration for the State Department would be the position contemplated in the court to hear the case. It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries. We do not now pass on the Bernstein exception, but even if it were deemed valid, its suggested extension is unwarranted.

However offensive to the public policy of this country and its constituent States an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.

* * *

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

Mr. Justice WHITE dissenting.

I am dismayed that the Court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases. I am also disappointed in the Court's declaration that the acts of a sovereign state with regard to the property of aliens within its borders are beyond the reach of international law in the courts of this country. However clearly established that law may be, a sovereign may violate it with impunity, except insofar as the political branches of the government may provide a remedy. This backward-looking doctrine, never before declared in this Court, is carried a disconcerting step further: not only are the courts powerless to question acts of state proscribed by international law but they are likewise powerless to refuse to adjudicate the claim founded upon a foreign law; they must render judgment and thereby validate the lawless act. Since the Court expressly extends its ruling to all acts of state expropriating property, however clearly inconsistent with the international community, all discriminatory expropriations of the property of aliens, as for example the taking of properties of persons belonging to certain races, religions or nationalities, are entitled to automatic validation in the courts of the United States. No other civilized country has found such a rigid rule necessary

for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts; and no other judiciary is apparently so incompetent to ascertain and apply international law.

I do not believe that the act of state doctrine as judicially fashioned in this Court, and the reasons underlying it, require American courts to decide cases in disregard of international law and of the rights of litigants to a full determination on the merits.

[The remaining text of Mr. Justice WHITE's extensive dissenting opinion is omitted.]

Notes & Questions: *How much of United States foreign affairs law is conclusively determinable only by the United States Supreme Court, despite the doctrine of Erie R.R. Co. v. Tompkins?* Students of federal courts law, admiralty, and conflicts of law will recognize the possibilities inherent in the breadth of the *Sabbatino* court's statement covering its holding that the act of state doctrine falls, even in diversity of citizenship cases, within the penumbra of federal interest, i.e. where the federal courts find or make law: "* * * [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community *must* be treated *exclusively* as an aspect of federal law." [Emphasis supplied.] This statement is certainly sufficient to cover all the concerns about the *Erie* decision that Jessup had in mind in his 1939 article, cited in the court's note 24. Additionally it could serve to expand the authority of the federal courts to declare the rules governing private rights and duties in a variety of international transactions. The trend has been for the Supreme Court to enlarge the sectors of federal interest in which, even in diversity cases, the federal courts make or find or create rules. This occurs even where there is no specific federal statutory norm. The same phenomenon is occurring in the continual development of the general maritime law which governs even in state court proceedings.

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1. THE UNITED STATES SUPREME COURT POST-SABBATINO APPLICATION OF THE ACT OF STATE DOCTRINE

* * *

ALFRED DUNHILL OF LONDON, INC. v. REPUBLIC OF CUBA

United States Supreme Court, 1976.
425 U.S. 682, 695, 96 S.Ct. 1854, 1861, 48 L.Ed.2d 301, 312.

[In his plurality decision, the Castro regime in Cuba, [on a sad day for U.S. citizens] nationalized the cigar manufacturing industry, which had been run by Cuban corporations owned almost entirely by Cuban nationals. Dunhill and other cigar importers had done business with the Cuban industry and continued to do so with the Castro intervenors placed in charge of cigar production and sales. The dispossessed owners, by then in the United States made claims for pre- and post-nationalization cigar sales and for trademark infringements by Dunhill and other importers of the American-registered trademarks. Dunhill and other importers, however, paid all accounts due to the intervenors. The importers and the dispossessed owners eventually resolved their differences, encouraged by the district and circuit court decisions in Dunhill's suit against the Cuban intervenors for the restitution to Dunhill of sums paid to them on account of pre-intervention sales. The Cuban government, however, refused to make restitution to Dunhill and, when sued, justified its action on act of state grounds. The circuit court held that the Cuban Government's repudiation of the restitution obligation was an act of state. An opinion by Justice White, disagreeing with this conclusion, argued that the activity was commercial, not sovereign. Three other justices agreed with him. Justice Powell concurred in the result but strongly rejected the view that great weight should be given to the views of the executive branch as to whether an activity should fall on one side or another of the sovereignty line. Four justices dissented in toto, and Stevens, J. did not concur in Part III of the opinion given below.]

Mr. Justice WHITE:

III

If we assume with the Court of Appeals that the Cuban Government itself had purported to exercise sovereign power to confiscate the mistaken payments * * * and to repudiate intervenors' adjudicated obligation to return those funds, we are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities. Our cases have not yet gone so far, and we decline to expand their reach to the extent necessary to affirm the Court of Appeals. * * *

It is the position of the United States,[a] stated in an amicus brief * * * that * * * a line should be drawn in defining the outer limits of the act of state concept and that repudiations by a foreign sovereign of its commercial debts should not be considered to be acts of state beyond legal question in our courts. * * *

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a. The Court appended to its opinion at Appendix 1 a letter from the Legal Adviser, Department of State, to the Court of Appeals and incorporated in the government brief amicus referred to in the above text.

Questions. 1. In view of the divisions of viewpoints expressed by the justices, what is the precedential effect of Dunhill? What is its *holding?* Note that Justice White characterizes the quasi-contractual obligation to repay fashioned by the American courts below as "a purely commercial obligation." Is this convincing? If not as to this case, what about a clearly commercial breach of contract by a foreign state agency? What is a *"quasi-contract"* in domestic U.S. law? In international law? In "continental law?"

2. As to clearly commercial transactions, should the test for act of state be the same as it is for foreign state immunity under the Foreign Sovereign Immunities Act? Should the test of commercial versus sovereign conduct be the same in both situations? If "yes", should the courts make this judgment or should Congress, considering that the executive branch gratefully ceded such decisions in immunity cases to the Congress and to the courts (through the required interpretation of the FSIA)? Are there any arguments of importance that in some situations what is commercial under the FSIA may not be commercial under the act of state doctrine?

FIRST NATIONAL CITY BANK v. BANCO NACIONAL DE CUBA

United States Supreme Court, 1972.
406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466.

[The Bank refused to return to the depositor a surplus of collateral following satisfaction of a loan, on the ground that it was entitled to set off and/or counterclaim for the nationalization by the Castro regime of its branch in Cuba. A five to four majority reached the result that the act of state doctrine did not bar the Bank's action, but there was no agreement on the basis for this result. Three members of the Court, Rehnquist, J., the opinion-writer, Burger, C.J., and White, J., concurred, based upon the Bernstein letter from the Department of State, which expressed the view of the executive that the act of state doctrine should not apply. These three were willing to follow the executive branch lead, citing *Belmont* and *Curtiss–Wright* as authority for "the exclusive competence of the Executive Branch in the field of foreign affairs." Justice Douglas decided for the Bank on the ground that it was entitled to assert a counterclaim under National City Bank v. Republic of China, 348 U.S. 356 (1955). Powell, J. decided for the Bank on the grounds stated below. Four dissenting justices characterized the remand order as "anomalous."]

Mr. Justice POWELL, concurring in the judgment.

* * * While Banco Nacional de Cuba v. Sabbatino * * * technically reserves the question of the validity of the Bernstein exception, as Mr. Justice BRENNAN notes in his dissenting opinion, the reasoning of Sabbatino implicitly rejects that exception. *Moreover, I would be uncomfortable with a doctrine which would require the judiciary to receive the executive's permission before invoking its jurisdiction.* [Emphasis sup-

plied.] Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.

* * *

I nevertheless concur in the judgment of the Court because I believe that the broad holding of Sabbatino was not compelled by the principles, as expressed therein, which underlie the act of state doctrine. As Mr. Justice Harlan stated in Sabbatino, *the act of state doctrine is not dictated either by "international law [or] the Constitution," but is based on a judgment as to "the proper distribution of functions between the judicial and the political branches of the Government on matters bearing upon foreign affairs."* (emphasis added). Moreover, as noted in Sabbatino, there was no intention of "laying down or reaffirming an inflexible and all-encompassing rule. * * *."

* * * The balancing of interests, recognized as appropriate by Sabbatino, requires a careful examination of the facts in each case and of the position, if any, taken by the political branches of government. I do not agree, however, that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process.

Nor do I think the doctrine of separation of powers dictates such an abdication. To so argue is to assume that there is no such thing as international law but only international political disputes that can be resolved only by the exercise of power. * * *

* * *

Questions. 1. Is there evidence in the lower court precedents that a Bernstein letter exception exists? See discussion and cases in § 2, *infra*.

2. Justice Powell's rejection of executive domination of outcomes in act of state situations was repeated in the Dunhill decision, where he also concurred in the result in opposition to the application of the act of state doctrine. Where do you suppose Justice Powell would, under his judicial flexibility approach, be willing to apply the doctrine?

W.S. KIRKPATRICK & CO., INC. v. ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL

United States Supreme Court, 1990.
493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816.

Justice SCALIA delivered the opinion of the Court.

In this case we must decide whether the act of state doctrine bars a court in the United States from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act.

I

[Facts]: * * * In 1981, Harry Carpenter, who was then Chairman of the Board and Chief Executive Officer of petitioner W.S. Kirkpatrick & Co., Inc. (Kirkpatrick) learned that the Republic of Nigeria was interested in contracting for the construction and equipment of an aeromedical center at Kaduna Air Force Base in Nigeria. He made arrangements with Benson "Tunde" Akindele, a Nigerian citizen, whereby Akindele would endeavor to secure the contract for Kirkpatrick. It was agreed that, in the event the contract was awarded to Kirkpatrick, Kirkpatrick would pay to two Panamanian entities controlled by Akindele a "commission" equal to 20% of the contract price, which would in turn be given as a bribe to officials of the Nigerian Government. In accordance with this plan, the contract was awarded to petitioner W.S. Kirkpatrick & Co., International (Kirkpatrick International), a wholly owned subsidiary of Kirkpatrick; Kirkpatrick paid the promised "commission" to the appointed Panamanian entities; and those funds were disbursed as bribes. All parties agree that Nigerian law prohibits both the payment and the receipt of bribes in connection with the award of a government contract.

Respondent Environmental Tectonics, * * * an unsuccessful bidder for the Kaduna contract, learned of the 20% "commission" and brought the matter to the attention of the Nigerian Air Force and the United States Embassy in Lagos. Following an investigation by the Federal Bureau of Investigation, the United States Attorney for the District of New Jersey brought charges against both Kirkpatrick and Carpenter for violations of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 et seq., and both pleaded guilty.

Respondent then brought this civil action against Carpenter, Akindele, petitioners, and others, seeking damages under the Racketeer Influenced and Corrupt Organizations Act [RICO], 18 U.S.C. § 1961 et seq., the Robinson-Patman Act, 15 U.S.C. § 13 et seq., and the New Jersey Anti-Racketeering Act. The defendants moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the action was barred by the act of state doctrine.

The District Court, having requested and received a letter expressing the views of the legal advisor to the United States Department of State as to the applicability of the act of state doctrine, treated the motion as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and granted the motion. Environmental Tectonics v. Kirkpatrick, 659 F.Supp. 1381 (1987). The District Court concluded that the act of state doctrine applies "if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States." Applying that

principle to the facts at hand, the court held that respondent's suit had to be dismissed * * *

The Court of Appeals for the Third Circuit reversed. Although agreeing with the District Court that "the award of a military procurement contract can be, in certain circumstances, a sufficiently formal expression of a government's public interests to trigger application" of the act of state doctrine, it found application of the doctrine unwarranted on the facts of this case. The Court of Appeals found particularly persuasive the letter to the District Court from the legal advisor to the Department of State, which had stated that in the opinion of the Department judicial inquiry into the purpose behind the act of a foreign sovereign would not produce the "unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid." The Court * * * acknowledged that "the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts," but concluded that "the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect." In light of the Department's view that the interests of the Executive Branch would not be harmed by prosecution of the action, the Court of Appeals held that Kirkpatrick had not met its burden of showing that the case should not go forward; accordingly, it reversed the judgment of the District Court and remanded the case for trial. We granted certiorari.

II

This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon "the highest considerations of international comity and expediency," Oetjen v. Central Leather Co. We have more recently described it, however, as a consequence of domestic separation of powers, reflecting "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, Banco Nacional de Cuba v. Sabbatino. Some Justices have suggested possible exceptions to application of the doctrine, where one or both of the foregoing policies would seemingly not be served: an exception, for example, for acts of state that consist of commercial transactions, since neither modern international comity nor the current position of our Executive Branch accorded sovereign immunity to such acts, see *Alfred Dunhill of London,* (opinion of WHITE, J.), or an exception for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act, since then the courts would be impeding no foreign policy goals, see First National City Bank v. Banco Nacional de Cuba, (opinion of REHNQUIST, J.).

The parties have argued at length about the applicability of these possible exceptions, and, more generally, about whether the purpose of the act of state doctrine would be furthered by its application in this case. We find it unnecessary, however, to pursue those inquiries, since

the factual predicate for application of the act of state doctrine does not exist. Nothing in the present suit requires the court to declare invalid, and thus ineffective as "a rule of decision for the courts of this country," the official act of a foreign sovereign.

In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. In Underhill v. Hernandez, [supra], holding the defendant's detention of the plaintiff to be tortious would have required denying legal effect to "acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States." In Oetjen, supra, and in Ricaud, supra, denying title to the party who claimed through purchase from Mexico would have required declaring that government's prior seizure of the property, within its own territory, legally ineffective. See Oetjen, supra, Ricaud, supra. In *Sabbatino,* upholding the defendant's claim to the funds would have required a holding that Cuba's expropriation of goods located in Havana was null and void. In the present case, by contrast, neither the claim nor any asserted defense requires a determination that Nigeria's contract with Kirkpatrick International was, or was not, effective.

Petitioners point out, however, that the facts necessary to establish respondent's claim will also establish that the contract was unlawful. Specifically, they note that in order to prevail respondent must prove that petitioner Kirkpatrick made, and Nigerian officials received, payments that violate Nigerian law, which would, they assert, support a finding that the contract is invalid under Nigerian law. Assuming that to be true, it still does not suffice. The act of state doctrine is not some vague doctrine of abstention but a "principle of decision binding on federal and state courts alike." *Sabbatino,* supra, (emphasis added). As we said in *Ricaud,* "the act within its own boundaries of one sovereign State * * * becomes * * * a rule of decision for the courts of this country." Act of state issues only arise when a court *must decide* —that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. Cf. Sharon v. Time, Inc., ("The issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred").

In support of their position that the act of state doctrine bars any factual findings that may cast doubt upon the validity of foreign sovereign acts, petitioners cite Justice Holmes' opinion for the Court in American Banana Co. v. United Fruit Co., [supra]. That was a suit under the United States antitrust laws, alleging that Costa Rica's seizure of the plaintiff's property had been induced by an unlawful conspiracy. In the course of a lengthy opinion Justice Holmes observed, citing *Underhill,* that "a seizure by a state is not a thing that can be

complained of elsewhere in the courts." *Id.* The statement is concededly puzzling. *Underhill* does indeed stand for the proposition that a seizure by a state cannot be complained of elsewhere—in the sense of being sought to be declared *ineffective* elsewhere. The plaintiff in American Banana, however, like the plaintiff here, was not trying to undo or disregard the governmental action, but only to obtain damages from private parties who had procured it. Arguably, then, the statement did imply that suit would not lie if a foreign state's actions would be, though not invalidated, impugned.

Whatever Justice Holmes may have had in mind, his statement lends inadequate support to petitioners' position here, for two reasons. First, it was a brief aside, entirely unnecessary to the decision. American Banana was squarely decided on the ground (later substantially overruled, see Continental Ore Co. v. Union Carbide & Carbon Corp., that the antitrust laws had no extraterritorial application, so that "what the defendant did in Panama or Costa Rica is not within the scope of the statute." Second, whatever support the dictum might provide for petitioners' position is more than overcome by our later holding in United States v. Sisal Sales Corp. There we held that, *American Banana* notwithstanding, the defendant's actions in obtaining Mexico's enactment of "discriminating legislation" could form part of the basis for suit under the United States antitrust laws. Simply put, *American Banana* was not an act of state case; and whatever it said by way of dictum that might be relevant to the present case has not survived *Sisal Sales.*

Petitioners insist, however, that the policies underlying our act of state cases—international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations—are implicated in the present case because, as the District Court found, a determination that Nigerian officials demanded and accepted a bribe "would impugn or question the nobility of a foreign nation's motivations," and would "result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States." The United States, as *amicus curiae,* favors the same approach to the act of state doctrine, though disagreeing with petitioners as to the outcome it produces in the present case. We should not, the United States urges, "attach dispositive significance to the fact that this suit involves only the 'motivation' for, rather than the 'validity' of, a foreign sovereign act," and should eschew "any rigid formula for the resolution of act of state cases generally." In some future case, perhaps, "litigation * * * based on alleged corruption in the award of contracts or other commercially oriented activities of foreign governments could sufficiently touch on 'national nerves' that the act of state doctrine or related principles of abstention would appropriately be found to bar the suit," (quoting *Sabbatino*) and we should therefore resolve this case on the narrowest possible ground, viz., that the letter from the legal advisor to the District Court gives sufficient indication that, "in the setting of this case," the act of state doctrine poses no bar to adjudication, ibid.**

** Even if we agreed with the Government's fundamental approach, we would question its characterization of the legal advisor's letter as reflecting the absence of any policy objection to the adjudication. The letter, which is reprinted as an appendix to the opinion of the Court of Appeals, see 847 F.2d 1052, 1067–1069 (CA3 1988), did not purport to say whether the State Department would like the suit to proceed, but rather responded (correctly, as we hold today) to the question whether the act of state doctrine was applicable.

These urgings are deceptively similar to what we said in *Sabbatino,* where we observed that sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application. We suggested that a sort of balancing approach could be applied—the balance shifting against application of the doctrine, for example, if the government that committed the "challenged act of state" is no longer in existence. But what is appropriate in order to avoid unquestioning judicial acceptance of the acts of foreign sovereigns is not similarly appropriate for the quite opposite purpose of expanding judicial incapacities where such acts are not directly (or even *indirectly*) involved. It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine (or, as the United States puts it, unspecified "related principles of abstention") into new and uncharted fields.

The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.

The judgment of the Court of Appeals * * * is affirmed. *It is so ordered.*

Query: Some say that the act of state doctrine is in desuetude. It has long confounded international lawyers and the *Kirkpatrick case* has done nothing to provide guidance. Indeed, it has been argued that, since *Kirkpatrick,* the act of state doctrine cannot be understood in any coherent fashion. As you saw in Justice Scalia's terse opinion, the Court held that the act of state doctrine functions as a special "rule of decision" or special choice of law rule, which requires courts faced with challenges to apparently official acts of sovereign foreign governments, to apply the law of the latter state. *See,* Gregory H. Fox, *Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis,* 33 Harv.Int'l L.J. 521 (1992). Did Justice Scalia oversimplify? If so, does that invite further use by counsel for foreign states and agencies, who would otherwise not be immune from suit under the restrictive theories of the FSIA? Sovereign immunity is an important shield where applicable. When it is removed, however, defense of the foreign state falls back to

the *act of state* doctrine. Does Justice Scalia's opinion create enough incoherence on these issues to breed additional such use? Ambiguity may be the medium of good lawyers.

BILLY LAMB AND CARMON WILLIS v. PHILLIP MORRIS, INC. AND B.A.T.

United States Court of Appeals, Sixth Circuit, 1990.
915 F.2d 1024.

[This is an early post-*Kirkpatrick* opinion. The plaintiffs, tobacco importers, sued Phillip Morris, Inc. under the antitrust laws and the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 & 2. The latter was held inapplicable to a private claim; and the trial court's application of the Act of State doctrine to bar the suit was reversed. The excerpts below show the influence of *Kirkpatrick* toward narrowing the application of the doctrine.]

Although the act of state doctrine typically involves an assessment of "the likely impact on international relations that would result from judicial consideration of the foreign sovereign's act," Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 520–21 (2d Cir.), we must initially determine whether the defendants in this case have established the factual predicate for application of the act of state doctrine. Act of state analysis is not generally guided by "an inflexible and all-encompassing rule," see *Sabbatino* [supra]. The Supreme Court recently indicated [however,] that, as a threshold matter, "[a]ct of state issues only arise when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *Kirkpatrick* (emphasis omitted). Here, the defendants failed to make such a showing.

The defendants view Justice Holmes' discussion of the act of state doctrine in American Banana Co., *supra* (1909), as supportive of their position that the doctrine may be applied if a legal claim impugns the motivations of a foreign state. See also the *Clayco Petroleum Corp. case.* However, the Supreme Court's recent decision in *Kirkpatrick*—a case involving civil RICO and Robinson–Patman Act claims relating to a New Jersey corporation's bribery of Nigerian officials—undercuts their contention by explicitly eschewing the logic of *American Banana.* The Court explained in *Kirkpatrick*, the act of state doctrine in its present formulation "does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid." In reaching this conclusion and permitting the plaintiffs' claims to go forward, Justice Scalia's opinion for the unanimous Court held that the act of state doctrine *does not* "bar a court in the United States from entertaining a cause of action that * * * require[s] imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of * * * an official act."

Notes and Questions. *What has the Kirkpatrick Case settled as to the American version of the act of state doctrine?*

In the last paragraph of the above opinion, Justice Scalia, for a unanimous Court, compresses the decision into a pithy rule: "* * * the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid * * * *" Is this a rule absolute, or does it hide some uncertainties? Consider this issue from both the standpoints of a lawyer wanting to rely on the application in an American court of an Act of State, (a) as to a bar to a plaintiff's suit against a non-immune foreign state; (b) to avoid Justice Scalia's rule as a bar by limiting its scope. What questions come to mind?

Is there a commercial exception to the act of state? A commercial exception only if the act of state produces effects outside the acting state? Anywhere? In the United States? What is a "sovereign act?" "Deemed valid," for what purposes? What about the "balancing acts" in some Circuit Court decisions not reviewed by the Supreme Court? Is the Supreme Court in *Kirkpatrick* deliberately simplifying the Act of State doctrine as to applications? If so, why? What weight will now be given to a letter from the Department of State to the effect that in its opinion the foreign action was taken *ultra vires* by "down-the-line" (but honest) bureaucrats? What if congress should enact a law that acts taken by foreign sovereigns in their territory against Americans in violation of customary international law shall be deemed invalid in the United States?

Justice Scalia wrote the *Weltover* opinion also. (*See* Ch. 7, p. 596). Reread *Weltover.* Compare the following with both *Kirkpatrick* and *Weltover.* A Stanford graduate student fell in love while in the USSR and married Frilova, a Soviet citizen. She returned to the United States (the Chicago area) and found that the USSR would not give Frilova an exit visa. A human rights activist lawyer brought an action on her behalf against the USSR for loss of consortium. The USSR did not appear. Jurisdiction in Federal Court was posited on Foreign Sovereign Immunities Act § 1605(a)(5), the so-called "torts exception." The trial court's ruling on act of state follows:

FRILOVA v. UNION OF SOVIET SOCIALIST REPUBLICS

United States District Court, Northern District of Illinois, 1983.
558 F.Supp. 358.

The denial of immigration is a public act. Additionally, the tenor of the legislative history suggests that suits are to be allowed only for ordinary claims, such as contract or tort claims arising from the foreign states activities in the United States. This court believes that the consortium claim, which resulted from a public act, falls outside of this scope. The court need not, however, decide the FSIA issue as it finds that the act of state doctrine clearly requires dismissal.

THE ACT OF STATE DOCTRINE

The act of state doctrine was established in the 1897 case of Underhill v. Hernandez, [supra], in which the Supreme Court held that:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

In *Sabbatino,* [supra], the Court articulated the act of state doctrine's modern rationale. Justice Harlan, writing for a majority of eight, described the doctrine as one arising "out of the basic relationships between branches of government in a system of separation of powers." The act of state doctrine therefore reflects general concern about the competency of the judiciary to decide questions in the area of foreign relations—an area the Constitution commits primarily to the Executive Branch. In short, the act of state doctrine operates to preclude United States courts from ruling on the validity of foreign governmental acts so as not to hinder or embarrass the Executive Branch in its foreign policy endeavors.

The act of state doctrine was not abolished in *Dunhill* [supra], as plaintiff would have this court believe. That portion of the *Dunhill* opinion which commanded a majority of the Court held the Cuban government liable merely because no act of state was present.

The issue before the Court in *Dunhill* was whether certain acts by the Cuban government constituted acts of state immune from suit in United States courts. The disputed act was Cuba's refusal to return funds U.S. purchasers advanced for cigar shipments which were never delivered. The majority in *Dunhill* expressed no doubt as to the continuing validity of the act of state doctrine. It simply held the Cuban government liable for a purely commercial transaction because "nothing in the record [revealed] an act of state * * *."

Note: The continuing validity of the act of state doctrine was also recognized by the dissenting opinion: [T]he act of state doctrine reflects the notion that the validity of an act of a foreign sovereign is, under some circumstances, a "political question" not cognizable in our courts.

The Court of Appeals affirmed on the non-applicability of the FSIA provision, and found that it did not have to deal with the act of state issue. The litigation was directed generally toward the vindication of a claimed human right against a foreign state before an American court, under the FSIA, because the plaintiff, a United States citizen, was not eligible to claim under the "alien torts" provision of the Judicial Code, 28 U.S.C. § 1350. (*See,* Chapter 10). What if there had been judicial jurisdiction, either under the FSIA provision or 28 U.S.C. § 1350? Would act of state bar such a human rights claim in an American court? Does the "Rule in *Kirkpatrick's Case*" apply inexorably to a "nonliberal" state's denial of an exit visa to its national?

2. EXPRESSIONS OF EXECUTIVE BRANCH VIEWPOINTS ON THE APPLICABILITY OF THE ACT OF STATE DOCTRINE: A RESUME

Several Legal Advisers to the Department of State have addressed the courts through the Department of Justice in pending cases where the act of state doctrine had been pleaded. In 1949, regarding the second *Bernstein* case, the Department of State took the initiative, informing the circuit court that American occupation policy in Germany invalidated Nazi racist legal action and thus the courts should feel relieved from any constraint linked to the act of state doctrine. 20 Dept. of State Bull. 592, 1949. Justice Harlan's majority opinion in *Sabbatino* notes that the Supreme Court had "never had occasion to pass on the so-called *Bernstein* exception." In *Sabbatino* itself, the Department of State expressed the view that it did not wish to make any statement bearing on the litigation, as Justice Harlan noted. This disinclination may have links to the pre-Tate Letter State Department discomfiture with involvement in sovereign immunity cases. In any event, it continued throughout the Kennedy–Johnson years but was replaced thereafter by various efforts of the executive branch to preclude or limit the application of the act of state doctrine in cases involving foreign nationalizations of Americans' foreign investments.

The communication that follows, from a Reagan-era Legal Adviser, focuses explicitly on the so-called *treaty exception* to the act of state doctrine. It also expresses a broader, general opposition to the application of the act of state doctrine in nationalization cases. A preference for national court decisions on the merits in nationalization cases, except for such as the executive might not wish to have brought, was consistently expressed by Legal Advisers in the Nixon–Ford period. The views of the various groupings of justices in the Supreme Court as to the weight to be given such executive branch initiatives may be appraised with benefit in the light of this summary.

ACT OF STATE DOCTRINE: FOREIGN EXPROPRIATIONS

Letter of the Legal Adviser
United States Department of State Bulletin, January 1983, p. 70.

November 19, 1982

The Honorable Rex E. Lee, Solicitor General of the United States, Department of Justice

Dear Mr. Solicitor General:

The Department of State has requested that the views of the United States be submitted to the United States Court of Appeals for the Sixth Circuit in a case styled Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia. This case involves an appeal from a decision by the United States District Court for the

Western District of Michigan in which the District Court abstained from ruling on the merits of the suit because of the act of state doctrine. Two aspects of the decision are of concern to the Department of State—the Court's characterization of the Treaty of Amity and Economic Relations between the United States and Ethiopia as being too "general * * * and susceptible of multiple interpretation" to constitute an agreed legal standard capable of judicial application, and the significance attached by the Court to the absence of a "Bernstein letter" from this Department stating that adjudication would not be harmful to the conduct of foreign relations.

We have worked closely with the Department of Justice in the preparation of a brief to convey to the Court of Appeals the views of the Executive Branch as amicus curiae on these two issues of special concern. The brief sets forth the reasons why the treaty provides a precise, administrable and, by agreement, governing rule of law. The brief also sets forth, partially in reliance upon this letter, why the courts should not infer from the silence of the Department of State that adjudication in this case would be harmful to the foreign policy of the United States. Since the latter issue involves the inferences to be drawn by the courts generally from actions of this Department, I wish to make clear the practice that we intend to follow in cases like this.

As expressed in *Sabbatino*, the presumption that the courts should abstain from considering the expropriatory acts of foreign states appears to have reflected two major concerns of the Supreme Court. The first was that articulation by United States courts of an applicable international law standard for compensation would pose special difficulties, including a perceived risk of conflict with the Executive Branch's assertion of a governing legal standard in the conduct of foreign relations. The second of the Court's principal concerns was that adjudication could complicate the conduct of bilateral relations with the expropriating state—for example, by frustrating ongoing claims settlement negotiations between the two governments. Where, as in the present case, there is an applicable treaty standard, the first of these concerns falls away. The second concern—potential interference with ongoing claims negotiations or other foreign relations interests—does not, in our view, warrant automatic abstention by the courts on act of state grounds. As Legal Adviser Monroe Leigh wrote to the Solicitor General concerning foreign expropriations in 1975: In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. [Letter of November 25, 1975, reprinted at Appendix I to Alfred Dunhill v. Cuba, [supra].]

The experience of the past seven years has reinforced this conclusion. Accordingly, we believe that a broad, inflexible rule of abstention in expropriation cases is not necessary to safeguard our foreign policy interests. When, as in this case, there is a controlling legal standard for compensation, we believe that the presumption should be that adjudication would not be inconsistent with foreign policy interests under the act of state doctrine.

If, however, the Department of State determines in a given case that judicial abstention is necessary for foreign policy reasons, it will request the Department of Justice to communicate that determination to the appropriate court. Such a communication could be either in response to an inquiry from a court concerned about the foreign policy implications of the case before it or on the initiative of the Executive Branch. (Private litigants and foreign governments frequently bring cases to the attention of the Department of State which they believe raise Act of State concerns.) If we indicate that adjudication would be consistent with foreign policy interests of the United States, we trust that the court will give appropriate weight to our views. As a general rule, however, where there is a controlling legal standard for compensation we would not plan to inform the courts of the absence of foreign policy objectives to adjudication of expropriation claims. Therefore, we would anticipate that silence on the part of the Executive in such cases would not be relied upon as a basis for judicial abstention under the act of state doctrine.

Sincerely, Davis R. Robinson

Questions. In the last two paragraphs, what is the meaning of the phrase, "a controlling legal standard for compensation"? Where does it come from? Does it exist only if established by a controlling international agreement, or does it include a customary international law standard?

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3. PRE-KIRKPATRICK FEDERAL CIRCUIT COURT DECISIONS ON THE ACT OF STATE DOCTRINE NOT REVIEWED BY THE UNITED STATES SUPREME COURT

The act of state doctrine has figured more prominently in national court litigation than might be inferred from the number of cases reviewed by the United States Supreme Court. In fact, for over a decade the Supreme Court did not make a significant decision in this area. Thus, a full awareness of the doctrine's status and significance requires consideration of a selected number of intermediate-level federal court opinions read in the light of the *Kirkpatrick Case*.

INTERNATIONAL ASSOCIATION OF MACHINISTS v. OPEC

United States Court of Appeals, Ninth Circuit, 1981.
649 F.2d 1354.

CHOY, Circuit Judge:

I. Introduction

The members of the International Association of Machinists and Aerospace Workers (IAM) were disturbed by the high price of oil and petroleum-derived products in the United States. They believed the actions of the Organization of the Petroleum Exporting Countries, popularly known as OPEC, were the cause of this burden on the American public. Accordingly, IAM sued OPEC and its member nations in December of 1978, alleging that their price-setting activities violated United States anti-trust laws.

* * *

OPEC achieves its goals by a system of production limits and royalties which its members unanimously adopt. There is no enforcement arm of OPEC. The force behind OPEC decrees is the collective self-interest of the 13 nations.

After formation of OPEC, it is alleged, the price of crude oil increased tenfold and more. Whether or not a causal relation exists, there is no doubt that the price of oil has risen dramatically in recent years, and that this has become of international concern.

Supporters of OPEC argue that its actions result in fair world prices for oil, and allow OPEC members to achieve a measure of economic and political independence. Without OPEC, they say, in the rush to the marketplace these nations would rapidly deplete their only valuable resource for ridiculously low prices.

Detractors accuse OPEC of price fixing and worse in its deliberate manipulation of the world market and withholding of a resource which many world citizens have not learned to do without.

In December 1978, IAM brought suit against OPEC and its member nations. IAM's complaint alleged price fixing in violation of the Sherman Act, 15 U.S.C. § 1, and requested treble damages and injunctive relief under the Clayton Act, 15 U.S.C. §§ 15, 16. IAM claimed a deliberate targeting and victimization of the United States market, directly resulting in higher prices for Americans.

The defendants refused to recognize the jurisdiction of the district court, and they did not appear in the proceedings below. Their cause was argued by various amici, with additional information provided by court-appointed experts. The district court ordered a full hearing, noting that the Foreign Sovereign Immunities Act (FSIA) prohibits the entry of a default judgment against a foreign sovereignty "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e).

III. Discussion

* * *

B. The Act of State Doctrine

The act of state doctrine declares that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state. This doctrine was expressed by the Supreme Court in Underhill v. Hernandez, [supra]. "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." The doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy.

* * *

The principle of separation of powers is central to our form of democratic government. Just as the courts have carefully guarded their primary role as interpreters of the Constitution and the laws of the United States, so have they recognized the primary role of the President and Congress in resolution of political conflict and the adoption of foreign policy. Compare Marbury v. Madison, 5 U.S. 137 (Cranch 1803); Baker v. Carr, 369 U.S. 186 (1962); Sabbatino, [supra].

The doctrine of sovereign immunity is similar to the act of state doctrine in that it also represents the need to respect the sovereignty of foreign states. The two doctrines differ, however, in significant respects. The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional. Rather, it is a prudential doctrine designed to avoid judicial action in sensitive areas. Sovereign immunity is a principle of international law, recognized in the United States by statute. It is the states themselves, as defendants, who may claim sovereign immunity. The act of state doctrine is a domestic legal principle, arising from the peculiar role of American courts. It recognizes not only the sovereignty of foreign states, but also the spheres of power of the co-equal branches of our government. Thus a private litigant may raise the act of state doctrine, even when no sovereign state is a party to the action.

* * *

The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity. While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations. As the district court noted, OPEC's "price-fixing" activity has a significant sovereign component. While the FSIA ignores the underlying purpose of a state's action, the act of state doctrine does not. This court has stated that the motivations of the sovereign must be examined for a public interest basis. *Timberlane,* [supra]. When the state qua state acts in the public interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty. Because the act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, we find that the

act of state doctrine remains available when such caution is appropriate, regardless of any commercial component of the activity involved.

* * *

This court has stated: "we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of Sabbatino, 'the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.' Id. (citations omitted.)" There is no question that the availability of oil has become a significant factor in international relations. The growing world energy crisis has been judicially recognized in other cases. * * * The record in this case contains extensive documentation of the involvement of our executive and legislative branches with the oil question. IAM does not dispute that the United States has a grave interest in the petro-politics of the Middle East, or that the foreign policy arms of the executive and legislative branches are intimately involved in this sensitive area. It is clear that OPEC and its activities are carefully considered in the formulation of American foreign policy.

The remedy IAM seeks is an injunction against the OPEC nations. The possibility of insult to the OPEC states and of interference with the efforts of the political branches to seek favorable relations with them is apparent from the very nature of this action and the remedy sought. While the case is formulated as an anti-trust action, the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources. On the other hand, should the court hold that OPEC's actions are legal, this "would greatly strengthen the bargaining hand" of the OPEC nations in the event that Congress or the executive chooses to condemn OPEC's actions.

A further consideration is the availability of internationally-accepted legal principles which would render the issues appropriate for judicial disposition. As the Supreme Court stated in Sabbatino,

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. 376 U.S. at 428.

While conspiracies in restraint of trade are clearly illegal under domestic law, the record reveals no international consensus condemning cartels, royalties, and production agreements. The United States and other nations have supported the principle of supreme state sovereignty over natural resources. The OPEC nations themselves obviously will not agree that their actions are illegal. We are reluctant to allow judicial interference in an area so void of international consensus. An injunction against OPEC's alleged price-fixing activity would require condemnation of a cartel system which the community of nations has thus far been unwilling to denounce. The admonition in Sabbatino that the courts should consider the degree of codification and consensus in the area of law is another indication that judicial action is inappropriate here.

* * *

IV. Conclusion

The act of state doctrine is applicable in this case. The courts should not enter at the will of litigants into a delicate area of foreign policy which the executive and legislative branches have chosen to approach with restraint.

* * *

Questions. In the *Dunhill* case (supra, p. 636) White, J. (and those concurring in his opinion) attempted to develop a "purely commercial obligation" exception to the act of state doctrine, on the ground, inter alia, of desirable parallelism with the FSIA. Is the Ninth Circuit in the suit against OPEC disagreeing with the White approach or finding that whatever might have been the result under FSIA, activity of the OPEC states is not "purely commercial"? At what point do state buy-sell-trade-financial activities cease to be "purely commercial"?

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4. THE CIRCUIT COURTS' BALANCING METHODOLOGY: WHAT IS BEING BALANCED? WHEN?

The *Sabbatino* majority opinion contains language against inflexibility in the application of the act of state doctrine. Some justices, notably White and Powell, limited themselves to an examination of each situation on its own facts. This approach and Justice Powell's insistence upon judicial independence in decisions as to the applicability of the act of state doctrine, seem to be the bases for any balancing process to determine whether to apply the act of state doctrine. The Supreme Court has not specifically reviewed any lower court approaches.

In 1987, the date of the previous edition of this book, litigation emphasis regarding act of state, however, had shifted away from the effort to remove the doctrine as a barrier to the enforcement of an American version of customary international law about nationalizations. This was accomplished either by ruling out act of state entirely in nationalization cases (as failed ultimately in Sabbatino) or by limiting its application through the development of various exceptions: the categories: "purely commercial" activity; the Bernstein Letter; and treaty exceptions. A case to case relativism now exists. This may be provisional. Many questions about this balancing approach are still open, if it survives *Kirkpatrick:* (i) Does the balancing approach eliminate the

precedents as to this or that exception? (ii) What factors are being weighed? (iii) What weight does each factor have? (iv) In application, does balancing result in outcomes more or less favorable to the application of the act of state doctrine than earlier approaches? (v) What is the true American version of the act of state doctrine today? (vi) Is the act of state doctrine evolving toward a forum-controlled choice of law process where two or more states have some degree of public (regulatory) law interest?

There should not be any more decisions on the question whether the imposition of foreign exchange control by a state is an act of state that stops American proceedings, for the courts have made it clear that the doctrine applies. There continue to be cases in which plaintiffs claim against non-state parties that they conspired with a foreign state, which then acted in a state-like way to plaintiff's detriment, either in tort or under antitrust law.

SECTION B. CONGRESS AND THE ACT OF STATE DOCTRINE

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1. ***A few paragraphs of history.*** Various interests concerned about nationalizations of direct foreign investment, and others hoping to reduce or prevent even legal nationalizations combined immediately after the decision by the Supreme Court in *Sabbatino* to add a second anti-nationalization provision to the Foreign Assistance [AID] Act. A key congressional figure in the drive was the late senator whose name is given to the Hickenlooper amendments.

The first Hickenlooper Amendment mandated that the President cut off development assistance to any country that did not (within a time frame for reassessment) conform as to Americans' investments to the international minimum standard for nationalizations asserted by the United States [refer to Chapter 15–B].

Shortly after the remand of the *Sabbatino case* for disposition in conformity with the Supreme Court decision, Congress enacted the second Hickenlooper Amendment.

FOREIGN ASSISTANCE ACT

22 U.S.C. § 2370.

* * *

(e)(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law [according to the standards set by Congress]: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

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1. ***Retroactive application to include the nationalization in* Sabbatino.** January 1, 1959 was the date that Fidel Castro occupied Havana. His regime was almost immediately recognized by the United States as the Government of Cuba. Both the United States Government and the American people were happy that the dictator Batista had been toppled. But attitudes soon changed. Castro was prickly and anti-American. His midnight trials and firing squad executions seen on American TV shocked American viewers. An exasperated Congress suspended the Cuban sugar quota in the price-supported American sugar market. The sugar quota dollars were, and long had been, Cuba's principal source of hard currency foreign exchange. Castro's responses were (i) to issue the nationalization decree involved in *Sabbatino* and (ii) to turn to the Soviet Union. Later he declared that he had always been a Communist, a statement that as to its truth still divides experts on Cuba. By the time the second Hickenlooper Amendment was enacted, the Cuban–American cold war was in full swing. Probably this explains why the amendment was rolled back to the beginning of the Castro regime, i.e. January 1, 1959.

2. ***The second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), held not to violate separation of powers or other constitutional requirements.*** The Supreme Court let stand the decision of the Second Circuit Court of Appeals to the above effect in *Banco Nacional de Cuba v. Farr, Whitlock [supra].* In deciding the *Farr, Whitlock case* the Court of Appeals reiterated its earlier holding in *Sabbatino* that the taking by Cuba had violated customary international law, an issue that the Supreme Court did not reach in its *Sabbatino* decision, because of its holding that the act of state doctrine precluded decision on the merits. As a result, the denial of certiorari in *Farr, Whitlock* also let stand the consequence of the Court of Appeals decision in *Sabbatino,* that the violation of international law by the act of nationalization authorized the remedy of invalidation of title to the property (and its produce) sought to have been nationalized. Also, in

Farr, Whitlock the Court of Appeals found nothing constitutionally wrong with the application to the same real parties and the same cause of action of the intervening second Hickenlooper Amendment. This Amendment was enacted after the Supreme Court remanded the *Sabbatino case*; it was explained in a Senate report as being legislation designed "to reverse in part the recent *[Sabbatino]* decision of the Supreme Court". In fact, the Court of Appeals quoted this report in support of its decision in *Farr, Whitlock*.

In the United Kingdom an act of Parliament overrules a final judgment of the highest court in the land. *Is this possible also under the Constitution of the United States*? Normally it is not. Should the issue of valid or invalid retroactive application of the second Hickenlooper Amendment turn on the legal effect of the Supreme Court's remand order? Did the successful parties in the Sabbatino case have a vested right in the decision in their favor on the act of state doctrine? Or, did the remand leave the case open as if not previously decided, so as to be reachable legally by the later enacted second Hickenlooper Amendment?

SECTION C. THE SECOND HICKENLOOPER AMENDMENT IN THE COURTS

Approach. Re-read 22 U.S.C. § 2370(e)(2), supra. What resorts to the otherwise applicable act of state doctrine does Congress exclude from the jurisdiction of courts in the United States? What is a "claim of title"? Title to what? All economic interests? Property interests? What kinds of property interests? The first case that follows was chosen because it is unusual in that the final decision on the meaning of (e)(2) is left to a state supreme court. The majority of that court gave a narrow interpretation to the statutory provision. On what authority? Why?

HUNT v. COASTAL STATES GAS PRODUCING CO.

United States Supreme Court of Texas, 1979.
583 S.W.2d 322

BARROW, Justice.

This suit was instituted by Nelson Bunker Hunt, Herbert Hunt and Lamar Hunt (Hunt) seeking damages against Coastal States Gas Producing Company and Coastal States Marketing, Inc. (Coastal States) for the alleged conversion of oil to which Hunt was entitled by virtue of a concession agreement with Libya. Coastal States counterclaimed for damages for Hunt's allegedly tortious interference with the contract and business opportunities of Coastal States. Both parties moved for summary judgment on the issue of liability after extensive development of the case. The trial court denied relief on all claims and the court of civil appeals affirmed. We affirm the judgment of the court of civil appeals.

In 1957 the Government of Libya granted Hunt a concession which gave him the right, for fifty years, to explore, drill and extract oil in an area now identified as the Sarir field. Hunt assigned a one-half undivided interest in this concession to (British Petroleum) in 1960. Oil was discovered in the concession area in 1961 and, by 1967, it was produced in marketable quantities. In September 1969, Colonel Mu'ammar al-Qadhafi assumed power in Libya under a new government, the Revolutionary Command Council, and commenced making changes in the existing contractual relations with the various oil producers holding concession agreements with Libya. In 1971, the Libyan Government nationalized the operations and interest of British Petroleum in the Sarir field and transferred its rights to the Arabian Gulf Exploration Company (AGECO). AGECO is a corporation whose entire capital stock is owned by the Libyan Government.

On June 20, 1973, by Libyan Law No. 42 of 1973, the Libyan Government nationalized all the rights and assets of Hunt in the concession agreement and assigned these rights to AGECO. Although Libya agreed to pay compensation, the amount was to be determined by a committee designated by the State. In response to this action, Hunt published notices in newspapers throughout the world claiming that the Libyan nationalization violated international law and threatened suit against anyone who came into possession of Sarir oil. In May 1973, Coastal States entered into a contract with AGECO to purchase oil from the Sarir field and it continued to purchase oil under this contract despite Hunt's claims against Libya and threatened suits. This oil was transported by Coastal States to a refinery in Italy where it was processed and sold to third parties. It was stipulated that a portion of the products derived from this oil was subsequently taken to the United States, although it was not stipulated that Coastal States transported or caused any of such products to be brought here. Nevertheless, Coastal States is domiciled in the United States and, at least, the net proceeds derived from the Sarir oil were brought here and are the basis of Hunt's suit for conversion.

British Petroleum was a party to the controversy with Coastal States at one time, but it subsequently entered into a full settlement with the Libyan Government after arbitration of its claim and it does not now assert any claim against Coastal States.[1] In May 1975 Hunt entered into a settlement agreement with the Libyan Government whereby, for the sum of approximately $19,000,000, it released any and all claims against the Libyan Government arising out of the nationalization of the Sarir field. Coastal States was not a party to this agreement and Hunt now seeks to recover the proceeds realized by Coastal States from oil allegedly purchased from AGECO prior to the May 1975 settlement.

Both the trial court and the court of civil appeals concluded that the trial court was foreclosed from inquiring into the validity of the Libyan nationalization of Hunt's interest in the Sarir field by the Act of State Doctrine. These courts further concluded that as a matter of law,

1. The arbitrator held that Hunt did not acquire title to the oil in the strata.

Hunt's actions in giving notice of his claim to oil from the Sarir field did not violate either state or federal law and would not support Coastal States' claim for damages for tortious interference. Hunt and Coastal States both filed applications for writ of error and complain of the take-nothing judgment entered on the claim of each.

Appeal by Hunt

Hunt's claim against Coastal States is necessarily based upon the assertion that Libya's expropriation was invalid so that Coastal States acquired no title from AGECO. The critical question involved in Hunt's appeal is the applicability of the Act of State Doctrine and more precisely, whether Hunt's suit comes within the exception to the doctrine created by the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2). The lower courts have held that the doctrine bars inquiry by a Texas court into the validity of acts done by a foreign sovereign.

The Act of State Doctrine is a judicially created doctrine of restraint. The landmark case of *Sabbatino* (1964), reaffirmed the doctrine as originally articulated in *Underhill v. Hernandez*, in the following language:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

In Sabbatino it was stated that the doctrine "arises out of the basic relationships between branches of government in a system of separation" and the court's prior recognition of the doctrine "expresses 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 rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."

In Hunt v. Mobil Oil Corp., the Act of State Doctrine was held to bar Hunt's inquiry into the validity of Libya's nationalization of Hunt's concession. In holding that the trial court properly dismissed Hunt's claim against seven major oil producers in the Persian Gulf area for damages under the anti-trust statute, the circuit court said: "We conclude that the political act complained of here was clearly within the act of state doctrine and that since the disputed pleadings inevitably call for a judgment on the sovereign acts of Libya the claim is non-justiciable." This final judgment against Hunt in that case controls his present suit for conversion unless it comes within the exception to the Act of State Doctrine created by the Hickenlooper Amendment.

The Hickenlooper Amendment was enacted by Congress in 1964 shortly after the Sabbatino holding and in obvious reaction to it. It provides in part: "[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a *claim of title or other right to property* is asserted by any party

including a foreign state * * * based upon (or traced through) a confiscation or other taking * * * by an act of that state in violation of the principles of international law * * *." (Emphasis Added) It must be recognized at the outset that this exception which was adopted over the objections of the Executive Department of the United States has been narrowly construed by our courts.

The statute enumerates three requirements which must exist in order to avoid the act of state doctrine under the Hickenlooper Amendment. 1. Expropriated property must come within the territorial jurisdiction of the United States. 2. The act of the expropriating nation must be in violation of international law. 3. The asserted claim must be a claim of title or other right to property. 22 U.S.C. § 2370(e)(2). The court of civil appeals concluded, without consideration of the first two requirements, that the Hickenlooper Amendment is not applicable to this case because Hunt acquired only a contract right by the agreement with Libya. We agree with this conclusion and therefore limit our consideration to the third requirement stated above.

Since Libya is both the place of the contract's execution and performance as well as the location of the subject matter, Libyan substantive law governs the interpretation and construction of the rights conferred to Hunt by the Concession Agreement. The Concession Agreement expressly provides that the applicable law is the Libyan Petroleum Law No. 25 of 1955 and this law provides: (1) All petroleum in Libya in its natural state in strata is the property of the Libyan State. (2) No person shall explore or prospect for, mine or produce petroleum in any part of Libya, unless authorized by a permit or concession issued under this Law.

The expressed intent of the Concession Agreement was to grant Hunt the *right* to search for and to extract oil within the defined area for the stated term. It did not grant Hunt title to the oil in the strata. Under Libyan law title to the oil passed at the wellhead. In 1966 Hunt and Libya voluntarily amended the 1957 Concession Agreement. Clause 16 of the amended agreement states:

> (1) The Government of Libya will take all the steps necessary to ensure that the Company enjoys all the rights conferred by the Concession. The *contractual rights* expressly created by this concession shall not be altered except by mutual consent of the parties.
>
> (2) This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of the execution of the agreement of amendment by which this paragraph (2) was incorporated into this concession agreement. Any amendment to or repeal of such Regulations shall not affect the *contractual rights* of the Company without its consent. (Emphasis added)

This language is significant in that it not only refers to Hunt's rights as "contractual," but it also recognizes Libya's ownership of the oil. We conclude that Hunt obtained only a contractual right under the Concession Agreement.

The Hickenlooper Amendment by its express terms applies only to a claim of title or other right to property. This construction was made abundantly clear in 1965 when Congress added the words "to property" following the phrase "claim of title or other right." Thus this exception to the act of state doctrine has no application here where only a contractual right was expropriated from Hunt. We have been cited to no case, and have discovered no case, holding to the contrary. The trial court and the court of civil appeals did not err in concluding that the act of state doctrine bars judicial inquiry into the validity of Libya's actions.

Appeal by Coastal States

We agree with the holding of the court of civil appeals that Hunt's motion for summary judgment was properly granted on Coastal States' claim of tortious interference with business contracts and business relations. Hunt's contractual rights in the Sarir field were expropriated by Libya and Hunt was fully justified in apprising the international community of his intent to file suit if they dealt with oil from this field.

The judgment of the court of civil appeals is affirmed.

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1. ***The Hunts' legal actions involving oil from Libya.*** The revolutionary regime that deposed the King of Libya cancelled the Hunt brothers' concessions from the latter. The efforts of the brothers to reach all parties possibly involved against their interests in oil from Libya have become litigation legend. Here you observe a post-nationalization hot oil suit against a purchaser of oil from the Hunts' concessions that were taken over by the revolutionary regime. In Chapter 15, you will consider two arbitral awards dealing with the Hunts' claims that the revolutionary regime must respect the concession rights granted them by the King. In other litigation the Hunt brothers have sued certain major American oil companies on theories of conspiracies with the revolutionary regime that, as to the majors, were claimed to violate the plaintiffs' rights under the antitrust laws of the United States.

2. ***Equivalent to property in nationalization situations.*** Suppose that under customary international law an oil concession cancellation does not give rise to a state obligation to compensate, but that under a national version of international law such cancellations are equivalent to a taking of property: how should a statute such as the second Hickenlooper Amendment be applied by an American court? Those who induced Congress to pass the amendment assumed that oil concessions were within the ambit of protection from application of the act of state doctrine. Inasmuch as Congress did so assume, why should the courts cut back on the statute? Which is the more dubious assumption: (i) that customary international law gives standing and remedies to private parties if they sue in national courts, even if they have no standing or direct remedies in international tribunals, or (ii) that a concession contract—or an arrangement to operate a foreign oil industry for a share of the profits (management-service contract)—is equivalent to property under the second Hickenlooper Amendment? If the first assumption is the more dubious but is applied when act of state doctrine does not stop the proceeding, why not the less dubious?

WEST v. MULTIBANCO COMERMEX, S.A.

United States Court of Appeals, Ninth Circuit, 1987.
807 F.2d 820, 829–30.

[A group of American investors in dollar and Mexican peso certificates of deposit sue the issuing Mexican banks for payment at face value, even though the banks have been turned over to governmental interventors (a type of nationalization) and the Mexican foreign exchange controls permit payments only under license and fix an unfavorable rate of exchange for permitted transfers. The act of state doctrine is one defense put forward; the plaintiffs respond with the second Hickenlooper Amendment. Thereupon the defendants argue that the second Hickenlooper Amendment does not apply to certificates of deposit.]

REINHARDT, Circuit Judge.

* * *

Defendants argue that Hickenlooper is inapplicable because rights arising out of ownership of certificates of deposit are contractual, and hence not "tangible property" which can be taken by expropriation within the meaning of the amendment. Although this proposition finds support in case law, e.g. French v. Banco Nacional de Cuba, 242 N.E.2d 704 (1968), it is based largely upon an overly formalistic attachment to private law categories and is contrary to the motivating policies of the Hickenlooper Amendment.

Defendants' construction would unnecessarily restrict the scope of Hickenlooper. As the District of Columbia Circuit has noted, the "broad, unqualified language of the carefully drafted amendment" should not be undermined by the importation of external constraints on interpretation. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1542 n. 180 (D.C.Cir.1984) (en banc), vacated and remanded because of subsequent legislation. The legislative history to Hickenlooper supports the rejection of a constricted interpretation and makes it clear that the protection afforded U.S. investments was to be broad in scope:

> The sponsors of the amendment referred to it as the "Rule of Law" amendment; they viewed it as authorizing courts to apply established law [in] suits challenging expropriations. Congressional intent to overturn Sabbatino was never limited to a single narrow class of cases. The purposes of the amendment include the promotion and protection of United States investment in foreign countries (which characteristically has always principally been land, minerals, and large fixed immovables), and securing the right of a property holder to a court hearing on the merits.

Moreover, the tangible/intangible characterization of property interests, urged by the defendants, is a distinction without a difference. This

distinction is not generally recognized in international, federal, or state law.

Although the certificates of deposit may be characterized as intangible property or contracts, they are "property interests" that are protected under international law from expropriation. For example, in its adjudication of disputes involving claims for compensation for alleged takings of property—bank deposits in Czechoslovakia—the Foreign Claims Settlement Commission observed that while "[t]he relationship between a depositor and bank arises only out of contract[,] * * * a contract right is property." The Commission ruled that the "right to payment of [a] deposit is regarded as 'property' and provides a basis for an expropriation claim. Here, we have citizens who purchased certificates of deposit." Such contracts are properly understood as investments and are therefore the type of "property" that Hickenlooper sought to protect.

In sum, the rights arising from a certificate of deposit are "rights to property" capable of being expropriated by foreign states under international law within the meaning of Hickenlooper. We reject the construction suggested by the defendants and hold that the "tangibleness" of property is not the dispositive factor. Accordingly, the amendment is applicable * * *.

Question. The plaintiffs lost anyway. The court held that foreign exchange control losses are not "takings." So, why did the court belabor the scope of the second Hickenlooper issue?

SECTION D. SIMILAR RESULTS IN OTHER LEGAL SYSTEMS

BUTTES GAS AND OIL COMPANY v. HAMMER

United Kingdom, House of Lords, 1981.
[1981] 3 All E.R. 616.*

[Two California oil companies quarreled about oil concession rights in the waters surrounding a small island in the Gulf of Arabia governed by the sovereign of a minor Arab emirate (Sharjah). Armand Hammer, holder of the commanding position in the Occidental Petroleum Company, at a press conference in London, accused the Buttes Gas and Oil Company of colluding with the then ruler of Sharjah to backdate a decree of that ruler extending the territorial waters of Sharjah around the island from 3 to 12 miles, to the detriment of Occidental. The Occidental–Buttes feud is as classic as that of the Hunt brothers against certain major oil companies in Libya.

* Reprinted with the permission of Butterworth's, London.

Buttes sued Occidental and Dr. Hammer personally in the United Kingdom, under a long-arm statute, for slander. The defendants pleaded truth as a defense, and Buttes responded that British courts could not examine the conduct of the ruler of Sharjah, as to his conduct regarding acts taken by him in his own territory, especially as to property interests therein. The Court of Appeal agreed that Occidental's defense should be considered on the merits. The Master of the Rolls (Lord Denning) rejected what he called a "second" American version of act of state, because it was "ill-defined in English law" and not as extensively applicable as in the United States. (A "first" version of the act of state doctrine, as explained in the introductory note to this chapter, would be in Britain the principle that a minister of the Crown cannot be held to answer within the realm for ministerial action outside the realm.) Roskill, L.J., reached the same result, but on the ground that the judicial power to strike a defense for collateral reasons should be used only sparingly, in very clear cases. In the House of Lords, Buttes continued its reliance on the second American version of the act of state doctrine. The House of Lords agreed with Buttes in the following terms.]

LORD WILBERFORCE.

* * *

So I think that the essential question is whether, apart from such particular rules as I have discussed, established by [cases cited], there exists in English law a more general principle that the courts will not adjudicate on the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of act of state but one for judicial restraint or abstention. The respondents' argument was that although there may have been traces of such a general principle, it has now been crystallised into particular rules (such as those I have mentioned) within one of which the appellants must bring the case, or fail. The Nile, once separated into a multi-channel delta, cannot be reconstituted.

In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the USA, which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process. The first trace of it is in the seventeenth century in Blad's Case.

* * *

More clearly as a recognition of a general principle is Duke of Brunswick v. King of Hanover (1844), a case in this House which is still authoritative and which has influenced the law both here and overseas. There are two elements in the case, not always clearly separated, that of sovereign immunity ratione personae, and that of immunity from jurisdiction ratione materiae; it is the second that is relevant. I find the principle clearly stated that the courts in England will not adjudicate on acts done abroad by virtue of sovereign authority. Thus Lord Cottenham LC states the question, quite apart from any personal immunity, as

being whether the courts of this country can "sit in judgment" on the act of a sovereign, effected by virtue of his sovereign authority abroad. His decision is conveyed in the words: "It is true, the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but, notwithstanding that it is so stated, still if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it." And he continues by distinguishing cases of private rights (cf. Aksionairnove Obschestvo Luther v. Sagor & Co.): If it were a private transaction * * * then the law upon which the rights of individuals may depend, might have been a matter of fact to have been inquired into * * *. But * * * if it be a matter of sovereign authority, we cannot try the fact whether it be right or wrong.

Lord Campbell is still more definite. The question he says is "as to the validity of an act of sovereignty", and he expresses the view that even if the Duke of Cambridge (i.e., not the sovereign) had been sued, "it would equally have been a matter of state".

It is justly said of this case, and of their Lordships' observations, that they are directed to the question whether a sovereign can be brought to account in this country in respect of sovereign acts, and that such general phrases as "sitting in judgment on", "inquiring into", "entertaining questions" must be read in their context. I agree that these phrases are not to be used without circumspection; the nature of the judgment or inquiry or entertainment must be carefully analysed. It is also to be noted that the acts in question were performed within the territory of the sovereign concerned (reliance is placed on this in some passages); an argument on this I have already dealt with. These qualifications accepted, the case is nevertheless supported, no doubt by reference to the issue in dispute, for a principle of non-justiciability by the English courts of a certain class of sovereign acts.

* * *

The constitutional position and the relationship between the executive and the judiciary in the United States is neither identical with our own nor in itself constant. Moreover the passages which I have cited lay emphasis on the "foreign relations" aspect of the matter which appeared important to the United States at the time. These matters I have no wish to overlook or minimise. I appreciate also the argument of counsel for Occidental that no indication has been given that Her Majesty's government would be embarrassed by the court entering on these issues. But, the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, on an appreciation of the nature and limits of the judicial function. This has clearly received the consideration of the United States courts. When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours, but that to which all the parties before us belong, spelt out moreover in convincing language and reasoning, we should be unwise not to take the benefit of it.

* * *

And thus farewell to the Rose Mary! In 1953, the Supreme Court of the then British protectorate of Aden held that the Iranian nationalization of the Anglo–Iranian Oil Company did not divest title to oil subsequently produced in Iran, despite its sale to a purchaser for value in international commerce. Anglo–Iranian Oil Co. Ltd. v. Jaffrate (The Rose Mary), 20 International Law Reports 316 (1957). Although civil law courts in Italy and Japan refused to follow suit, The Rose Mary spawned numerous "pursuit of the product" litigations involving sugar, tobacco, copper ore, and of course, petroleum. In the Buttes decision, followed with a strong ruling against foreign review of title to property nationalized at its situs, *Rumasa, S.A. v. Multinvest (UK) Ltd.* [1986] 1 All ER 129, the Aden court's decision, ignoring act of state, has been rejected by Anglo-Commonwealth law.

ANGLO–IRANIAN OIL CO. LTD. v. S.U.P.O.R. CO.

Italy, Court of Venice, 1953.
22 Int'l L.Rep. 19 (1958).*

The Facts: The respondent Company had purchased in Persia certain oil which was shipped in the Miriella from Abadan and lay in store in Venice. The Anglo–Iranian Oil Company (A.I.O.C.) claimed the oil on the ground that the Persian Law of May 1, 1951, nationalizing the petroleum industry had not affected the ownership of A.I.O.C. in this particular cargo of oil and that in any event the Oil Nationalization Law could not properly be enforced by an Italian court as it violated the principles of Italian "public order". The A.I.O.C. applied for "judicial sequestration" [an order for interim custody] of the oil pending the hearing of their claim. S.U.P.O.R. objected on the ground that for the Court to grant such an order would amount to prejudging the substantive claim and so to "annulling" the law of a foreign sovereign State, namely, the Persian Oil Nationalization Law.

Held: that the application must fail. Although the respondents were in error in contending that the Court had no power to examine, and if necessary to refuse to apply, the law of a foreign State, on the merits of the substantive claim the Court found that the Persian Oil Nationalization Law was not contrary to Italian "public order"; the applicant Company therefore had no claim to the ownership of the oil in question.

If, however, the question is tested by examining the Nationalization Law in regard to public order, which has been referred to at some length in the contentions put forward on behalf of A.I.O.C., the claim of

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ownership appears unjustified, which supports the rejection of the request for sequestration.

* * *

It can be seen * * * that the Nationalization Law does not exclude the payment of compensation to A.I.O.C.; moreover, it unequivocally recognizes the right to claim such compensation. In fact, whilst Article 2 envisages a deposit to meet the claims of the Company, Article 3 contains the solemn undertaking on the part of the Persian Government to examine, in addition to its own claims, those of the Company; these claims, which are not specified in Article 2 but which are "likely" ("probable" in the English text produced by A.I.O.C.), are in Article 3 defined as being "rightful", and the argument maintained by A.I.O.C. that among these legitimate claims the Law does not include the claim for compensation—which is the most likely and most legitimate, though not the only one—must be regarded as being an entirely arbitrary view.

Little importance, from a legal point of view, can be attached to the argument of A.I.O.C. that the Law does not fix the measure of compensation nor require promptness in payment. Even considering the exceptional nature of the question, which—it must be recognized—as compared with the normal application of a foreign Law almost touches the limits contemplated by Article 31 of the Preliminary Rules, the Persian Law can be examined only with a view to establishing whether it fails to provide for the payment of any compensation, so as to be contrary to our Constitution, the provisions of which present the principle of public order and which admits expropriation "provided that compensation is paid". And other questions, such as the measure of compensation, its form, and promptness in payment, do not concern the public order: these are accessory elements which should be agreed upon the basis of present historical, political, social and economic conditions, which should be proportionate to the nature and importance of the property in question, and which do not enter the sphere of public order provided that they do not in practice annul the compensation and make it illusory.

* * *

The decisions of French courts. *Union des Républiques Socialistes Soviétiques v. Intendant Général Bourgeois és qual. et Soc. La Ropit, Court of Cassation,* 1928, [1927–1928] Ann.Dig. 67 (No. 43). The ships of the Russian company La Ropit were nationalized by decree while they were in Odessa. Odessa at the time was not yet under the control of the Soviet revolutionary government and a number of the ships escaped to Marseilles. After being recognized by France, the government of the USSR sued in the French courts claiming title to the ships. The supreme court rejected the claim because giving effect in France to foreign legislation expropriating property without compensation would conflict with French established order (i.e. *ordre public*).

Société Potasas Ibericas v. Bloch, Court of Cassation, [1939] Dalloz Rec.Heb. 257. The plaintiff was a corporation whose mines and other facilities in Spain had been nationalized. Bloch was the consignee of a shipment of chemical products from the Spanish state company which had taken over the facilities. The plaintiff claimed title to the shipment. A first decree of nationalization had been issued on August 8, 1936, against industries belonging to absent owners, but without specific mention of the plaintiff and without provision for compensation. The shipment arrived in France before the issuance of a second decree which specifically took the property of the plaintiff and provided for compensation. The court held that the second decree could not take effect retroactively in France with respect to a shipment already there and hence the consignee could not justify his possession of it.

Société Hardmuth, Court of Appeal of Paris, 1950, 44 R.Crit.Dr. Int'l Pr. 501 (1955). Hardmuth, a corporation in Czechoslovakia, was nationalized. Its new directors claimed the property of the corporation in France as against the former owners. The court rejected the claim relating to the tangible property in France, such as buildings, because measures of nationalization without compensation could not be given effect in France. But it recognized the claim concerning trademarks. Their nationalization was effective in Czechoslovakia and their protection in France was required by a convention on industrial property to which France and Czechoslovakia were parties.

Martin v. Bank of Spain, Court of Cassation, 1952, 42 R.Crit.Dr. Int'l Pr. 425 (1953). Spanish law required bills of Spanish currency, especially those coming in from France, to be embossed with a special seal in order to be legal tender. The plaintiff acquired in France bills of Spanish currency which were not so embossed and presented them for exchange against valid ones at the Spanish customs. They were given a receipt, but no money. Their invalid bills were turned over to the Bank of Spain. They sued the bank for payment in valid currency of the amount of their receipt. The court said that, even if the principle of immunity were disregarded, the refusal to pay the plaintiffs in valid currency "constituted acts of authority outside the control of the French courts."

De Keller v. Maison de la Pensée Française, Tribunal Civil de la Seine (référés) 1954, 44 R.Crit.Dr. Int'l Pr. 503 (1955). The plaintiff invoked an emergency and summary procedure by which the court was requested to take temporary custody of 37 out of 49 paintings by Pablo Picasso exhibited by the defendant, a nonprofit organization. The defendant had the 37 Picassos on loan from the Russian state art galleries in Leningrad and Moscow. The plaintiffs alleged that the paintings belonged to their deceased father, whose private art gallery the Russian state had confiscated in 1918, and contended they would establish their title to them in further proceedings. The court denied the request. It would have to determine whether the presence in France of paintings acquired by a foreign state in its own territory, and by a method legally valid there, violated French juridical order. Such a determination raised difficult questions which could not be resolved in

the instant procedure without prejudging the merits as well as the jurisdiction of the French courts in the matter.

The nationalizations in Algeria led to substantial litigation in France, listed in Cour de Cassation Lachaume, Chronique de Jurisprudence Française Relative au Droit International Public 1969, Ann.Dr. Int'l Fr. 1970, at 874, 898 (1971).

SECTION E. EXTRATERRITORIAL NATIONALIZATIONS DISTINGUISHED

REPUBLIC OF IRAQ v. FIRST NATIONAL CITY BANK

United States Court of Appeals, Second Circuit, 1965.
353 F.2d 47.

FRIENDLY, Circuit Judge. King Faisal II of Iraq was killed on July 14, 1958, in the midst of a revolution in that country which led to the establishment of a republic, recognized by the United States in August. On July 19, 1958, the new government issued Ordinance No. 23 which decreed that "all property [of the dynasty] * * * whether moveable or immoveable * * * should be confiscated." At the time of his death King Faisal had a balance of $55,925 and 4,008 shares of Canada General Fund, Ltd., a Canadian investment trust, in deposit and custody accounts with Irving Trust Company in New York. In October 1958, the Surrogate's Court for New York County issued to the defendant letters of administration with respect to King Faisal's New York assets. During that month the Consul General of the Republic of Iraq notified Irving Trust that the Republic claimed all assets of King Faisal by virtue of Ordinance No. 23. Notwithstanding the notice, Irving Trust subsequently transferred to the administrator the balance in the account and certificates for the shares, which were later sold.

In March 1962, the Republic brought this action against the administrator in the District Court for the Southern District of New York to recover the bank balance and the proceeds of the shares. From a judgment dismissing the complaint, the Republic appeals. We affirm.

The District Court properly held that it had jurisdiction of the action. Under 28 U.S.C. § 1332(a) the district courts are vested with original jurisdiction of all civil actions "where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between * * * (2) citizens of a State, and foreign states or citizens or subjects thereof." Although this general language does not grant jurisdiction to probate a will or administer an estate, it has been established by a long series of decisions "that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."

The principal questions raised in this appeal are the proper definition of the act of state doctrine and its application to foreign confiscation decrees purporting to affect property within the United States. Although difficulty is sometimes encountered in drawing the line between an "act of state" and more conventional foreign decrees or statutes claimed to be entitled to respect by the forum, the Ordinance involved in this case is nowhere near the boundary. A confiscation decree, which is precisely what Ordinance No. 23 purported to be, is the very archetype of an act of state. *See* Restatement of Foreign Relations Law of the United States § 41c [hereinafter Restatement].

* * *

Under the traditional application of the act of state doctrine, the principle of judicial refusal of examination applies only to a taking by a foreign sovereign of property within its own territory. Cf. *Sabbatino, supra*; 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." Restatement § 46.

In this case, neither the bank account nor the shares in the Canadian investment trust can realistically be considered as being within Iraq simply because King Faisal resided and was physically present there at the time of his death; in the absence of any showing that Irving Trust had an office in Iraq or would be in any way answerable to its courts, we need not consider whether the conclusion would differ if it did. So far as appears on this record, only a court in the United States could compel the bank to pay the balance in the account or to deliver the certificates it held in custody. The property here at issue thus was within the United States. Although the nationality of King Faisal provided a jurisdictional basis for the Republic of Iraq to prescribe a rule relating to his property outside Iraq, Restatement § 30(1)(b), this simply gives the confiscation decree a claim to consideration by the forum which, in the absence of such jurisdiction, it would not possess—not a basis for insisting on the absolute respect which, subject to the qualifications of Sabbatino, [supra], the decree would enjoy as to property within Iraq at the time.

Extra-territorial enforcement of the Iraqi ordinance as to property within the United States at the date of its promulgation turns on whether the decree is consistent with our policy and laws. We perceive no basis for thinking it to be. Confiscation of the assets of a corporation has been said to be "contrary to our public policy and shocking to our sense of justice,". Confiscation of the assets of an individual is no less so, even if he wears a crown. Our Constitution sets itself against confiscations such as that decreed by Ordinance No. 23 not only by the general guarantees of due process in the Fifth and Fourteenth Amendments but by the specific prohibitions of bills of attainder in Article I. It is true that since these provisions are addressed to action by the United

States or a state, they might not prevent a court of the United States from giving effect to a confiscatory act of a foreign state with respect to property in the United States. But at least they show that, from its earliest days under the Constitution, this nation has had scant liking for legislative proscription of members of a defeated faction, although—or perhaps because—many states, in their dealings with property of the loyalists immediately after the Revolution, had practiced exactly that. Foreigners entrusting their property to custodians in this country are entitled to expect this historic policy to be followed save when the weightiest reasons call for a departure. In saying this we are not guilty of disrespect to the recitals in the preamble of Ordinance No. 23; subject to the narrow exception discussed below, the policy of the United States is that there is no such thing as a "good" confiscation by legislative or executive decree.

* * *

Affirmed.

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1. ***The problem of jurisdiction to nationalise.*** A number of decisions in other countries also hold that a state's purported act of state in seeking to take into public ownership assets not within its territory will not be recognized. These decisions hold either that the act of state doctrine does not apply to such situations, that such takings are clearly against *ordre public,* or that the state has no jurisdiction to nationalize property that is within the jurisdiction to nationalize of the forum state or some third state. Problems of extraterritorial nationalization, then, should be distinguished from the act of state doctrine, and decisions denying recognition of extraterritorial nationalization should not be counted as decisions rejecting the act of state doctrine where the extraterritorial issue is not present. See Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy—of Errors,* 20 Vand.L.Rev. 429 (1966–1967), especially Appendix II.

As in conflict of laws, there is a problem as to the localization—or ascribed situs—of intangibles, in a range from unliquidated claims against a debtor to negotiable securities. Most nationalization cases, however, involve either land or movables that are capable of having an actual physical location. *Illustration*: when Egyptian President Nasser nationalized the assets of the Universal Suez Canal Corporation, he got the canal, but the big investment portfolio of the company kept in Paris remained beyond his grasp.

2. ***The act of state doctrine and customary international law.*** In a suit by one state against another in the International Court of Justice, or in an arbitration to be governed by customary international law, would act of state or a similar principle justify the court or arbitral panel to rule that the respondent state should have applied it? You have

noted that national legal systems do not claim international legal status for the principle. Nonetheless, can a case be made for the existence of such a principle? Cf. the Statute of the International Court of Justice, Article 38(1)(b) and (c), in the Doc. Supp. As between (b) and (c) which has the greater supportive potential for such a principle?

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status in organized society. It is a form of punishment more primitive than torture for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

In Trop, the provision held unconstitutional involved conviction by court-martial and dishonorable discharge for desertion in wartime. Denationalization provisions have suffered at the hands of the Supreme Court. In the *Kennedy* case, the court held that the provision for loss of nationality by remaining outside the United States to avoid military service was punitive and lacked due process safeguards guaranteed by the Constitution of the United States. In *Schneider v. Rusk*, 377 U.S. 163 (1964), the court struck down the provisions for loss of nationality by a naturalized citizen who had continuously resided for three years in the country of his origin. Although in *Perez v. Brownell*, 356 U.S. 44 (1958), the court held that it was within Congress's foreign affairs power to provide for loss of citizenship by one who votes in a foreign election, this case was overruled in *Afroyim v. Rusk*, 387 U.S. 253 (1967). In Afroyim, the court held that the Fourteenth Amendment gives an individual "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship." The relationship between the expatriating acts specified by Congress and the voluntary relinquishment required by the Afroyim ruling was elucidated in *Vance v. Terrazas*, 444 U.S. 252, reh. denied 445 U.S. 920 (1980):

> In sum, we hold that in proving expatriation, an expatriating act and an intent to relinquish citizenship must be proved by a preponderance of the evidence. We also hold that when one of the statutory expatriating acts is proved, it is constitutional to presume it to have been a voluntary act until and unless proved otherwise by the actor. If he succeeds, there can be no expatriation. If he fails, the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship.

The requirements of Vance were found satisfied in *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir.1985). A United States citizen obtained Canadian citizenship and, in the process, took an oath of allegiance to Canada. These were both expatriating acts under United States legislation. He also expressly renounced his United States citizenship, as required for acquisition of Canadian citizenship. The court found that he had performed the expatriating acts voluntarily and that the oath of renunciation of United States citizenship had been taken with specific intent to renounce that citizenship. That the individual's motive in acquiring Canadian citizenship and taking the required oath had been only to advance his career in Canada did not negate his specific intent to renounce his United States citizenship.

One of the grounds for loss of nationality is "making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state." 8 U.S.C. § 1481(a)(5). If a citizen of the United States makes such a renunciation and later seeks return to the United States, can he be excluded? If he is later found in the United States, can he be deported? To what state? See *Jolley v. Immigration and Naturalization Service*, 441 F.2d 1245 (5th Cir.), cert. denied.

7. ***Denaturalization and deportation.*** The United States has sought to deport individuals who committed war crimes during the Second World War. Although these individuals had become citizens of the United States by naturalization, their citizenship was revoked as a predicate to deportation. See chs. 10 and 16.

8. ***Other sources of utility:*** See the 1987 Restatement, § 212, especially Reporters' Note 4, on immigration law.

SECTION B. INTERNATIONAL CRITERIA FOR STATE PROTECTION

NOTTEBOHM CASE (LIECHTENSTEIN v. GUATEMALA)

International Court of Justice, 1955.
[1955] I.C.J.Rep. 4.

* * *

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

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

Guatemala has referred to a well-established principle of international law, which it expressed in Counter-Memorial, where it is stated that "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection".

* * *

Liechtenstein considers itself to be acting in conformity with this principle and contends that Nottebohm is its national by virtue of the naturalization conferred upon him. Nottebohm was born at Hamburg [in] 1881. He was German by birth, and still possessed German nation-

minorities." DeVisscher, Theory and Reality in Public International Law 126 (Corbett trans., 1968).

SECTION A. RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS

This process of looking after one's own kind is reflected in the practice of diplomatic protection in the 18th and 19th centuries. By this practice the state sought protection for its own nationals when they had left its territory to travel, reside or trade in a foreign state. If its nationals were injured by the foreign state, diplomatic protests were made, asserting that the foreign state had violated its treaty obligations or, in many cases, obligations imposed by international law generally. In theory, rights of the protecting state had been violated, not the rights of the injured individual. In the absence of an international judiciary in which the rights of the offended state could be litigated, states occasionally resorted to arbitration and authorized ad hoc tribunals to decide claims based upon alleged injuries to individuals. A substantial body of precedent, establishing a primitive law of human rights, was developed until the practice of arbitrating violations of personal rights began to slacken after World War II. The diplomatic protest remains a major vehicle for the assertion of human rights claims.

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1. THE PRINCIPLE OF DIPLOMATIC PROTECTION

The traditional principle of diplomatic protection has been that an injury to an alien is actually an injury to the state of which the alien is a national. Thus, a claim for injury to an alien is the claim of the state of which the alien is a national. Does this artificial theory still underlie the doctrine of diplomatic protection? Has it been modified? Do individuals have any standing to assert their own interests or "rights" against a foreign state? Keep these questions in mind as you read the following materials. Certainly, the reality of the claim, as being one by the state on behalf of the individual has been recognized.

ADMINISTRATIVE DECISION NO. V

Mixed Claims Commission (United States–Germany), 1924.
7 U.N.Rep.Int'l Arb. Awards 119, 152.

* * *

Ordinarily a nation will not espouse a claim on behalf of its nationals against another nation unless requested so to do by such nationals.

When on such request a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammeled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. Even if payment is made to the espousing nation in pursuance of an award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake, or protect the national honor, at its election return the fund to the nation paying it or otherwise dispose of it. * * *

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2. THE INTERNATIONAL MINIMUM STANDARD

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1. ***Equality versus international minimum standard.*** The General Claims Commission in *Roberts v. Mexico*, 4 U.N.Rpt. Int'l Arb. Awards 17 (1976) rejected, as the ultimate test, equality of treatment of aliens and nationals and adopted a test: whether aliens are treated in accordance with *ordinary standards of civilization*. When European nationals began to travel for colonization and trade, their governments became concerned for their personal safety. In diplomatic protests on behalf of their nationals, European states asserted that there existed a *minimum standard of justice* to which all states must adhere in their treatment of aliens. See Dawson and Head, International Law, National Tribunals and the Rights of Aliens, Chapter I (1971). Does such a minimum standard in fact exist as a matter of international law? Or must a state merely assure that aliens are not treated any worse than the state treats its own nationals? What standards are (or are supposed to be) comprehended by the minimum standard? Does an Islamic nation's prohibition of the consumption of alcohol or of women being in public unveiled violate the minimum standard? Is the "minimum standard" really only an imposition of Western values?

2. ***Standard for determining that there has been a denial of justice.*** By what standard would a court decide that there has been a denial of justice? Must the complaining party show that there has been a failure to meet the standards of local law? Or may the standards of local law be so high that a failure to meet those high standards is not, of itself, a denial of justice? Would the local court hold, on the other hand, that even though the standards of municipal law have been met there may be a denial of justice because those standards do not meet the higher standards of international law? Do aliens have more protection than nationals? *See, e.g.*, Cantero Herrera v. Canevaro, S.Ct., Peru (1927), [1927–1928] Ann.Dig. 219 (No. 149).

3. ***Traditional view.*** Traditionally, some jurists have denied that there is an international standard to which each state's jurisprudence must attain. It is frequently stated that the alien is entitled only

to equality of treatment with nationals. In analyzing this proposition it should be noted that the broad question of state responsibility for injury to aliens has been discussed somewhat indiscriminately in connection with two types of problems: injury to an alien individual in his personal rights (e.g., rights to physical security and personal freedom, rights to fair trial in cases involving personal liberty) on one hand and the alien individual's (or corporation's) rights to property, on the other. During much of the 20th Century, the latter rights have been the subject of considerable controversy, particularly with respect to the expropriation of property by states socializing and collectivizing the means of production. See Chapter 15. Would you expect a system of international law to be more protective of personal rights than of property rights?

4. ***Influence of the creation of new states on the question of the international standard.*** The Western World prior to World War II debated the question of an international minimum standard versus a standard of national treatment. This debate may be viewed as one within an established legal system in which the members of that system sought to delineate the contours of a body of customary law acceptable to them. With the influx of new states into the community of nations, mostly former colonies, the debate took on a different tone. Guha Roy notes:

> The international community in its inception was confined to only some Christian states of Europe. It expanded within very narrow limits to embrace, first, the other Christian states of Europe and next their own offshoots in other continents. It thus retained until recently its racial exclusiveness in full and its geographical and other limitations in part. The international law which the world-wide community of states today inherits is the law which owes its genesis and growth, first, to the attempts of these states to regulate their mutual intercourse in their own interests and, secondly, to the use made of it during the period of colonialism.
>
> The contacts of the members of the restricted international community of the past with other states and peoples of the much larger world outside its own charmed circle were not governed by any law or scruples beyond what expediency dictated. The history of the establishment and consolidation of empires overseas by some of the members of the old international community and of the acquisition therein of vast economic interests by their nationals teems with instances of a total disregard of all ethical considerations. A strange irony of fate now compels those very members of the community of nations on the ebb tide of their imperial power to hold up principles of morality as shields against the liquidation of interests acquired and held by an abuse of international intercourse. Rights and interests acquired and consolidated during periods of such abuse cannot for obvious reasons carry with them in the mind of the victims of that abuse anything like the sanctity the holders of those rights and interests may and do attach to them. To the extent to which the law of responsibility of states for injuries to aliens favors such rights and interests, it protects an unjustified status quo or, to put it more bluntly, makes itself a handmaid of power in the preservation of its spoils.
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> * * *
>
> The law of responsibility then, is not founded on any universal principles of law or morality. Its sole foundation is custom, which is binding only among states where it either grew up or came to be adopted. It is thus hardly possible to maintain that it is still part of universal international law. Whatever the basis of obligation in international law in the past, when the international community was restricted to only a few states, including those, fewer still, admitted into it from time to time, the birth of a new world community has brought about a radical change which makes the traditional basis of obligation outmoded.
>
> Once it is found that the right of diplomatic protection of their nationals abroad, claimed by states as a customary right, is not universally binding, the structure of this law as part of universal international law crumbles, for this right is assumed to be the sole basis of a state's claim to stretch out its protecting hand to its nationals in the territory of another state independently of its consent. Its elimination from universal international law necessarily means that, even outside the limited zone of the applicability of this law, the responsibility of a state for injuries to aliens remains in every case in which it may be held to be responsible exactly in the same way as in the case of its own nationals, but it remains its responsibility not to the home state of the injured alien but to the injured alien himself. It ceases to be an international responsibility and becomes a responsibility only under the municipal law of the state concerned. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55 AJIL 863, 866, 888 (1961).*

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1. ***What variations in legal systems are comprehended by the international minimum standard?*** National legal systems differ considerably as to how they deal with an accused in a criminal proceeding pending trial on the merits. In some countries, the accusation of a criminal offense results in the accused being put into detention pending investigation by a magistrate on the question of whether there is a probable case against him. In most Civil Law countries, bail is not allowed for the period pending trial (they consider it scandalous that one with money can buy this liberty). Individuals who do not pose a threat of danger or pose a risk of disappearing are not detained. Often, the physical conditions of detention centers are rather grim. In many Civil Law countries, exclusionary and other rigorous rules of evidence are sparse and the defendant is not allowed in all cases directly to confront the witnesses against him. In view of these differences, can it be said

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the instant case, and the *Godínez Cruz* case. The Court's reasoning in the latter case, which was decided on January 20, 1989, is for all practical purposes identical to that of *Velásquez*.

* * * In all three cases the Commission invited Messrs. Claudio Grossman, Juan Méndez and José Miguel Vivanco, the lawyers who represented the private parties in the proceedings before the Commission, to serve as advisers to its delegation in the proceedings. * * *

Notes: 1. The case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain). The case was decided in 1970, [1970] I.C.J.Rep. 3. A portion of the text of the decision appears in Chapter 15. The case concerned claimed injury to a corporation's property. In the course of an opinion dealing with the question of the proper state to maintain an action to redress this injury, the court stated:

> 33. When a State admits into its territory foreign investments or foreign nationals, * * * it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.
>
> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.
>
> 35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:
>
> The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach.

> (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 181–182.)

* * *

Despite the expansiveness of its language in paragraphs 33 and 34, the court made the following puzzling observation later in its opinion:

> 91. With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.

The Reporters of the 1987 Restatement addressed the court's statement:

> * * * Apparently, the Court meant that, as a matter of interpretation, general human rights agreements ordinarily do not contemplate diplomatic protection by one state party on behalf of an individual victim of a violation by another state party, at least where the victim was not a national of the protecting state. However, unless otherwise provided or clearly implied, there appears to be no reason why a party may not make an inter-state claim for a violation of such an agreement as for any other multilateral agreement. * * * Section 703, Reporters' Note 2.

2. ***Remedies.*** If a state refers to the court a dispute about a second state's treatment of the second state's own nationals, what relief should be requested or granted? Would monetary relief be administrable? Would a declaratory judgment be more workable? Would it be effective? See Judge Jessup's dissenting opinion in the South West Africa cases, [1966] I.C.J.Rep. at 329.

3. ***Advisory Opinions.*** How could an individual injured by his own state seek relief by way of an advisory opinion? The individual would need the support of some other state, to enlist the aid of the General Assembly or the Security Council (or some other body authorized under Article 65 of the Statute of the International Court of Justice) to ask for the opinion. It is obvious that the political difficulties that would be encountered by a single individual in pursuit of an advisory opinion through these channels would be virtually insurmountable. On the other hand, a group of individuals alleging a gross violation of a convention or general international legal obligation might possibly have more success, assuming a political context favorable to their cause. Beyond the political problems involved in procuring the request for an advisory opinion, there is the problem of inducing the

court to render the opinion. The question put to the court would have to be constructed in terms that would permit the court to find it had been asked for an opinion on a legal question under Article 65 of the statute. In addition, the court might have to be persuaded it was not in effect deciding a dispute involving a state without that state's consent to its jurisdiction.

ADVISORY OPINION ON THE WESTERN SAHARA

International Court of Justice, 1975.
[1975] I.C.J.Rep. 12, 22.

[The General Assembly, in 1975, focused on the decolonization of formerly Spanish Western Sahara and the claims to territorial sovereignty made by Morocco and Mauritania. The General Assembly finally requested the International Court of Justice to issue an *"advisory opinion"* addressing two problems: (1) When Spain colonized the Western Sahara, was the latter *terra nullius?* If no, (2) what is the legal nexus between the Western Sahara and Morocco or Mauritania?

27. Spain considers that the subject of the dispute which Morocco invited it to submit jointly to the Court for decision in contentious proceedings, and the subject of the questions on which the advisory opinion is requested are substantially identical; thus the advisory procedure is said to have been used as an alternative after the failure of an attempt to make use of the contentious jurisdiction with regard to the same question. Consequently, to give a reply would, according to Spain, be to allow the advisory procedure to be used as a means of bypassing the consent of a State, which constitutes the basis of the Court's jurisdiction. If the Court were to countenance such a use of its advisory jurisdiction, the outcome would be to obliterate the distinction between the two spheres of the Court's jurisdiction, and the fundamental principle of the independence of States would be affected, for States would find their disputes with other States being submitted to the Court, by this indirect means, without their consent; this might result in compulsory jurisdiction being achieved by majority vote in a political organ. [Thus, there are compelling reasons to deny the request].

Spain had not consented to the proceedings and had consistently and persistently objected. Spain invoked the fundamental rule that a state may not be compelled to submit its disputes to the Court's jurisdiction. *Citing, inter alia, the Status of Eastern Carilia Case, supra.*

30. In other respects, however, Spain's position in relation to the present proceedings finds no parallel in the circumstances of the advisory proceedings concerning the Status of Eastern Carelia in 1923. In that case, one of the States concerned was neither a party to the Statute of the Permanent Court nor, at the time, a Member of the League of Nations, and lack of competence of the League to deal with a dispute involving non-member States which refused its intervention was a decisive reason for the Court's declining to give an answer. In the present case, Spain is a Member of the United Nations and has accepted the

provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers. In the proceedings in the General Assembly, Spain did not oppose the reference of the Western Sahara question as such to the Court's advisory jurisdiction; it objected rather to the restriction of that reference to the historical aspects of that question.

31. In the proceedings concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, this Court had to consider how far the views expressed by the Permanent Court in the Status of Eastern Carelia case were still pertinent in relation to the applicable provisions of the Charter of the United Nations and the Statute of the Court. It stated, inter alia:

> "This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions. The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the organization, and, in principle, should not be refused." * * *

32. The Court affirmed in this pronouncement that its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them. However, the Court proceeded not merely to stress its judicial character and the permissive nature of Article 65, paragraph 1, of the Statute but to examine, specifically in relation to the opposition of some of the interested States, the question of the judicial propriety of giving the opinion. Moreover, the Court emphasized the circumstances differentiating the case then under consideration from the Status of Eastern Carelia case and explained the particular grounds which led it to conclude that there was no reason requiring the Court to refuse to reply to the request. Thus the Court recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant not for the Court's competence, but for the appreciation of the propriety of giving an opinion.

Chapter 13

THE INTERNATIONAL LAW ABOUT INTERNATIONAL AGREEMENTS

Introduction: 1. ***The Law of Treaties*** is a segment of international law governing treaties. The Vienna Convention article 2.1(a), defines treaty, for purposes of the convention as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Ask yourself the following questions as you study this and the next chapter. Is there a difference between general international law on treaties and the Vienna Convention on Treaties? Is this definition broader or narrower than a treaty in general international law? Is it possible to have a treaty between a state and an international organization or between a state and a multinational corporation, or between a state and an organization not [yet] a state? In this regard, note the recent ground-breaking *agreement* between Israel and the Palestinian Liberation Organization. Note also that the only "*treaty*" in U.S. constitutional law is an international agreement that is entered into by the President and receives the Advice & Consent of ⅔ of the Senators present, Art. II, § 2[2]. Its relationship with international law is explored in the next chapter. We saw in Chapter 1, supra, that article 38 of the Statute of the International Court of Justice sets out the *sources* of international law. "[I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting

states * * *" is the first in the hierarchy. Not only are treaties a basic source of international law, they are *the* key vehicle by which the international system changes most rapidly. They are the modii vivendi of states; they provide the mechanism for the various subjects of international law to arrange their relations, indeed, to make their own law. This aspect of treaties is really not much different from citizens of states in their contractual relationships. They are called treaties, conventions, modii vivendi, concordats, charters, articles of agreement, pacts, protocols, and accords, agreements, memoranda of understanding, among other designations. These labels are not significant. It is important to note differences such as multilateral versus bilateral or agreements in which special rules are allowed to govern (e.g. reservations).

Studying the law on treaties helps one understand law in general. *What makes treaties binding?* By the same token, why are contracts in a domestic system binding? The *Code Civil* in France provides that the conventional obligation (i.e., the contract) is the means by which the parties make their own law as between themselves (as long as what they do does not violate important public policy). Is there a parallel in international treaty law? If the Code makes the treaty binding, what makes the Code binding? The Constitution? What makes the Constitution binding? The social contract? Public policy? General principles? In antiquity, religious solemnity provided the obligatory force for both contracts and treaties. The general principle, *pacta sunt servunda,* is often said to be *The Law* of international relations and apparently makes them binding. *Why?*

2. ***The Treaty on Treaties: present status and significance as evidence of customary law.*** We had you read the Vienna Convention on the Law of Treaties (in Doc.Supp.) at the outset of this course. The Convention entered into force January 27, 1980. Although not yet acted upon in the Senate of the United States, to which the President referred it on November 21, 1971, the Vienna Convention is good evidence of what customary international law about treaties and other international agreements is, at least with respect to most of its provisions. We will consider some problematic provisions. The Department of State has stated since 1973 that it considers the convention as a codification of customary international law. Is it correct to say that the Vienna Convention is a codification of customary international law on treaties? A "common-law lawyer" may say yes, but a "civilian" would cringe. *What is a code?* Is the Vienna Convention comprehensive, complete and exclusive? Is it coherent and systematic? A true Code preempts the field. Thus, given the definition of treaty in article 2.1(a), quoted above, does a treaty really have to be written? Do you believe that agreements are found to be binding whether they are written or not? If not written, are they treaties? What body of law controls? If some other body of law controls, is the Convention a code? Does this mean that those who designated it a codification understood the term not in the continental or civil law sense (from which the term arises and retains its meaning), but in the "common law" sense, wherein it has no meaning other than a compilation of rules or a digest of some sort. The

Convention's preamble, states: "rules of customary international law will continue to govern questions not regulated by the * * * Convention." Does this mean that if an issue is "regulated by the Convention," no new custom may develop? Will custom modify the Convention? Is Custom a source of law relating to agreements along with the Convention? Does pre-existing custom control interpretation? Can inconsistent custom, still followed even by member states, overrule the Convention?

The Vienna Convention on Treaties has been considered authoritative with respect to the executive's treatment of issues related to international agreements arising after May 22, 1969. See, Rovine, Digest of U.S. Practice in International Law 1973, at 307, 482–83 (1974). Several judicial decisions in the U.S. have also followed the Convention. These executive and judicial acceptances may raise problems of separation of powers and of "supreme law" under Article VI of the Constitution (*cf.* Chapter 14), especially if the Senate buries the Convention or rejects it as a result of the opposition of one-third of the Senate plus one. Nevertheless, study of the law about treaties during the usable life of this edition ought to be undertaken with knowledge of the Convention's treatment of the various international legal issues that follow. Ask yourselves when you finish this chapter: Is the Vienna Convention either silent or a poor guide on any of the issues raised in this chapter? What issues does it clarify well or seem to settle? Where does it fall? Where, if anywhere, does the convention expand doctrine?

The Convention was developed from draft articles prepared by the International Law Commission (ILC). The work of the last rapporteur (Sir Humphrey Waldock, later a judge of the International Court of Justice) was overwhelmingly the most influential on the commission as it prepared the draft that went to the Convention at Vienna. The ILC's Draft Articles, with commentary, can be found in 61 AJIL 263 (1967). The Convention itself is authoritatively commented upon by two of the American negotiators, Kearney and Dalton, in The Treaty on Treaties, 64 AJIL 495 (1970):

> The Convention on the Law of Treaties sets forth the code of rules that will govern the indispensable element in the conduct of foreign affairs, the mechanism without which international intercourse could not exist, much less function. It is possible to imagine a future in which the treaty will no longer be the standard device for dealing with any and all international problems—a future in which for example, the use of regulations promulgated by international organizations in special fields of activity, such as the World Health Organization's sanitary regulations, will become the accepted substitute for the lawmaking activity now effected through international agreement. But, in the present state of international development, this is crystal-gazing. For the foreseeable future, the treaty will remain the cement that holds the world community together.

3. ***The wide range of utilization of international agreements.*** Undertakings between states are major tools of operations in the international legal system. Rules of customary law, derived from

the usual modes of conduct of international relations, right reason, judicial decisions, general principles of law common to the world's major legal systems and the like, usually lag behind developing needs within the international community. Moreover, for technologically complicated and politically sophisticated situations they lack specificity. International agreements, on the other hand, are often made because the parties have realized a need to reach specific accord upon some issue, matter, or common concern. Like contracts or trusts in private law, international agreements are cut to the cloth of the interests of the parties.

Functionally, international agreements cover a wide range of interests, extending from certain types of agreements that are in effect conveyances of real estate (treaties of lease, cession and admeasurement of boundaries) through mutual promises to pursue common lines of action (military alliances, mutual defense, safety at sea) to organic arrangements that function much as constitutions (the U.N. Charter). Some international agreements are regarded as executed internationally as between the parties when made (boundary treaties). Others are executory, such as the mutual promises of the members of the NATO to consider an attack on one an attack on all and to respond effectively.

In Chapter 15 we shall see that international agreements have given the international legal system almost all the rules that exist as to international economic law. In the more traditional political areas, international agreements alter or expand customary international law. Also, they may restate it. Finally, given the lack so far of an effective international parallel to national legislatures, international agreements of the multipartite sort are used to make new law such as with respect to pollution of the high seas, uses of the moon, Antarctica, aerial hijacking, human rights. These latter have legislative characteristics, (are sometimes called *traité-lois,* or law-making treaties) establish a series of legislation-like rules among nations, (e.g., the Hague and the Geneva Conventions, or UNCLOS, the U.N. Treaty on Drug Trafficking or a multilateral, or series of bi-lateral consular relations treaty(s)). It is with respect to them that the analytical issue whether the rules therein stated are themselves international law arises. Treaties and other international agreements have *constitutional* characteristics (i.e., they are creative of institutions and organizations, e.g., the U.N. Charter, the Treaty of Rome Maastricht—in force since Nov. 1, 1993, and the constituent treaties of most international organizations). Some treaties have "common-law" like customary law-creating, characteristics (a series of treaties or even one adopted by all nations may create customary international law). Treaties also may "codify" rules of customary international law. Finally, they have simple contract-like characteristics (*un traité contrat*) (e.g., the Louisiana Purchase). Some treaties may be seen as being "*merely*" aspirational, such as the Helsinki Final Act, although it is worth wondering whether such aspirational treaties do not sometimes in the long-run create law. Ask the Czechoslovak underground if Helsinki helped them and whether it is now incorporated in their domestic law. See, Chapters 10 (Human Rights), 11 (Individual Responsibility), 16 (International Resolution of Disputes), and 17 (States and the Use of Force).

Suffice it to note that the modern international practitioner must of necessity have a lot to do with international agreements and that the International Court of Justice has subject-matter jurisdiction as to issues concerning international agreements. Treaties are a most vital part of international law; they promote trade and commerce, allow cooperation in other economic and even criminal law matters, provide for common defense, they promote friendship, cooperation in all areas of international intercourse, such as providing for the post, protect the environment, protect the rights and interests of individuals.

Treaties & the E.U. One of the most significant modern uses of treaties is to create structures such as the multipartite international agreements that underlie the European Union (EU). This establishes new institutions, binds the member states to uniform courses of action, makes EU law (and that deriving therefrom as declared by EU agencies) superior to member state national law in enumerated situations, and provides for centralized budgeting and financing of important activities, such as the Community Agricultural Policy (CAP), under the community treaty on economic matters (the European Economic Community treaty). The EU system is neither a conventional international organization nor (so far) a federation that eliminates the international statehood of its members. If community authority to make superior law that is directly applicable in some, but not all, situations of governance should expand appreciably into general governmental affairs, the EU might one day become a new federated state. If the authority of the EU should decline to the extent of becoming non-binding directly within member states, it would become indistinguishable from ordinary international organizations.

SECTION A. INTERNATIONAL AGREEMENTS AS BASES OF LEGAL RIGHTS AND DUTIES

Pacta sunt servanda, the standard of performance. Even before the Vienna Convention, the prevailing rule was that a treaty undertaking should be performed in good faith, but some authorities contended that the proper standard, if not for all, then for some types of treaties, was utmost fidelity (*uberrima fides*). The concept is similar to that of fiduciary obligation in anglo-american law. Article 26 of the Vienna Convention adopts the first (pacta sunt servanda) standard, although some delegates at the Vienna treaty conference wanted it stated that only valid treaties in force should be so entitled. Some others wished to confine the performance standard to treaties in force which conformed to the convention, which would have raised a serious retroactivity problem. What is the difference between the two standards? Judge Lauterpacht's separate opinion in the *Norwegian Loans Case* (1957), noted that "[u]nquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part

of international law." Did Judge Lauterpacht see *pacta sunt servanda* as a rule of customary international law? As a general principle of international law? As both?

YALTA CONFERENCE, AGREEMENT REGARDING ENTRY OF THE SOVIET UNION INTO THE WAR AGAINST JAPAN, FEB. 11, 1945

59 Stat. 1823.

The leaders of the three Great Powers—the Soviet Union, the United States of America and Great Britain—have agreed that in two or three months after Germany has surrendered and the war in Europe has terminated the Soviet Union shall enter into the war against Japan on the side of the Allies on condition that:

1. The status quo in Outer-Mongolia (The Mongolian People's Republic) shall be preserved;

2. The former rights of Russia violated by the treacherous attack of Japan in 1904 shall be restored, viz:

(a) the southern part of Sakhalin as well as all the islands adjacent to it shall be returned to the Soviet Union,

(b) the commercial port of Dairen shall be internationalized, the preeminent interests of the Soviet Union in this port being safeguarded and the lease of Port Arthur as a naval base of the USSR restored,

(c) the Chinese-Eastern Railroad and the South-Manchurian Railroad which provides an outlet to Dairen shall be jointly operated by the establishment of a joint Soviet-Chinese Company it being understood that the preeminent interests of the Soviet Union shall be safeguarded and that China shall retain full sovereignty in Manchuria;

3. The Kuril islands shall be handed over to the Soviet Union.

It is understood, that the agreement concerning Outer-Mongolia and the ports and railroads referred to above will require concurrence of Generalissimo Chiang Kai-Shek. The President will take measures in order to obtain this concurrence on advice from Marshal Stalin. The Heads of the three Great Powers have agreed that these claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated. For its part the Soviet Union expresses its readiness to conclude with the National Government of China a pact of friendship and alliance between the USSR and China in order to render assistance to China with its armed forces for the purpose of liberating China from the Japanese yoke.

И. Сталин (J. Stalin)
Franklin D. Roosevelt
Winston S. Churchill

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tion: The traditional methods of interpretation may be summarized by the following points:

(1) It is considered that the texts have an everlasting and fixed character as long as they have not been expressly abrogated.

(2) Strict respect for the letter of the legal or conventional texts.

(3) Examination of these texts, considered by themselves without regard to their relations with the institution or convention as a whole.

(4) Recourse to travaux préparatoires in case of doubt as to the scope of these texts.

(5) Use, in reasoning, of out-and-out logic, almost as in the case of problems of mathematics or philosophy.

(6) Application of legal concepts or doctrines of the law of nations as traditionally conceived.

(7) Application of the decisions of the present International Court, or of the earlier Court, in similar cases which arise, without regard to the question whether the law so laid down must be modified by reason of the new conditions of international life.

(8) Disregard for the social or international consequences which may result from the construction applied.

Some form of reaction is necessary against these postulates because they have had their day. In the first place the legal or conventional texts must be modified and even regarded as abrogated if the new conditions of international life or of States which participated in the establishment of those texts, have undergone profound change. Then it is necessary to avoid slavish adherence to the literal meaning of legal or conventional texts; those who drafted them did not do so with a grammar and a dictionary in front of them; very often, they used vague or inadequate expressions. The important point is to have regard above all to the spirit of such documents, to the intention of the parties in the case of a treaty, as they emerge from the institution or convention as a whole, and indeed from the new requirements of international life.

Recourse should only be had to travaux préparatoires when it is necessary to discover the will of the parties with regard to matters which affect their interests alone. A legal institution, a convention, once established, acquires a life of its own and evolves not in accordance with the ideas or the will of those who drafted its provisions, but in accordance with the changing conditions of the life of peoples.

A single example will suffice to show the correctness of this assertion. Let us assume that in a commercial convention there is a stipulation that all questions relating to maritime trade are to be governed by the principles of international law in force. These principles may have been followed by the parties for a century, perhaps, without any disputes arising between them; but one of the parties may, at the present time, by reason of the changes which have recently taken place in such matters, come to Court to claim that the century-old practice hitherto followed should be changed on the ground that it must be held that the will of the parties is no longer the same as it was at the time when the

convention was signed. This is in many ways similar to the rebus sic stantibus clause which is so well known in the law of nations.

It is to be observed that out-and-out reliance upon the rules of logic is not the best method of interpretation of legal or conventional texts, for international life is not based on logic; States follow, above all, their own interests and feelings in their relations with one another. Reason, pushed to extremes, may easily result in absurdity. It is also necessary to bear in mind the fact that certain fundamental legal conceptions have changed and that certain institutions and certain problems are not everywhere understood in the same way. * * *

SECTION D. PERFORMANCE OF INTERNATIONAL AGREEMENTS

1. NOVATION, AMENDMENT AND MODIFICATION OF INTERNATIONAL AGREEMENTS

As in the private law of contracts, the parties to an international agreement may, if third party rights protected by international law are not involved, agree to end the agreement, substitute another agreement for it, or otherwise change particulars in it. Consult Articles 37, 39, 40, and 41 of the Vienna Convention. Cf. The 1987 Restatement, §§ 334 and 339 (semble, as to modification).

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2. INVALIDATION

As in the private law of contracts, an international agreement may be or become unenforcible for strong public policy reasons. Jus cogens, to the extent it has developed or will develop, is one such reason; see p. 1001, et seq. The niceties of common law distinctions between void and voidable contracts do not carry over into customary international law, but under certain circumstances an obligated party under a treaty may prevail against performance by succeeding in establishing a legal basis for invalidation. Such bases have been expanded by the Vienna Convention beyond what they were in pre-convention customary international law, thus providing an instance in which the Vienna Convention progressively develops, rather than merely codifies, customary international law. A significant example involves force and duress. In pre-Charter times, force and duress (military, political, or economic) were two of the legitimate means by which a state was required to become legally obligated to another state or states, contrary to the obligated states' wishes. Many grabs of territory were thus established over many centuries. Likewise, error, even fraud in the inducement, were not defenses. Study now Articles 46 through 53 of the Vienna Convention.

Only Article 51 (coercion of the representative of a state) was an assuredly recognized legal basis for later invalidation prior to the Vienna Convention. Does the Vienna Convention go too far the other way, say as to fraud (Article 49)? In diplomacy, as in war, ruses and deceptions have a long history of usage, and it cannot assuredly be affirmed that their actual use has ended in post-Charter, post-Vienna Convention days. Treaty capitulations imposed upon a state by use or threat of force impermissible under the United Nations Charter, however, seem clear targets for subsequent successful invalidation. On what ground, other than Article 52 of the Vienna Convention? See also the 1987 Restatement, § 331, especially Comment *d* and Reporters' Note 3.

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3. DURATION, SUCCESSION, SUSPENSION, TERMINATION

1. ***Duration, (general).*** International agreements may be for fixed time periods, ending automatically at the expiration of the time set. Some provide for automatic renewal if nothing is done at the end of the period. If no time period is fixed, international agreements continue until legally terminated. International agreements may declare that they continue in perpetuity, but some, such as the 1903 canal treaty between the United States and Panama have not so continued.

See, Vienna Convention article 4, which allows for termination * * * when and in the manner indicated in the agreement. It also allows termination of an agreement when all of the parties agree. Does this apply to multilateral treaties? What would be the result if a sufficient number of parties withdrew from a multilateral agreement to put the number of parties remaining below that required for *"entry into force?" Do articles 54 or 55 help?*

A few international agreements that fix no time period are considered to be of perpetual duration, such as those creating the European Community (EC). Many treaties that create international organizations (often called constitutive treaties) provide procedures for amendment (see the United Nations Charter, Articles 108 and 109.) Typically such treaties do not provide for withdrawal but withdrawals have taken place nevertheless.

2. ***Relative durability of various types of international agreements.*** While international agreements are in strict legal analysis all equally durable, in the actual practices of states some agreements are more durable than others. Bilateral treaties that are or become out of balance as to mutuality of interests between the parties are susceptible to unilateral denunciation that politically the advantaged party may be unable to complain of. In international relations practice treaties, bipartite and multipartite, that create territorial rights (said to be executed treaties) are usually stable. So are treaties that deal with a common problem or need shared by the parties. Where, in the past, war has either terminated or suspended international agreements, peace

treaties may clarify the situation by stipulating the pre-war bilateral treaties that the parties deem still to be in force and by stating for the negotiating history of the peace treaty that multipartite treaties, unless specifically stipulated against, continue in force. The peace treaties negotiated with Italy, Finland, Hungary, Rumania and Bulgaria at Paris in 1946 followed the method just described.

When the issue is whether an international agreement has an internal legal effect, as in cases in national courts where a party claims under a treaty, the court looks to the element of the national government that is in charge of international relations for guidance as to whether the agreement is still in effect. In some states subsequent inconsistent national law may affect the internal legal standing of the international agreement, although internationally it has not been legally ended. Various cases in the next chapter illustrate aspects of this problem in United States law.

3. ***Two significant instances of treaty instability.***

The Treaty of Versailles, 1919. This treaty was negotiated to end World War I with Germany. The Covenant of the League of Nations was an annex to it. President Woodrow Wilson went to Paris to negotiate it. The stroke that led to his death happened while he was trying to convince the American people to support the treaty after far less than half the Senate balked at approving it without reservations that politically could not have been re-negotiated with Germany and the other Allies. A young John Maynard Keynes became famous for his attack on its reparations provisions and his study of the disintegration of Wilson's principles under the pounding of vengeful European leaders, especially Georges Clémenceau, premier of France. Keynes, The Economic Consequences of the Peace (1919). In addition to reparations that Germany claimed it could not pay without an expansion of its export trade unacceptable to the Allies, Germany from the beginning evaded the arms limitations provisions of the treaty. Hitler, after he was elected chancellor in 1933, denounced the treaty, armed openly and stated as an objective of his 1,000 year Reich the elimination of the injustices done to Germany under Versailles, including the Allies' imposition on Germany of onerous terms that would not have been acceptable in the first instance but for disintegration of the German economy following the Armistice of November 11, 1918. Many asked themselves, as World War II approached and during that war, whether a more benign Versailles Treaty would have avoided a second terrible war in Europe, or whether a more severe and effectively policed 1919 treaty would have prevented World War II. Unconditional surrender and Allied military occupation were imposed upon Germany following World War II. No peace treaty has yet been made with Germany, including either the former Federal German Republic or the German Democratic Republic. The western Allies successfully resisted Soviet demands for heavy reparations charges (20 billion dollars in current production), so far as the occupation zones administered by France, the United Kingdom and the United States were concerned; and this resistance is historically directly linked to the division of Germany into two states.

The Panama Canal Treaty of 1903. A zone eleven miles wide through the fledgling state of Panama was granted to the United States in perpetuity, along with authority to act there " * * * as if sovereign." In 1964 internal objection in Panama erupted into riot at a high school within the zone when the Panamanian flag was hauled down by U.S. students. To avoid further unrest negotiations to replace the treaty of 1903 began in 1965 but did not result in mutually agreed terms until after a military coup in Panama in 1968 and the subsequent mobilization by Panama of world opinion in its favor, including a special session of the Security Council held in Panama. Under two treaties still in force Panama and the United States are jointly responsible for the security of the Panama Canal, United States law has been replaced in the zone by Panamanian law and courts, various public installations in the zone are in the process of being transferred to Panama, and by the year 2000 the canal itself is to pass to Panamanian ownership and control.

See, generally and as to other instances, Malawer, Imposed Treaties and International Law, 7 Cal.W.I.L.J. 1 (1977); Stone, De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace, 8 Va.J. of Int'l L. 356 (1968); David, The Strategy of Treaty Termination—Lawful Breaches and Retaliations (1975). Cf., the metalegal literature of conflict resolution and negotiating science, such as Deutsch, Cooperation and Trust, Some Theoretical Notes, Nebraska Symposium on Motivation (1962); R. Bilder, Managing the Risks in International Agreements (1981). M. Halberstam, *A Treaty is a Treaty is a Treaty,* 33 Va.J.Int'l L. 51 (1992); I. Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities,* 12 Mich.J.Int'l L. 371 (1991).

4. ***Duration and the territorial applicability of international agreements as affected by the life of states and the growth and division of states.*** International agreements lose states as parties if such states cease to exist. But short of complete subjugation by different ethnic groups, states have always had a high survival rate. As to international agreements not otherwise terminated, the treaties to which the former German Reich was a party were carried on through the former two divided Germanies to today's Germany, despite the unconditional surrender of the Reich and the exercise of supreme authority in the territory of the former Reich by the occupying powers for from seven to ten years and technically much longer for Berlin. However, it was decided that the statehood of Austria should be re-established by treaty after the 1938 incorporation of Austria into the Reich by Hitler. Technically the Republic of Italy is the Kingdom of Savoy territorially expanded and governmentally altered insofar as treaties are concerned.

The USSR was the Tsarist Russian Empire with a different ideology, even though propagandistically the Marxist–Leninist structure was depicted as a new arrangement for a new species of humanity. Shortly after the 1917 Revolution, Lenin cancelled unilaterally some treaties giving Russia imperialistic territorial and other rights in Iran. This attitude has long since been cast upon the ash heap of history by Lenin's successors, clung tenaciously to all Russian rights under Tsarist treaties.

The post World War I Treaty of St. Germain split up the Austrio–Hungarian Empire into a vestigial Austria and a somewhat altered Hungary, restored Serbia as a part of a new Yugoslav state (which has now dissolved or re-created itself in such tragic fashion) and made Bohemia, after centuries of non-treatment as a state, into a new Czechoslovak state, which has now divided itself in two. Many of the "nations" created in this era are now becoming independent; all of them have retained the treaties of their predecessors.

In the decades since World War II, many former colonies have spun off as new states, and in the arrangements for their independence it has been usual to deal with the determination of what treaties of the metropole shall continue in force for the new entity. Then, if third states are concerned, the mother country carries out the negotiations for the continuation or cessation of such treaties as to the people or territory of the new state. Usually newly-created states opt for the continuation of boundary and other territorial interests, including servitudes, transit rights, and similar arrangement. Sometimes the retiring sovereignty is able to negotiate for the new state the continuation for it of advantages it formerly enjoyed as a colony under multilateral treaties, such as (GATT); see § B of Chapter 15. The new state usually elects to decide for itself what multipartite treaties open for accession it will become a party to. As to the United Nations, the new state must apply to be admitted as a member under Article 4(2) of the Charter.

Historically, the appearance of entirely new states out of revolution is comparatively rare, except for the states of the Western Hemisphere, beginning with the United States of America. The former French Indochina, Israel, Bangladesh, and, possibly the Republic of Indonesia, are the major post World War II instances.

Treaty provisions on termination and related matters. Treaties contained in the Documentary Supplement display a variety of approaches to the question of termination. These include:

a. No express provision appears in the following:
   (i) International Covenant on Economic, Social and Cultural Rights.
   (ii) International Covenant on Civil and Political Rights.
   (iii) Vienna Convention on the Law of Treaties.
   (iv) Vienna Convention on Diplomatic Relations.
   (v) 1958 Conventions on the Law of the Sea.

b. Denunciation at any time by notice to Secretary-General of United Nations (to take effect one year after receipt of notice): International Convention on the Elimination of all forms of Racial Discrimination, Article 21.

c. After ten years the convention remains in force for successive periods of five years, for parties that have not denounced (by notice to Secretary-General) six months before end of current

period: Convention on the Prevention and Punishment of the Crime of Genocide, Article XIV.

d. Notice of withdrawal may be given to Depository Governments after one year after treaty in force (to take effect one year after receipt of notice): Space Treaty, Article XVI.

Some conventions provide an amendment process (e.g., Nuclear Test Ban, Space Treaty, United Nations Charter, and the 1982 Law of the Sea Convention). Some conventions provide that parties may request revision by notifying the Secretary-General of the United Nations, in which event the General Assembly shall decide what steps to take (e.g., conventions on Racial Discrimination, the Territorial Sea, the High Seas, the Continental Shelf). The 1958 Law of the Sea Conventions provide that such requests can be made only after five years from the date the relevant convention has come into force.

Article 56 of the Vienna Convention on the Law of Treaties provides that if there is no provision for termination, denunciation or withdrawal, a treaty is not subject to denunciation unless "it is established that the parties intended to admit the possibility of denunciation or withdrawal" or "a right of denunciation or withdrawal may be implied by the *nature* of the treaty." [Emphasis supplied.]

Query: *Who has the authority to withdraw from or to terminate a treaty? Do Agency Law principles apply, as discussed supra? We discuss the issue relating to U.S. law in the next chapter.*

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1. ***Outbreak of hostilities.*** In *Clark v. Allen*, 331 U.S. 503, 508 (1947), the court said: "We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 494–495. There may be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. *Karnuth v. United States*, 279 U.S. 231. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in *Techt v. Hughes* * * * and we believe it to be the correct one. That case concerned the right of a resident alien enemy to inherit real property in New York. Under New York law, as it then stood, an alien enemy had no such right. The question was whether the right was granted by a reciprocal inheritance provision in a treaty with Austria which was couched in terms practically identical with those we have here. The court found nothing incompatible with national policy in permitting the resident alien enemy to have the right of inheritance granted by the treaty. * * *

Article 73, Vienna Convention on the Law of Treaties provides: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty * * * from the outbreak of hostilities between States."

2. ***Suspension and revival of treaties.*** The Supreme Court view in *Clark v. Allen, supra,* that hostilities do not necessarily suspend or abrogate treaty provisions is elaborated by some text-writers. Focusing on types of treaties, rather than provisions in treaties, they say that hostilities abrogate political treaties, such as those for mutual security or alliance, but only suspend less sensitive ones, such as consular, navigation, and commercial arrangements. Suspension is sometimes used as an alternative to cancellation for failure of performance by the other party either in the same treaty or under general international law. Suspension of treaty concessions is common in international trade law under the General Agreement on Tariffs and Trade (GATT). Suspension is also used in some instances to manifest political disapproval of another treaty party's policies. See also, Resolution, The Effects of Armed Conflicts on Treaties, 61 Ann.Inst.Dr.Int'l de l'Institut de Droit Int'l (1986); *Sedco Inc. v. National Iranian Oil Co.* and the Islamic Republic of Iran, 84 ILR 521 (Iran—US Claims Trib. 1986).

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4. CHANGE OF CIRCUMSTANCES (REBUS SIC STANTIBUS)

BREMEN (FREE HANSA CITY OF) v. PRUSSIA

Germany, Staatsgerichtshof, 1925.
[1925–1926] Ann.Dig. 352 (No. 266).*

Facts. A treaty entered into on 21 May, 1904, between Bremen and Prussia provided for an exchange of portions of territory belonging to each of the two States mainly with the view of enabling Bremen to extend the facilities for transport by sea. Article 13 of the Treaty laid down that a specified portion of the territory received by Bremen in exchange should be used by Bremen only for the purpose of constructing ports and other works connected with navigation, and Article 22 provided that no works connected with the fishing industry should be constructed or allowed by Bremen. The area of the territories exchanged was 595 and 597 hectares, but it appears from the judgment that the territory received by Prussia was only useful for agricultural purposes and, therefore, less valuable. Prussia, therefore, asked for further consideration, and received it in the form of the above restrictive clauses calculated to safeguard the interests of her adjoining provinces menaced by the competition of the neighbouring Bremen fishing industry. Before the Staatsgerichtshof Bremen asked for a rescission of the restrictive clauses, subject, if necessary, to adequate compensation to be paid by her. She claimed that, as a result of the outcome of the War of 1914–1918, there had taken place a *total change in the circumstances* (emphasis added) which underlay the conclusion of the Treaty. It was expected in 1904 that not only would the commercial fleet of Bremen, especially

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the North German Lloyd, continue to exist, but also that a rapid development of that fleet would take place. It was in view of this expectation that Bremen agreed to the restrictions contemplated in Articles 13 and 22. Bremen pointed out before the court that the Treaty of Versailles effected a complete change in the situation in that the German commercial fleet was handed over to the Allied Powers; that the position of Bremen as a centre of shipping and navigation was irretrievably lost; and that the operation of the restrictive clauses had become most oppressive as the prohibited activities had now become the only sphere open to Bremen as a maritime State. *Held:* That the application of Bremen must be refused;

1. International Law recognizes to a large extent the possibility of termination of treaties on account of changed circumstances in accordance with the principle rebus sic stantibus.

2. This principle applies also to treaties concluded between State members of the German Reich. Although rules of International Law do not eo ipso form part of German constitutional law, they may be resorted to in order to supplement the latter. The regard for the interests of the other contracting party which International Law expects from a State, cannot be regarded as inequitable and devoid of a legal foundation within the German Federation.

3. However, as the two restrictive clauses formed an integral part of the treaties in question and as Prussia would not, in the opinion of the Court, have agreed to the treaties but for the restrictive clauses they could not be abrogated without her consent.

4. Neither could the clauses in question be abrogated subject to compensation to be paid to Prussia by Bremen. No such alteration of individual provisions of the treaty is admissible as would compel one contracting party to remain subject to the obligation while surrendering what it intended to achieve as the principal object of the treaty, at the time of the conclusion of the treaty.

5. The above decision [is not] a rejection of the doctrine rebus sic stantibus. The doctrine could still be applied in regard to certain payments or time limits contemplated in several provisions. * * *

The clause rebus sic stantibus. The Vienna Convention on the Law of Treaties provides in Article 62 (in somewhat negative language) for terminating, withdrawing from or suspending a treaty because of a ***fundamental change of circumstances.*** Read article 62 carefully (in Doc. Supp.) This provision should be read in conjunction with the procedures established in Articles 65–68, which also refer to invalidity, termination, withdrawal from or suspension of a treaty. Why is article 62 couched in negative terms? Does article 62 appear to limit the application of rebus sic stantibus? When is a change of a "fundamental character" an "essential basis" of the consent? What is meant by the term to "radically transform" the party's obligations? What happens if one of the parties to a treaty has a change in government? What if the

change occurs as a result of the acts of the party raising the issue of rebus sic stantibus? These questions raise serious difficulties with rebus sic stantibus. Can a private party raise rebus sic stantibus—say, for example, that a person's extradition has been requested and the regime of the requesting state is now much more hostile to him than the prior one? The U.S. answer seems to be no. *See, T.W.A. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984). Many scholars have raised doubts about the viability and wisdom of rebus sic stantibus. See, e.g., Schwarzenberger, Clausula Rebus Sic Stantibus, 7 Ency.Pub.Int'l L. 22 (1984). Others have signalled some value to the rule, such as being a mechanism for enhancing stability and peace, through providing an outlet for intolerably burdensome treaties or for those in which the community no longer has a strong interest. This latter point was made by O. Lissitzyn, *Stability and Change: Unilateral Denunciation or Suspension of Treaties by Reason of Changed Circumstances*, 61 ASIL Proceedings 186 (1967); *see also*, the creative article by D. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 A.J.I.L. 1 (1988).

Suppose a state simply ceases to comply with a treaty and is subsequently called to account by the other party. Is rebus sic stantibus a defense? Can be invoked unilaterally by a state after it breaches? Does the Vienna Convention allow an unlimited right to terminate a treaty unilaterally on the basis of rebus sic stantibus? This is exactly what was suggested by the Attorney General in his opinion to the President in 1941. Is this a wise policy to promote or was it an expedient? Do you think that unilateral denunciation of a treaty based on rebus sic stantibus is often tested in the courts or in arbitration?

To avoid the doctrinal implication of the term rebus sic stantibus, the International Law Commission decided not to use it either in the text or the title of the Vienna Convention article on fundamental change. See the Commentary of the International Law Commission in its draft Article 59 (now Treaty Article 62), 61 AJIL 428 (1967). It is clear, however, that the Commission was carefully and narrowly stating its preferred version of the rule of rebus sic stantibus. The commission noted that the International Court of Justice had avoided taking a position on the existence of the rule by finding, in the one case which posed the question, that the facts of that case did not warrant application of the rule. Free Zones of Savoy and Gex, P.C.I.J., 1932, Series A/B, No. 46. The commission further noted that, although municipal courts "have not infrequently recognized the relevance of the principle in international law," they have "always ended by rejecting the application of it in the particular circumstances of the case before them." (*See, Bremen v. Prussia, supra.*) However, the commission found in state practice "a wide acceptance of the view that a fundamental change of circumstances may justify * * * termination or revision of a treaty."

The doctrine of rebus sic stantibus, either in those terms or in other words, is to be found in the domestic law of states in cases not involving treaties but, rather, commercial contracts between private persons. Article 610 of the German Civil Code provides that one who promises to make a loan can revoke the promise in case of misgivings if a material

deterioration develops in the pecuniary circumstances of the other party, through which the claim for repayment is jeopardized. See also Article 321 of that Code on bilateral contracts. Article 2–615 of the United States Uniform Commercial Code provides: " * * * (a) Delay in delivery or non-delivery in whole or in part by a seller * * * is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made * * *." *Are there differences?* Is there reticence by domestic courts to use it? If rebus sic stantibus is common to municipal systems of law, why, then, should there be such hesitancy to recognize that the rule is a rule of international law? Are there any peculiar risks to its application in international law that do not exist, or exist to a lesser extent, in municipal law? Is the weakness of international adjudication one such risk?

Impossibility of performance. Article 61 of the Vienna Convention sharply differentiates supervening impossibility of performance from fundamental change of circumstances (Article 62). But, like the latter, Article 61 is tightly drafted against excuse from performance. Is impossibility related to rebus sic stantibus? Does it have a legal foundation at least as solid as that of rebus sic stantibus? It would seem so. It has been utilized less than has rebus sic stantibus, however.

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5. DENUNCIATION: PRIOR BREACH BY THE OTHER PARTY

Similarities to the private law of contracts. Neither parties to private contracts nor states parties to treaties are disposed to carry out their obligations if the other side has not lived up to its undertaking to do something first, or has made it clear it does not intend to perform. There are public international public law parallels to failure of consideration (in the common law world, or failure of cause in the civilian world (one type of which is failure of consideration)), prior breach of condition precedent, material breach, anticipatory breach, or frustration of expectations, and the like, but they are not sharply etched in the conduct of states as legal principles.

Most jurists agree that a violation of a treaty by one party provides a right in the other party to abrogate the treaty or to suspend its own performance. Reprisals, otherwise unlawful may be available. There is a split of opinion on the scope of the right to abrogate. Some jurists see it as the only viable sanction for some countries, while others see it as being too risky for wide use. Generally the right is limited to breaches of *material, fundamental,* or other *primary* aspects of a treaty. Of course, these "limitations" give rise to uncertainty and potential dispute.

See gen., International Law Commission Draft Articles on the Law of Treaties, Commentary on "Breach." 61 AJIL 263, 422 (1967).

Vienna Convention on the Law of Treaties, on Breach—see Article 60 in the Documentary Supplement. What is a *material breach*? Take for example the case of the attempted extradition of hijacker Willie Holder, where failure to understand a foreign criminal justice system or the desire to ensure adoption of a treaty by avoiding a negotiation snag that would be impossible to overcome, ultimately caused a heated exchange of diplomatic notes; claiming breach of treaty:

BLAKESLEY, COMPARATIVE LAW: ITS PURPOSES & POSSIBILITIES, 27 TEX.I.L.J. 315, 320–22 (1992)*.

* * * [L]anguage and perception of etymology tell us a great deal of each other's legal culture. This enables us to understand how each other thinks about legal issues. We take our own worldview for granted as the product of our natural common sense, but in reality it is provided by our mother tongue. Vox populi, vox dei. This feeling is a weakness [and] a strength. Paradoxically, it is a weakness that many international lawyers and scholars suffer. To be a good international lawyer, one needs to be a good comparativist.

An example of this comes to mind. The word "to represent" in English is the same in French: "*représenter.*" Yet the conceptual meaning and mental picture created by the word in the mind of a United States attorney and his or her French counterpart is startlingly different. In a case in which the United States sought the extradition of Willie Holder, who had been charged with the hijacking of an American airliner, the French *Avocat Général,* who "*represents*" the United States Government before the French courts in extradition matters, presented the evidence against Holder and then proceeded to *recommend* to the French court that Holder not be extradited. As the *Avocat Général* saw it, the crime was excepted from extradition because it was a political offense. The United States Government was outraged that the *Avocat Général,* the person ostensibly "*representing*" the United States in France, would simply present the evidence and then argue against the United States' position.

The problem arose because of the differing meanings given to the term "represent." The American vision of "represent" conjured up the aggressive adversarial paradigm. The French *Avocat Général* was functioning, however, under the French concept of the term "représenter," which requires him to present all the papers, but to speak to the court as his perception of justice would require (*la parole est libre*). Thus, he must present exculpatory evidence and arguments, if he feels that they are appropriate. Both sides in this controversy were right, based on their own notion of "representation." Notwithstanding the use of the same term, misunderstanding arose because of the different visions of criminal justice triggered

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Would the marked expansion of the federal legislative power afforded by the Supreme Court suggest that de facto interchangeability exists under Article VI? Might the court decline to decide the controversy under the political question doctrine?

It is readily apparent that the American executive-congressional international agreement comes close to the simultaneous ratification and internal implementation-by-law models in continental constitutions. It has been mildly mooted in the literature whether a direct replacement of the Article II arrangement in the Constitution by a bicameral, simple majority, legislative act of approval would be acceptable constitutionally, even if the Supreme Court might not hear the issue. Would the political branches be violating their own oaths to "preserve, protect, and defend the Constitution" Could it be argued effectively that such a development would merely be another case of the evolution of the Constitution, as, say, in regard to the right of privacy? How far would you be willing to go? Why?

Chapter 15

INTERNATIONAL ECONOMIC LAW

The Why of This Chapter

We believe every person who is interested in or concerned about legal order in the world community needs to understand the basics covered in this Chapter, e.g. the emerging, growing, shifting and changing economic law sector of the international legal system. The materials chosen are broadly representative but are only a minimal introduction to specializations that are covered in advanced or graduate courses such as International Economic Law, Foreign Trade Law, Transnational Finance Law, Multinational Business Enterprise Law, Legal Controls of Planetary Resources, International Business Taxation and the like. This field engages more private practitioners and big law firms than any other sector. The monied levels of legal activity are so vast probably because the planet is fast-becoming one world economically—but not legally.

Overview

Economic equality does not prevail in our world of "legally equal states" and various types of international entities themselves linked to legally equal states. There are rich states, modestly endowed states, poor states and seemingly hopeless states. The economic condition of a state is a tremendous factor in its real-world state of development, including politics, potential for aggression, and human rights sensitivity.

While an equilibrium of assured economic equality cannot be fashioned, it is obvious that as much as possible should be done to provide a planetary maximization of asset-uses. The means are free and fair exchange of goods and services among states (Trade); permitted and reasonably-assured movements of investment capital from state to state (Foreign Investment); effective regulations to minimize theft and fraud as to capital movements across frontiers (Transnational Cooperation in Regulatory Activities); and fair and assured utilization of energy resources (Transnational Cooperation in Resource Management). The legal situation as to each of these headings will be taken up in this Chapter. But, first, consider these illustrative situations:

Problems. The problems sketched below are an introduction to the subject matter in this chapter.—***Problem A.*** Denial of entry of foreign goods. For a long time private enterprise in State X has exported large quantities of electric home appliances to consumers in State Y, paying normal import duties. Suddenly, authorities in State Y decree a very low quota on foreign-made electric home appliances, stating that this is done to save the domestic home appliance industry from extinction. Business failures and serious unemployment result in the home appliance industry of State X.

Problem B. Denial of entry of foreign business capital. Home appliance manufacturers in State X decide to set up production in State Y for the State Y market, using Y labor. State Y refuses to permit the transfer of the requisite business capital from State X to it.

Problem C. Deprivation of rights flowing from ownership. A corporation organized in State Z owns 100% a corporation chartered in State Y that under State Y law owns subsurface rights to mine certain minerals. These rights are now worth $50,000,000. State Y expropriates these rights and pays no compensation, charging that the alien group from State Z paid only $500,000 for the rights to begin with and has since profited $100,000,000 from their exploitation.

Problem D. Deprivation of developmental opportunity. State M has a population growth rate of three percent a year and a Gross National Product per capita of $62 a year—a very poor state indeed. It has been receiving from State N and from International Organization O foreign assistance grants to help with its population problem and development loans on concessional terms (below the market cost of the money to the lenders) to support a National Development Plan designed to boost GNP per capita to $200 over ten years. In the fifth year of the assistance program State N objects to the denial of basic human rights in State M. N cuts off its bilateral development assistance to M and successfully prevents O from providing multilateral assistance.

Problem E. Security of Supply of an essential natural resource. The industrialized countries have become increasingly dependent upon foreign oil for heating, electricity generation, transport fuel and industrial uses. Some of the leading oil producers are concentrated in the unstable Middle East where they pursue foreign policies at times sharply at variance with those of some of the main oil consumer countries. The producers impose an oil embargo as an economic weapon against the consumer countries in order to induce policy changes; and by cartel actions the producers force a dramatic increase in the price of oil. The consumers in turn abruptly face the prospect of long-term foreign policy vulnerability to adversarial action of the producers as well as exposure to disruption of essential supplies by reason of natural disasters, military action in the producing regions, transport difficulties and other causes beyond their control, together with the prospect of economic loss through production controls and other cartel pricing practices.

* * *

Notwithstanding these major activities and needs, there is no customary international law imposing duties and creating correlative rights in the above cases, except possibly Case C, where capital-exporting states (or most of them) would argue that there is a rule of customary law requiring fair compensation and some capital-receiving (usually also poor and developing) nations would disagree. Except for the increasingly disputed nationalization area of Case C and some rules about the trading rights of neutrals in pre-UN wars—rules that in World War I and II were not followed because the enemy continued to breach closely related rules—the rules of the economic activity of international legal systems are found in international agreements. These rules are incomplete. The lawyer's role in the transnational economic field is currently active and highly important, although international lawyering takes one more often than not into national centers of law and policy and to the law in treaties, rather than to decisions of international tribunals or the doctrines of international law publicists. Students and law firms, as well as corporations and other businesses need to know that the market for good international lawyers is burgeoning. They often do not.

GENERALITIES ABOUT FOREIGN TRADE AND INVESTMENT

Historically the movement of goods (but not services or capital) has been public and at least taxed for revenue purposes. In ancient times walled cities had a kiosk at the city gate for the tax-gatherers. (Whether

the charges levied there were purely for revenue or to some degree "protection" we cannot say; but trade in goods was only very rarely entirely "free".) Capital, on the other hand, moved quietly or secretly, usually unmolested by minor authorities for obvious reasons. Trade in services is a modern concept. (As we shall see, it became a matter of debate in GATT, at the United States' initiative, only in the past few years). In earlier times personal services usually involved chattel slavery or indentures or simply the movement of medical or other skilled providers from one place to another, as from Athens to Rome. Services were not thought of as things, and even today, in GATT and elsewhere, "trade" in services is slightly exotic.

Capital movements, in contrast to Trade, do not raise "tariff-like" problems. We know of no direct taxes on capital movements. But there are sometimes prohibitions or hindrances. Conversion of capital from one money system to another involves the costs of the foreign exchange transaction; and under circumstances usually not entirely in the hands of any single government, foreign exchange controls may be imposed in certain circumstances on the conversion of local currency profits. The "charge" on a capital movement, thus, remains free of direct control by most state authorities, but it can be discouraged or encouraged by monetary management and other activities of host state agencies. In international law the major problems arising in regard to capital investment in foreign countries have been those of freedom to enter, protection from host state action or inaction in violation of international law, and freedom from discriminatory, larcenous, or patently unfair regulation by the state into which it moves.

Lawyers need to know about relevant trade law, foreign investment law and the different sets of international economic law rules with differences as to where to seek redress. *For instance:* do not take a trade hassle to the State Department or an expropriation of your client's Ruritanian factory to the International Trade Commission! (Not at first, anyway.)

SECTION A. FOREIGN TRADE LAW

A SKETCH OF THE IMPORT-PROCESS AS TO TRADE IN GOODS AND THINGS

The shipment arrives at the frontier, usually pre-cleared, or delivered directly to a customs broker. The bill of lading describes the contents, using, if possible, the customs nomenclature of the receiving state. The goods or things are inspected for the accuracy and the veracity of the importer's classification. The customs inspector may change the classification and hence also the rate of duty, classifications being numerous, narrow, and sometimes surprisingly (or shockingly) variant as between items that seem not to be very different. (These differences may reflect hidden protectionism, sometimes ancient, with reasons forgotten.) If the importer does not accept a re-classification, a

lawyer specializing in trade law has to be engaged to take the dispute through administrative review, and eventually, if necessary, judicial review. There is a whole body of specialist law about customs classification (and levy) issues. Note that the foregoing refers to trade in goods and things, not services. Services do not ordinarily receive customs classification for the levy of duties. Entry of them, vel non, is a matter of host state control not unlike those on direct foreign businesses, treated in Section B.

There are other import controls than custom duties: quotas, sanitary and safety regulations, and importing state sanctions or other inducements to the exporting state to conform to some value or standard of interest to the import state. Quotas as to quantity or value have been often of more concern to foreign suppliers than customs duties, particularly when rates of duty have been reduced to low percentages of value. You will see later that trade liberation arrangements, such as GATT, approach the rate of duty and quota problems along somewhat different lines. As to health, sanitary and safety regulations, contemporary news reports of American exporters' complaints about Japanese "testing" delays and alleged "Mickey–Mouse" standards have probably come to your attention. Ironically, at this writing, the American meat-consuming public is having a problem with the Great American Hamburger, "protected" from foreign beef by the Wholesome Meat Act, which inter-alia, requires American official inspection of slaughter houses abroad that would export to the United States.

Prohibition of imports from a particular source for foreign policy reasons or national moral values (such as human rights) involves the legal pros and cons of "economic sanctions" (also, known under more stressful conditions as "economic warfare"). So do controls (including absolute prohibitions) on the export of materials and devices deemed of national security concern. Until the dissolution of the Soviet Union and the warming of the Cold War, administrative practice before the Export Control Administration of the United States Department of Commerce and judicial review of the actions thereof, and lobbying, supported a number of specialist attorneys, both for the Government and for the contesting would-be exporters. We do not vouchsafe here present levels of activity in this field.

Finally, as to the customs process: beyond what happens at the customs frontier, there are in the United States and elsewhere, rather vast and complicated administrative law procedures, and in the United States, federal court judicial review.

A BRIEF HISTORY OF TARIFFS AND OF TRADE LIBERALIZATION

The era of European colonization of the Americas saw *mercantilism* practiced with varying degrees of exclusivity by the Spanish, Portuguese, French, and British colonizers. The metropoles, to varying degrees over time, sought to have their colonies trade with the world through them; and the same attitudes characterized later European colonizations in

other parts of the world. A vestige of this era, (British) *Empire Preference* (as to terms of trade) lasted well into this century.

According to popular history, the British–Northamericans who revolted and created the United States of America, a revolution triggered by a trade-taxation issue, found themselves after Independence divided on a trade issue that persisted in national politics roughly until the Truman Administration. You may remember the issue from school history as: *Tariffs for Revenue Only* versus *Tariffs to Protect Infant Industry* (and later, *Tariffs to Protect the American Laborer*). The deep division on this issue reflected the conflicting aspirations of industrial states of the Union and agricultural states and areas. Why, then? What now? What is South Carolina today? Illinois? California?

In 1930 Congress enacted the highest levels of duty in American history. (The Smoot–Hawley Tariff Act). Why was this done in the first year of the Great Depression? What happened to these very high (often over 30%) ad valorem rates of duty? They still remain in the United States tariff schedules! But they are in Schedule 2 of the TSUS (Tariff Schedule of the United States), which means that they apply only when Schedule 1 of TSUS does not apply; Schedule 1 represents the rate of duty on imports from Most–Favored–Nations. Schedule 1 rates reflect many years of bilateral and multipartite tariff-lowering activities of the United States. President Franklin D. Roosevelt's choice for Secretary of State, "Judge" Cordell Hull, Senator from Tennessee, was a classic "Free Trade Democrat". (The Term "Free Trade" in the American lexicon did not mean, necessarily, zero duty, but lower duty.) The American initiative was nearly a solo one for years. Secretary Hull and his successors first used bilateral negotiations, then multipartite negotiations mainly through the General Agreement on Tariffs and Trade (GATT), to bring down rates of duty from Smoot–Hawley levels (Schedule 2) to a range which currently regards a 10 percent-of-value duty as quite high. How was this done? By the use of Unconditional Most–Favored–Nation procedures, which we shall consider now.

Even before the Roosevelt–Hull era, the United States occasionally experimented swapping tariff concessions with other countries; i.e., with Hawaii exchanging lower U.S. duties on Hawaiian pineapples for lower Hawaiian duties on iron plowshares. The United States would then inform another pineapple-producing state that it could have the same deal. This kind of relationship was known as Conditional–Most–Favored–Nation–Treatment (Conditional MFN). Sometimes the items in the swap varied a bit; but the basic principle remained that of a concession for a concession. Obviously, Conditional MFN could not be utilized to spread trade liberalization widely and quickly. In 1927 (before Roosevelt–Hull), the United States first moved to Unconditional MFN, when Brazil and the U.S. promised to give each other any break as to customs duty given to any third state. In the Roosevelt–Hull era, Unconditional MFN treaties were increasingly negotiated on a bi-lateral basis, with the MFN agreement usually part of rather standardized "treaties of friendship, commerce, and navigation", (FCN treaties). In theory, such bilateral treaties would be negotiated with a "principal supplier" of the commodity to be imported, in order to ensure mutual

interest in making generous concessions as to rates of duty, or sometimes, quotas. The effect of such treaties was an across-the-board reduction in tariffs, because states with an MFN treaty right were automatically entitled to concessions given any other state that was the "nation-most-favored" as to that commodity.

In 1947–48 a multipartite version of Unconditional MFN became possible through tariff negotiation between any two members of the General Agreement on Tariffs and Trade (GATT), via Article I of the Gatt agreement (pp. 1116–1117). The optimistic assumption was that in GATT Negotiating Rounds (see infra), a pair of principal suppliers would negotiate to the bone, and both concessions could be claimed throughout the GATT membership. Hence, in Country C problem contained in the introduction to this Chapter, page 1114, Unconditional MFN is called "the heart of GATT". However, this does not mean that the United States can claim the zero rate of duty on, say, French wine, that prevails between France and the United Kingdom. In other words, states that are grouped together in common markets do not have to favor non-members of that market. What about free trade areas? You will come to them. Meanwhile, bilateral unconditional MFN still exists between a GATT member and a state not in GATT; see MFN for China.

1. MOST FAVORED NATION TREATMENT

Problem. At a time when its own tariffs were highly protectionist, State A analyzed world trade conditions and came to the conclusion that tariff barriers were undesirably high worldwide including the tariffs of States B, C and D. Up to that time, State A had given another state only such tariff cuts for its exports to State A as were compensated for by some corresponding cut in that state's duty on State A's exports to it. This requirement of compensation applied even where the other state had been promised most favored nation treatment in a treaty with State A, and State A had given a cut to a third state, which, in turn, had conceded a trade benefit to State A.

When State A decided to launch a worldwide effort to lower tariff barriers, it announced that it was changing its concept of most favored nation treaties to an unconditional form. Thereafter, States A, B, C and D each entered into unconditional most favored nation agreements (MFNs) with the other three. States A, B and C are highly-developed, producing wide ranges of manufactured goods. State D is a less well-developed country, largely an agricultural producer and non-competitive as to costs with A, B and C insofar as manufactured goods are concerned. If D did not have high tariffs or low quotas on goods (say automobiles) manufactured in A, B and C, its high cost domestic market would yield to the foreign imports of manufactured goods and D would lose scarce foreign exchange to pay for the imports.

States A and B enter into wide-ranging and hard-bargained bilateral trade treaties that result in average tariff cuts of 50% from schedules on both sides. C and D, under their MFN treaties with A and B, claim the benefits of these cuts but offer none in return, with the result that their tariff walls loom higher than ever as clogs on interna-

tional trade. Considering the materials on pp. 1119 et seq. answer these *questions*: 1. Why did A move to unconditional MFN? 2. Why did A and B make their arrangement, assuming they knew that C and D might not offer cuts? 3. Could A and B legally withdraw their promises to C and D, if they had been led to believe by C or D that they, too, would offer cuts, which they did not in fact offer?

Questions to come back to: (after more on GATT, or on review):

Assume that states A, B, and C are members of GATT and:

1. A and B entered into a bilateral MFN arrangement: Are C and D entitled to claim MFN?
2. C is a member of the EU, which has no tariffs among EU countries, but a common external tariff applicable to all non-members of the EU. What are the recourses within GATT of A and B?
3. D is a member of a free trade area, wherein members have zero tariffs among themselves but keep their national tariffs as against non-members. What are A & B's recourses within GATT?

PATTERSON, DISCRIMINATION IN INTERNATIONAL TRADE, THE POLICY ISSUES 1945–1965

at 6 (1966) *

Discriminatory policies were sometimes defended on the much wider grounds that they fostered freer trade. In a world in which there are problems of unemployment and in which tariff barriers exist and are reduced by a process of negotiation and exchange of "concessions," in such a world a policy of nondiscrimination (unconditional-most-favored-nation treatment) by A and B reduces their future bargaining power in the quest for larger markets in C and D. The consequence, many held, could easily be a slowing down in tariff reductions all around the world. This case for discrimination was more difficult to deal with by those who favored more liberal trade policies and it was commonly accepted as a potent case for discrimination. Ways were found to partially meet the problem—notably, the development of the "principal supplier" rule and specialized tariff classification [6]—but at the cost of impairing the most-

6. The principal supplier—or chief source—rule requires that a nation negotiate reductions in import barriers on a given product only with the country which had been supplying the greatest portion of the former's import of that product. It is thus intended that each concession will be negotiated with the country having the greatest interest in it. This practice preserves bargaining power when the unconditional-most-favored-nation practice is followed, because there is a tendency under it for some products of prime interest to other countries (those goods for which each is a major supplier) not to be the subject of negotiation between other pairs of countries. Specialized tariff classification facilitates the application of the principal supplier rule by so defining products for trade barrier cutting purposes that fewer, rather than more, of the exports important to those not participating in a given bilateral negotiation qualify for the bilaterally agreed cuts.

favored-nation principle.[7]

* * *

Trade liberalization and the rise of most favored national treatment in the unconditional form. Broadly, both the conditional and unconditional forms of most favored nation treatment reduce the discrimination that exists in international trade when two states restrict exclusively to themselves the trade advantages they give to each other. Bilateral and strictly exclusive trade bargains were the norm over much of the historical period of the modern state, often being linked to treaties of military and political alliance. To a considerable extent for some countries such arrangements existed until sometime after World War II in the Western world, usually those with foreign exchange difficulties. Bilateral trade arrangements of the exclusive sort still characterize the trading practices of the Eastern European socialist bloc.

However, there is evidence that, in past centuries, states sometimes found it in their respective national interests to make trade liberalization arrangements in the knowledge that there were outstanding most favored nation promises to third states, and in some instances these promises were of the unconditional type.

Between the two World Wars and after the second down to date, subject to questions that arise in relationship to material to follow in this section, the United States has been the prime mover toward trade liberalization (lower tariffs and the reduction of quotas on imports, i.e. quantitative restrictions). Exclusive trade agreements were not favored by the United States even when political parties favoring highly protective tariffs were in power. Until shortly before an exchange of notes with Brazil in 1923, the United States adhered to the practice of entering into conditional most favored nation treaty relationships. See Whitney v. Robertson, 124 U.S. 190, 8 S.Ct. 456 (1888), where an importer of goods from San Domingo (today the Dominican Republic) failed to get the lower than tariff schedule rate the United States had given the King of Hawaii on the same product, because the United States treaty with the country of the import's origin was of the conditional most favored nation variety and that country did not give American imports concessions comparable to those that the King of Hawaii had given. It was so held even though the treaty had not specifically stated that the United States treaty promise to that country was conditioned upon the giving of such compensation.

Nonetheless, the general level of United States and other tariffs remained high. What is said to be the highest general level of tariffs in United States history was reached in the Tariff Act of 1930, coinciding with the Great Depression and European defaults on war debts to the United States, because of the debtors' inability to sell enough for dollars and gold to pay without seriously impairing the credibility of their own monies and their capacity to pay for necessary imports. Franklin D.

7. The argument lost some more of its potency when, immediately after World War II, arrangements were made for simultaneous bilateral negotiations, a procedure which Germany had followed before World War I, and which became the hallmark of the General Agreement on Tariffs and Trade.

Roosevelt came to power in 1933 committed to trade liberalization through the negotiation of bilateral tariff reductions that by unconditional most favored nation treatment would spread throughout the world trading system. It was assumed that the maximum use of the principal supplier technique (see the excerpt from Patterson above) would ensure the requisite network of tariff-cutting agreements.

Congress responded with the Reciprocal Trade Agreements Act of 1933, which as codified and from time to time extended and amplified as to the scope of the President's delegated power to cut tariffs, is still the basis of United States trade liberalization treaties and for United States participation in the General Agreement on Tariffs and Trade (GATT).

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND JAPAN OF APRIL 2, 1953

4 U.S.T. 2063, 206 U.N.T.S. 143.

Article XIV

1. Each Party shall accord most-favored-nation treatment to products of the other Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other Party, by whatever route and by whatever type of carrier, with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities [re] importation and exportation.

* * *

Article XXII

* * *

2. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, * * *, of any third country.

GENERAL AGREEMENT ON TARIFFS AND TRADE OF OCTOBER 30, 1947

61 Stat. Part 5, A12, 55 U.N.T.S. 187.

Article I

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with

respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 1 and 2 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 3 of this Article and which fall within the following descriptions:

[There follow specified excepted trade preferences, *i.e.* tariff advantages that are to remain exclusive. Generally, these were those between the United Kingdom and other Commonwealth entities; France and Territories of the French Union; the Customs Union of Belgium, Luxembourg and the Netherlands and the overseas territories of Belgium and the Netherlands; the United States and the Republics of Cuba and the Philippines and dependent territories of the United States; preferences between a few neighboring countries, the United States and Canada—Mexico not being included.]

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1. ***The institutional history of GATT.*** The GATT, as a set of multipartite treaty rules about international trade and as a slightly developed international organization, is all that survives of an ambitious post-World War II effort to establish an International Trade Organization (ITO). The Charter of the International Trade Organization died aborning, in part because it attempted to regulate internationally restrictive trade practices and cartels and monopolies, as well as tariffs and quotas. GATT was put into effect pending sufficient state approvals to permit the ITO to come into being, which it never did. As the prospects for the ITO dimmed, GATT institutionalized itself, although it still is not, strictly speaking, a full-fledged international organization.

As to the expectations for the ITO, see Rubin, The Judicial Review Problem in the International Trade Organization, 63 Harv.L.Rev. 78 (1949). For the early period of GATT, consult Gorter, GATT after Six Years: An Appraisal, VIII Int'l Orgs. 1 (1954). The failure of the ITO also cost the less-developed countries (LDCs) their effort to write into MFN treatment an explicit exception for their development-related exports; the developed countries agreed to such a principle (Art. XV of the ITO) for the ITO, but successfully resisted its inclusion in the GATT part of that arrangement. As things turned out GATT was the only part of the total effort to regulate all major aspects of international trade that went into effect. As to the work of GATT, consult Hudec, The GATT Legal System and World Trade Diplomacy (1975), and Jackson, World Trade and the Law of GATT (1970), and Jackson & Davey, Legal Problems of International Economic Relations (2d ed. 1986).

2. ***GATT as a legal curiosity.*** It is often said that unconditional most favored treatment is the heart of GATT. It is also about the only part that requires GATT member states to alter pre-existing national legislation contrary to GATT. Technically, no state is a party to GATT as such. GATT is in force only through a Protocol of Provisional Application, and that Protocol allows states at signature to indicate that (or what) then-existing national legislation contrary to Part II of GATT will remain in effect. Part I of GATT, including Article I, above, is not affected by the "existing legislation" provision in the Protocol of Provisional Application.

3. ***Membership in GATT.*** A GATT publication, *Activities,* periodically updates GATT membership and is a useful source of general information about the organization, headquartered at Geneva, Switzerland. In July, 1992, 104 states were members; 28 states where GATT formerly applied during colonial periods were awaiting decisions on admission. Several members have divided or otherwise split-up since the above date, notably the former Czechoslovakia and the former Yugoslavia. The former U.S.S.R., which became an observer in 1990, has been succeeded by the Russian Federation as observer at GATT. Most states-members of the Commonwealth of Independent States, also derived from the former U.S.S.R., are reported by GATT to be adopting GATT–based guidelines for their evolving trade regimes and thus looking toward association. The three Baltic States, Estonia, Latvia and Lithuania, are reported to have expressed interest in observer status. Also, as of the above date, GATT working parties were considering the membership applications of Bulgaria, Paraguay, Mongolia; and Panama, Ecuador, Syria, Taiwan and Viet Nam had made formal or informal soundings about accession. Cuba is a long-standing member. (Does this surprise you?) Mexico became a member several years ago, thus making all states in the proposed North American Free Trade Agreement (NAFTA) members of GATT as well.

4. ***Other international economic structures.*** Dealing with international economic policy more broadly cast than trade alone are UNCTAD (United Nations Commission on Trade and Development); OECD (Organization for Economic Cooperation and Development), based at Paris and not a specialized agency of the United Nations or a commission thereof; and UNCITRAL (United Nations Commission on International Trade Law) which works in the field of research, negotiation and proposal of private law rules of international trade, including standardized rules for arbitration of trade disputes.

UNCTAD has very wide membership, including all major developed countries and the developing countries except Albania and North Korea. So far it has reflected the viewpoints of the developing world, but as we'll see later, the developing countries bloc in the Assembly is currently not very active. OECD is open to all countries, but its developing country membership, though appreciable, is short of UNCTAD's. OECD does very professional economic and social research, often leading to policy-linked proposals, but these, unlike those of the two United Nations Commissions (UNCTAD and UNCITRAL) do not have a track through the Economic and Social Council to the United Nations General

Assembly. OECD proposals, instead, go directly to member states' governments for further individual or collective consideration. The World Bank Group (formerly the International Bank for Reconstruction and Development and affiliates) and the International Monetary Fund (IMF) are strongly capitalized, specialized agencies of the United Nations, with weighted voting. Both have very important links to foreign trade, but most of these links are beyond the scope of this introductory presentation. Common markets and free trade areas are also, in a sense, types of "international" economic structures, and they are very significant in GATT and otherwise in world trade. However, they do not provide universal membership by states, and hence they are not ordinarily thought of as being "international", but either as "transnational" or *sui generis.*

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2. DEPARTURES FROM MOST FAVORED NATION TREATMENT

Types of departures. The most favored nation principle is used in modern commercial treaties for more than just trade (tariffs and quotas). Custom dictates certain exclusions from the coverage of most favored nation provisions, civil aviation for example. Certain other activities are also excluded, sometimes explicitly or by the general understanding of the mutually promising states: defense industries and administration of aliens' estates. As to trade in the strict sense, there is a customary exclusion of preferences given to frontier traffic.

The more important departures are those arising where common markets (a more precise term than the older "customs unions") and free trade areas provide trade advantages for the participating states in their trade with each other that, if extended to nonparticipating states having most favored nation treaties with member states individually, would destroy a major incentive toward the customs union or the trade area. Article XXIV of GATT states the contours of the exception under reference, but in practice few of the arrangements that have been made have fitted GATT like a glove, with the result that waivers have been sought and usually granted. The U.S. quickly approved such a waiver as to the present European Union (EU), when, prior to the Treaty of Rome (1956), the then European Economic Community (EEC) was being created, on the basis of free trade among the member states and a common external tariff as to non-member states. By hindsight, should it have? Why did the U.S. not only tolerate, but welcome, the EEC concept as early as 1948? All EU states are GATT members; so the EU itself is also subject to the GATT system, and the sole tariff of its members is the common external tariff, which means that only it is the basis of the EU's MFN obligation.

The same general principle of MFN exception applies to the European Free Trade Association (EFTA), as to the tariff and quota preferences the member states give each other. But as there is no common external tariff in EFTA, each EFTA state, through GATT, is responsible for

dealing properly with third states in the administration of its national tariff. The currently inoperative Central American Common Market (CACM) has the same MFN structure as the EC; and the Latin American Free Trade Association (LAFTA) (currently dormant) is like EFTA, as to unconditional most favored nation treatment. Other groupings in developing Africa, Southeast Asia, the Caribbean Basin, and Latin America (the Andean Group within LAFTA) are similarly classifiable as either common markets or customs unions.

The European Union (formerly ECC, then EC) is the world's largest trading unit, although this will change, if NAFTA works. It negotiates for all twelve member states at GATT, through the EU Commission based at Brussels. The member states also have presence at GATT, technically through observers, but there have been instances of de facto direct member state activity at GATT through negotiation.

The European Free Trade Area (EFTA) once included the United Kingdom, Ireland, and Denmark, but these shifted to the (then) EEC (now EC). EFTA still includes Austria and Sweden, both of which have applied to join the EU. Switzerland and Leichtenstein (whose foreign affairs are managed by Switzerland) may have some lingering problems about shifting from EFTA to the EU, due mainly to Switzerland's "neutralization" at the Congress of Vienna (1815). Norway left the EEC and joined EFTA because of EEC regulation and limitations on North Sea herring fisheries. Nevertheless, and despite internal opposition, Norway is a candidate. Finland, which before the collapse of the Soviet Union had made some bilateral free trade arrangements with members of the Eastern Bloc (but not the USSR), was freed from concern about USSR objection to Finland's joining either Western trade area, and is a definite candidate to follow Sweden into the EU.

Multi-member free trade areas and a few multi-member "almost" common markets have been attempted by less-well developed African and Western Hemisphere states, within significant success so far. A major obstacle is that there is usually very little trade among the countries attempting broader-based trading relationships. The Asian side of the Pacific Rim has made some moves toward multi-member arrangements, and the remarkable economic growth of some of these countries gives rise to expectations of success for such arrangements. There are two political problems, however: (i) memories of Japanese aggression and occupation, and, (ii) the Chinese economic and ideological monolith. Both problems impede the association of these two states with each other and with developing states.

The other major departures from MFN in GATT are those authorizing member states to offer generalized systems of import trade preferences (GSP) to developing countries; emergency foreign exchange situations in the importing country, under which disincentives to imports are permitted; and authorization for the imposition of over-schedule duties to rectify dumping (goods offered as exports below home country cost of production), governmental subsidization of exports, unfair trade practices as to exports, and temporary escape clause situations. These other departures from MFN tend to concentrate disputes in the importing country and hence in administrative agencies and courts there, while challenges to alleged Art. XXIV departure from MFN usually arise in negotiating arguments at a GATT "Round" of trade negotiations or by a specific referral of a dispute to a GATT dispute-settlement panel at Geneva. These matters are dealt with in much greater detail in specialty courses on international trade law.

Departures from MFN for developing countries. The United States, the European Economic Community, and various developed countries individually are authorized by a 1971 waiver to Article I of GATT (and by the later development of a new part added to the GATT agreement) to give developing countries tariff and quota trading advantages which are denied to developed countries.

The term GSP (generalized system of preferences) is in general usage to refer to this type of departure from unconditional most favored nation treatment. By 1987, it was seen that the developing countries had not been lifted out of their difficulties by GSP to the degree theoretically viewed as possible in 1961 and 1971. Apologists for developing countries blame ungenerous § 7 GSP concessions and sporadic tergiversations in policy by developed countries for their disappointment. Many observers in developed countries admit that GSP classifications are often narrow and even arbitrary, but they also claim they can identify other deficiencies in developing country economics which prevent full effectiveness for existing GSP. See in the Documentary Supplement excerpts from the United States GSP system, as provided in Title V of the Trade and Tariff Act of 1984.

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3. DEPARTURES FROM IMPORT BINDINGS FOR REASONS OTHER THAN NON-ENTITLEMENT TO MFN TREATMENT

1. ***Focus.*** Under this sub-heading, there are presented, very briefly, the general types of situations in which the rate of duty, or other term of trade with respect to import, binding a state (by bilateral international agreement or by the bindings resulting from trade liberalization negotiations in the GATT tent under Article II) may be altered by special circumstances. In some circumstances, these alterations may have an incidental or an asserted or actual intended discriminatory effect on the most favored nation principle as well. A good deal of the work of American specialists in international trade law falls into this area.

2. ***Foreign exchange and other stringencies.*** What happens legally when a GATT member finds that its trade liberalization policy has brought it a flood of imports priced in a scarce foreign currency at a time when its own exports are lagging, with the result that its adverse balance of trade (trade deficit) affects or threatens to affect its balance of payments or even its reserves to back its own currency? See the incident that follows:

GENERAL AGREEMENT ON TARIFFS AND TRADE OF OCTOBER 30, 1947

61 Stat. Part 5, A12, 55 U.N.T.S. 187.

Article XII

1. Notwithstanding the provisions of paragraph 1 of Article XI [eliminating quotas], any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

2. (a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

(i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or (ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves

* * *

(b) Contracting parties applying restrictions under subparagraph (a) of this paragraph shall progressively relax them as such conditions improve * * *.

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1. ***The 1971 tariff surcharge and GATT.*** GATT Article XII provides that "* * * any contracting party, to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise * * * [imports.]" The language means quotas, not upward revision unilaterally of tariff bindings under GATT Article II. The distinction is based on an earlier focus on high tariffs, which only since 1974 is shifting to non-tariff barriers, as general levels of duties fall. So the 1971 Nixon surcharge violated GATT.

For a short time in the early 1970s the Soviet Union and the United States were reciprocally entitled to MFN treatment under a bilateral trade agreement; but the USSR withdrew from the agreement, because of objection to an emigration rider that Congress in the Trade Act of 1974 made applicable to Soviet exports to the United States. *What happens if the Russian Federation joins GATT? If the United States and the Russian Federation make a bilateral trade treaty?*

2. ***Tariff Schedules of the United States.*** They are made up of very narrow categories of products, with the result that the customs classification problem is often litigated. Are pregnant Holstein heifers weighing over 700 pounds "cows imported specially for dairy purposes" and thus entitled to a lower rate of duty per pound than "cattle generally"?

CURRENT STATUS OF CERTAIN OTHER COMMON MARKETS AND FREE TRADE AREAS

The Central American Common Market (CACM) has not revived from the political debacle of the eighties in that region. The Latin American Free Trade Association (LAFTA), while not moribund, has accomplished little. Other groupings in less-well-developed areas (LDC's) of Africa, Southeast Asia, and the Caribbean Basin also have shown little progress. Proposals for new attempts in developing or hope-to-be developing countries continue to be made, but structures remain unstarted or incomplete. Why so little forward movement? Could it be that common markets and free trade areas require for vigor substantial amounts of existent or feasibly-developable, normal commerce by members with each other? How much commerce is there, say, between Costa Rica and El Salvador, or Brazil and Chile? Why is a free trade area between Canada and the United States functioning? An elaborate North American Free Trade Agreement (NAFTA), linking Canada, the United States and Mexico, has been negotiated and obtained the advice and consent of the Senate. Implementing legislation is in process. In July, 1993, the Canadian Parliament completed approval of NAFTA. The President of Mexico and the long-governing political party that he heads, strongly support it. Will two developed and one developing country be able to make it work? In the time when the EU was a group of six advanced European countries with substantially equal foreign exchange reserves, it was thought by experts that substantial parity in levels of economic development was essential to success of a common market or free trade area. But now the twelve states in the EU are at three levels of economic capacity. Is it working? Will it hold? If so, can Mexico hold its own, as to foreign exchange resources, under NAFTA? Does the answer depend, inter alia, on what advantages NAFTA itself may throw Mexico's way as to employment, levels of industry, foreign capital investment, and less stringent environmental regulation? Will it be deemed in the long run interests of Canada and the United States to provide such advantages to Mexico? In the case of the United States, would the concession of advantages to Mexico be acceptable should such concessions help relieve the illegal alien problem? Mexican President Salinas believes so, and is reported to have committed thirty million dollars to lobbying NAFTA's approval by Congress!

CUSTOMS LAW IN ACTION: A SKETCH

Classifications (under categories of substances and manufactures) in the TSUS (Tariff Schedules of the United States) tend, as do those of other states, to be very narrow, with differences in the customs duties that often seem unjustified by the degree of difference in the items themselves. Why is this so? Does it reflect accumulations of special interests and political pressures on the tariff-makers? The answer is "Yes", to a considerable degree. (In the United States the ultimate

tariff-makers are the Congress, with revenue bills initiating in the House of Representatives.) Transnational efforts to rationalize and standardize customs categories and classifications have been under way for some time and progress is being made toward greater uniformity. But, to illustrate a simple situation: "Cows imported specially for dairy purposes" enjoy a lower rate of duty than "cattle generally". *Issue:* Do pregnant Holstein heifers weighing over 700 pounds qualify? See E. Dillingham, Inc. v. United States, 490 F.2d 967 (C.R.PA.1974). *Make a bet:* Yes or No, then look it up. (*Note:* the Court of Customs and Patent Appeals (CCPA) has been abolished and its federal appellate jurisdiction transferred to the United States Court of Appeals for the Federal Circuit, an Article III (constitutional) court, which like the Circuit Court for the District of Columbia, sits exclusively in Washington.)

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4. THE FAST TRACK: ANOTHER WAY FOR THE UNITED STATES TO MAKE TRADE AGREEMENTS

Coping with an Old Separation of Powers Problem. The Constitution gives the revenue power to Congress, with initiation in the House of Representatives. Because American trade law began with and still involves tariffs, which are revenues, and also, because trade is *commerce* under Article I, Congress has until recently (until it committed to "fast-track") held onto detailed control of and micro-managed tariff and trade acts. Congress tended to "take care" of its constituencies, creating a hodge-podge of tariff classifications, rates of duty, quotas, and subsidies. Further, the House of Representatives would never tolerate the making of international trade law by the President and the Senate via self-executing treaties. As a result, tariff acts were both complicated and delayed by diverse special interest pressures presented to Congress; for instance, a proposal for a higher duty on sheep wool than goat wool (or even Toggenberg goat versus mohair-producing goat). The TSUS reveals ample examples of such gerrymandering of rates of duty and customs classifications.

The problem is even more difficult when a broad-ranging trade agreement is involved. Such an agreement requires negotiation; negotiation with other states is an Executive or Executive–Senate function. However, the agreement also involves tariffs and revenues; hence the entire Congress is entitled to approve or disapprove of its terms. In the process, amendments to the negotiated text would surely be made.

In another of several efforts to bridge the separation-of-powers gulf between the White House and the Hill, without turning the American Federal Government into a Parliamentary system, a procedure inevitably called "Fast Track" was devised and enacted into legislation in 1974, and has now been codified as 19 U.S.C. § 2501, et seq. (see the Doc. Supp.). In effect, Congress and the President agree that if (i) the President notifies Congress at least 90 days in advance that he is

entering a trade negotiation and (ii) undertakes (presumably to the satisfaction of Congress) to keep the relevant Committees in both Houses fully informed as to all significant aspects of the negotiation, then each House shall adjust its rules to permit voting yea or nay without amendments on the trade agreement, provided that the President submits with it a proposed act of implementing legislation. So far, the Fast Track has functioned well and has brought efficiently into force a considerable number of technical agreements on specific international trade matters. The Fast Track has also enabled wider-ranging trade agreements of the EFTA sort to be implemented, including ones with Israel and Canada, with NAFTA negotiated but not yet submitted to Congress.

EXCERPT FROM THE TRADE AGREEMENTS ACT OF 1979

19 United States Code § 2501 et seq.

Sec. 2. Approval of Trade Agreements. [The fast track procedure in section 151 of the Trade Act of 1974—19 U.S.C. § 2191. The text of the Section is in the Doc. Supp.]

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5. NON-TARIFF BARRIERS, TRADE IN SERVICES, EXPORT CONTROLS

Tour d'horizon. Rates of duty and quotas are no longer significant entry barriers in developed country market areas, except as to agricultural products. Japan, in fact, has the lowest tariff levels on manufactured goods as compared to the EC and the United States, and all three are on the average below 10%. A number of developing countries still use, or are compelled by the International Monetary Fund to use, import-reducing devices, including tariffs, to conserve foreign exchange resources by reducing the consumption of foreign goods. Today the major entry barriers in major markets, agriculture excluded, are: complicated import procedures; overly meticulous safety and other inspections of imports; governmental, private, or governmental-private informal arrangements providing biases against imports and ultimately favoring consumer preferences for domestic products, preferences obviously nearly non-existent in the United States. Non-tariff barriers are more difficult to negotiate than mere tariff cuts or quota increases. Hence, Congress has sought to keep its hand in non-tariff barriers, while as to tariffs it merely sets the range within which the President may negotiate cuts. One result is the fast-track, Section 151 procedure.

A problem for the United States is that it has low entry barriers (subject to the debatable charge previously mentioned that the whole United States customs system is a non-tariff barrier), whereas both the EC and Japan have some formidable ones. In the case of EC the great barrier is an automatic variable levy on imports of all agricultural products that, if produced in the EU are subsidized. This is a tariff

barrier technically, but it works in an unconventional way for a tariff. It can be argued that it is essentially a non-tariff barrier.

The Japanese barriers are to a high degree difficult to understand, as seen by non-Japanese. With low duties, why should European Community alcoholic beverages be so costly in Japan? [The EC has raised this in GATT.] What arrangements [some westerns wonder] go on between Japanese industrialists and MITI, the powerful Japanese Ministry of International Trade and Industry?

On the whole, the array of legal proceedings brought against Japanese exporters to the United States have failed to give domestic American producers effective protection in steel, automobiles, color television receivers, barber chairs, shirt-pocket radios, etc. The result is that through executive action the United States has warned Japan of possible congressional intervention and negotiated voluntary restraint or orderly marketing arrangements [OMAs] through the Japanese government, although an early, controverted arrangement was purported to be a direct initiative by a Japanese steel manufacturer's association.

Parallel—some say—to the decline of its heavy manufacturers, the United States now wishes to see an international legal mechanism for trade in services: banking, insurance, legal, consultative, managerial, technology-transferring. In the next GATT round, the Uruguay Round, the issue of expanding GATT from goods to include services was on the agenda. And because services sometimes involve property rights under foreign law (patents and trademarks), or business establishments abroad, or special machinery located there, the services issue sometimes comes close to the direct foreign investment problems considered in Section B, to follow herein.

In some instances assured and non-discriminatory access to exports is the international trade problem involved. Most issues as to the export controls of the United States have related to national security or foreign policy goals, although access problems as to certain metals, industrial diamonds, and eventually, petroleum (again) might arise.

THE "ROUNDS" IN THE BIG GATT TENT

For roughly its first twenty years (1948–68) GATT operations were mainly directed to lowering tariffs. The general plan for this was that periodically the member states' representatives would gather at a particular place to open membership-wide tariff-cutting and terms-of-trade-easing negotiations. The concessions that any "negotiating pair" made to each other would spread automatically via Article I of GATT (by MFN). In theory the concessional negotiations would be between pairs or groups of principal suppliers, each of which would have some import goodie to trade for a concession to that suppliers' export. By the end of the Sixth ("Kennedy") Round (Geneva, 1964–67) tariffs within GATT were reduced substantially, to their present low levels. Also, in the Kennedy Round attention began to shift to "non-trade" barriers, but

little was accomplished as to lowering or eliminating them at that Round. The Seventh (so-called "Tokyo") Round (1973–79) focused on "Codes" of trade conduct, which are not instantly spreadable through the GATT tent but depend on accession by members for binding effect. The agreement finally made through the Uruguay Round was put into effect in a signing ceremony at Marrakesh, Morocco, April 15, 1994. A major effect of this arrangement is that it provides for the transmutation of the GATT, in 1995, into a full-fledged specialized agency under Articles 57 and 63 of the U.N. Charter, to be called the INTERNATIONAL TRADE ORGANIZATION. Thus, a major, but failed objective of the 1948 Havana Conference is finally achieved, a half-a-century later. One general expectation is that the new International Trade Organization will provide greater effectiveness in the resolution of internal disputes between member states. Also, there are expectations that its existence will reduce or end the need for "GATT Rounds," described immediately above.

ENVOI ON TRADE: THE DEVIL IN THE DETAILS

The California press for May 23, 1993, reported that California congresspersons were urging the United States Trade Representative to take this matter up with Mexico, in the context of the North American Free Trade Agreement (NAFTA). Mexico has recently removed its prior import license requirement for foreign table wines and lowered its tariff on such wines to 20 percent of value (a high going-rate of duty today). At the same time, Mexico has given Chilean wines a four-year phase-out of the duty, whereas under NAFTA the duty on American wine is to be phased-out in ten years. One might enquire: What about MFN in NAFTA? Would Article I of GATT apply to the arrangement between Mexico and Chile, if (a) the agreement is bilateral, (b) there is a Mexican–Chilean free trade agreement, or (c) there is a wider free trade area of Latin–American countries? The California wine industry currently exports wine worth over 4 million dollars to Mexico, despite the import license requirement and duty barriers, but anticipates a larger Mexican market as that country becomes more prosperous under NAFTA. Of course, California wants a level playing field with competing wine-producing countries. One wonders: what is the EU rate of duty on wines from (a) Algeria, (b) Chile, (c) Australia, (d) the United States? Are there reasons why they might not be uniform?

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1. ***Reasons for use of controls on export trade.*** Export controls have been used over time to gain advantages for states enjoying certain types of natural or technological monopolies; to reduce the force potential of other states; to evince extreme political dissatisfaction with the domestic or foreign policies of another state or states; and in time of war as an instrument of economic warfare.

2. ***Extraterritorial use of export controls historically by the United States.*** It is reasonably accurate to suggest that the United

States became familiar with export controls in the course of learning economic warfare from the British in two World Wars. In wartime, it sought to deny all sorts of economic advantages to the enemy using any possible shred of power which might exist, including sanctions against persons not nationals acting in any place designated as "enemy territory" for economic warfare purposes by the President.

In the Cold War period, beginning as early as 1946, the United States undertook an effort, that is still being made, to induce its allies to use denials policies ranging from keeping technology from the USSR (and for a long time the Peoples' Republic of China) to pressuring the communist leaders of Poland not to bear down on anti-socialist movements, such as Solidarity. The Export Administration Act, at the section numbers given above, shows what the potential range of objectives of denials policies is.

American presidents and congresses have all, since 1946, followed denials policies from time to time. And they have included in the ambit of their efforts the foreign subsidiaries and technology licensees of American parent corporations. These efforts have generated much opposition, even passion, in allied countries, and they have not been very successful. See the 1987 Restatement, Section 414, Comment *b* and Reporters' Notes 3, 4 and 8, and Section 431, Reporters' Note 3.

SECTION B. THE LEGAL SITUATION OF FOREIGN-OWNED ENTERPRISES

1. DIPLOMATIC PROTECTION AND CUSTOMARY INTERNATIONAL LAW: A BIT OF SOCIO-HISTORY

Until contemporary times, a dispute between a state asserting the right to espouse a claim against another state for its treatment of a foreign enterprise in the latter, if not settled by diplomacy in some pragmatic way, became an issue about the content of customary international law, whether the dispute was an unresolved public issue, before a court or, possibly, an arbitral body. Disputes of this sort almost always involved a foreign investment in an economic enterprise. The world has had few disputes about capital movements and other investment activities that did not involve host state treatment of a foreign-owned business establishment. In the absence of treaty coverage of the legal aspects of foreign business enterprise controversies, states asserting claims on a legal basis turned to customary international law; and, as might be expected, defending states sometimes disputed either the existence of any governing customary international law or its applicability in the particular situation.

Disputes between states as to the applicability or content of customary international law seldom arose between wealthier and more powerful states, where cross-investments in each others' economies were commonplace. But such disputes arose, and sometimes generated considerable heat, between developed (and usually older) states and less-well-developed ones (usually former colonies of some European power). International judicial settlement of the relevant issues of customary international law was slight, even after the first world court was created by the League of Nations in 1919. (When you studied the Permanent Court of International Justice and its successor, the International Court of Justice, you saw why: *the "optional clause".*) Arbitration ad hoc of such disputes could involve the application and content of customary law only if chosen as the basis of decisions by the arbitral agreement (the *compromise*).

Despite all these difficulties there is a large jurisprudence (in the sense of a body of law) as to customary international law about investment disputes, and its coverage is wide, from standing-to-claim through details of compensation. Earlier editions of this casebook covered the ins-and-outs of the classic terrain more completely than we think we should present it to you here, chiefly because the resolution of investment disputes is moving into new ways of settlement that we want to acquaint you with. We have, therefore, eliminated some of the less-significant aspects of the customary international law route to claims settlements. If these should become important again, during the life of this edition, or of yours in practice, you will not lack sources for dealing with them, beginning with the 1987 Restatement of the Foreign Relations Law of the United States, especially sections 711–713, et seq., and including any one of the first three editions of this casebook, other casebooks, and textbooks galore.

What were the causes of the old dispute about the content and reach of customary international law, a dispute that pitted the developed, capital-exporting world against certain portions of the developing world? *Socialism versus capitalism? No.* The socialist-communist states (except Castro–Cuba) never rejected the legal validity of existing foreign interests' nationalization claims as an element of the abolishment of private property, although admittedly some took time to settle; and the spur of American non-recognition of the Soviet Union from 1917 to early Franklin Roosevelt, is seen by some as based on Communist rejection of customary international law, but by others as an earlier version of President Reagan's "Evil Empire" syndrome (i.e., American non-recognition on politico-moral grounds).

Touchiness about sovereignty in new states arising out of former colonies? Definitely. The widely-popular *Calvo* and *Drago Doctrines*, to be explained shortly, were based on assertions of absolute sovereignty by states in Latin America that feared they would compromise their new independence, unless they resisted assertions of a higher authority for customary international law. Further, when such assertions came not from old masters of onetime colonies, but from another former colony, now a vigorous, powerful state given to sending its Marines to protect the foreign investments of its nationals, a complex emotional element was added. This element was intensified by the gross insensitivities of many of the early foreign entrepreneurs in Latin America, beginning with and especially in, the extractive industries, involving the processing and export of irreplaceable raw materials (inter alia, tin, copper, guano, iron ore, coal, silver, gold, precious stones, and petroleum). Attitudinal and political tensions were further accentuated by the following factors: low in-country profit sharing; internal misuses of whatever the national share was; low wages and poor working conditions; exclusion of nation-

al investors, either by their lack of money or choice of the foreigners, usually the latter; and a cultural inheritance going back to Roman law: the principle that sub-surface wealth is *Res Publica.*[a] This doctrine could be squared with grants of concessions, but foreign operators' attitudes too often left impressions that they acted as owners, which impressions were exploited as political gambits supporting the "return" of state property via uncompensated nationalizations. Further, hostility to foreign control of mining and the like became part of national "folklores"[b] against all types of foreign-dominated economic presence. Notwithstanding this, foreign ownership of manufacturing, mercantile, banking, and shipping establishments only rarely had troubles. Large scale agricultural enterprises, however, had some problems, e.g. bananas in Central America, sugarcane production and refining in Cuba (even before Castro), and marine-life food processing in several places. Railroads eventually came into national public ownership, as did telephone[c] companies in various countries.

2. THE CLASSIC INTERNATIONAL STATE-TO-STATE INTERNATIONAL CLAIMS PROCESS

Pre-View. The specifics of the now-aging classical claims process, along with the fundamental concept of an international minimum standard, are the ingredients of a mixture that is the customary international law of diplomatic protection and claims. Elements of this body of customary law survive in the newer modalities for settlement previously discussed and thus must be understood. To illustrate: regardless of the forum or institution selected for dealing with an international claim, the remedy would be some variant of a "make whole" principle, whether phrased as "full", "fair" or, in the American formula, "prompt, adequate and effective" compensation. And the claim, if asserted as a legal one, would be dealt with as an assertion of obligation under customary international law, not a voluntary act of generosity (*ex gratia* payment) with no admission of legal liability. Keep in mind that, although in this Chapter we are dealing with economic claims involving foreign business establishments, other types of claims arise that are governed by the same fundamental bases, such as claims for personal mis-treatment or worse by the respondent state of a plaintiff state's national.

STATEMENT OF POLICY BY THE PRESIDENT OF THE UNITED STATES [NIXON] CONCERNING THE INTERNATIONAL MINIMUM STANDARD

8 Weekly Compilation of Presidential Documents 64 (1972).

* * *

I * * * wish to make clear the approach of this administration to the role of private investment in developing countries, and in particular

a. Especially in the oil industry, except in Peru, where the Liberator from Spain (Simon Bolivar) either knew no Roman law, overlooked or chose to ignore it.

b. With charmed recollection of Thurman W. Arnold's Folklore of Capitalism.

c. A president of Chile, Dr. Salvador Allende, may have been killed because of induced military opposition to "socialistic" nationalization of a foreign-owned telephone system.

to one of the major problems affecting such private investment: upholding accepted principles of international law in the face of expropriations without adequate compensation.

A principal objective of foreign economic assistance programs is to assist developing countries in attracting private investment. A nation's ability to compete for this scarce and vital development ingredient is improved by programs which develop economic infrastructure, increase literacy, and raise health standards. Private investment, as a carrier of technology, of trade opportunities, and of capital itself, in turn becomes a major factor in promoting industrial and agricultural development. Further, a significant flow of private foreign capital stimulates the mobilization and formation of domestic capital within the recipient country.

* * *

The wisdom of any expropriation is questionable, even when adequate compensation is paid. The resources diverted to compensate investments that are already producing employment and taxes often could be used more productively to finance new investment in the domestic economy, particularly in areas of high social priority to which foreign capital does not always flow. Consequently, countries that expropriate often postpone the attainment of their own development goals. Still more unfairly, expropriations in one developing country can and do impair the investment climate in other developing countries.

In light of all this, it seems to me imperative to state—to our citizens and to other nations—the policy of this Government in future situations involving expropriatory acts.

1. Under international law, the United States has a right to expect:

— That any taking of American private property will be nondiscriminatory;

— That it will be for a public purpose; and

— That its citizens will receive prompt, adequate, and effective compensation from the expropriating country.

Thus, when a country expropriates a significant U.S. interest without making reasonable provision for such compensation to U.S. citizens, we will presume that the U.S. will not extend new bilateral economic benefits to the expropriating country unless and until it is determined that the country is taking reasonable steps to provide adequate compensation or that there are major factors affecting U.S. interests which require continuance of all or part of these benefits. 2. In the face of the expropriatory circumstances just described, we will presume that the United States Government will withhold its support from loans under consideration in multilateral development banks. 3. Humanitarian

assistance will, of course, continue to receive special consideration under such circumstances.

* * *

BARCELONA TRACTION, LIGHT AND POWER CO., LTD. (BELGIUM V. SPAIN)

International Court of Justice, 1970.
[1970] I.C.J.Rep. 3.

[The decision was on a narrow issue, the question whether Belgium had standing to espouse claims of its nationals who owned the majority of the shares of a corporation organized in Canada. In the course of 303 pages of separate opinions by members of a court, who except for one judge ad hoc, agreed on the disposition of the case, almost every aspect of the nationalization problem as it concerns investments in the corporate form is discussed by one or more of the judges. The selections that follow deal with the international minimum standard. It is perhaps revealing that the dispositive opinion and some of the separate opinions assume it exists. Other views, pro and con, are more explicitly stated.]

Separate Opinion of Judge TANAKA, at pp. 115, 116.

* * *

Here, it is not necessary to emphasize the spirit of a universally recognized rule of customary international law concerning every State's right of diplomatic protection over its nationals abroad, that is, a right to require that another State observe a certain standard of decent treatment to aliens in its territory. * * *

* * *

Briefly, the idea of diplomatic protection does not seem to be a blind extension of the sovereign power of a State to the territory of other countries; the spirit of this institution signifies the collaboration of the protecting State for the cause of the rule of law and justice.

* * *

Separate Opinion of Judge JESSUP at p. 162, 164–167.

* * *

10. In adjudicating upon [this] case the Court must apply rules from one of the most controversial branches of international law. The subject of the responsibility of States for injuries to aliens (otherwise referred to as the diplomatic protection of nationals), evokes in many current writings recollections of political abuses in past eras. The Court is not involved here in any conflict between great capital-exporting States and States in course of development. Belgium and Spain are States which, in those terms, belong in the same grouping. I do not agree with the Spanish contention on 20 May 1969 that Belgium was merely trying to get the Court to internationalize a private litigation, but

it is true that basically the conflict was between a powerful Spanish financial group and a comparable non-Spanish group. This case cannot be said to evoke problems of "neo-colonialism".

Moreover, the Court is not here in the least concerned with such provocative problems as State sovereignty over natural resources or the rules applicable to compensation in case of nationalizations or expropriations. Professor F.V. Garcia Amador, in his sixth report as Special Rapporteur of the International Law Commission on State responsibility set forth an admirable attitude:

> * * * his purpose was to take into account the profound changes which are occurring in international law, in so far as they are capable of affecting the traditional ideas and principles relating to responsibility. The only reason why, in this endeavour, he rejected notions or opinions for which acceptance is being sought in our time, is that he firmly believes that any notion or opinion which postulates extreme positions—whatever may be the underlying purpose or motive—is incompatible and irreconcilable with the idea of securing the recognition and adequate legal protection of all the legitimate interests involved. That has been the policy followed by the Commission hitherto and no doubt will continue to be its policy * * *.

11. The institution "of the right to give diplomatic protection to nationals abroad was recognized in * * * the Vienna Convention on Diplomatic Relations, 1961", as Mr. Gros (as he then was) reminded the sub-committee of the International Law Commission. The institution of the right to give diplomatic protection is surely not obsolete although new procedures are emerging. With reference to diplomatic protection of corporate interests, the customary international law began to change in the latter half of the nineteenth century. As Jennings writes, in somewhat picturesque and Kiplingesque language: "It is small wonder that difficulties arise when 19th century precedents about outrageous behaviour towards aliens residing in outlandish parts are sought to be pressed into service to yield principles apposite to sophisticated programmes of international investment." Since the critical date in this case is 1948, developments in the law and procedures during the ensuing last two decades are not controlling.

* * *

14. In States having different types of economic and financial problems, international law has become increasingly permissive of actions involving nationalizations. In place of what used to be denounced as illegal expropriation, the issues now turn largely on the measure of compensation, since even the famous General Assembly Resolution on Permanent Sovereignty Over Natural Resources, provides that compensation is due.

* * *

Separate Opinion of Judge PADILLA NERVO

* * *

The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded. Special agreements to establish arbitral tribunals were on many occasions concluded under pressure, by political, economic or military threats.

The protecting States, in many instances, are more concerned with obtaining financial settlements than with preserving principles. Against the pressure of diplomatic protection, weaker States could do no more than to preserve and defend a principle of international law, while giving way under the guise of accepting friendly settlements, either giving the compensation demanded or by establishing claims commissions which had as a point of departure the acceptance of responsibility for acts or omissions, where the government was, neither in fact nor in law, really responsible. In the written and in the oral pleadings the Applicant has made reference, in support of his thesis, to arbitral decisions of claims commissions—among others those between Mexico and the United States, 1923. "These decisions do not necessarily give expression to rules of customary international law, as * * * the Commissions were authorized to decide these claims 'in accordance with principles of international law, justice and equity' and, therefore, may have been influenced by other than strictly legal considerations." * * *

In considering the needs and the good of the international community in our changing world, one must realize that there are more important aspects than those concerned with economic interests and profit making; other legitimate interests of a political and moral nature are at stake and should be considered in judging the behaviour and operation of the complex international scope of modern commercial enterprises.

* * *

Separate Opinion of Judge AMMOUN

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5. In this connection, it is essential to stress the trends of Latin-American law and that of Asia and Africa, and their undeniable influence on the development of traditional international law. It seems indeed that among the principles and norms which have sprung from the regional law peculiar to Latin America are the norms and principles whose aim is to protect countries in that part of the world against the more powerful industrialized States of North America and Europe. An Afro-Asian law also seems to be developing as a result of the same preoccupations, springing from the same causes. In the field of the responsibility of States and of diplomatic protection, the same points of view have been adopted in the countries of the three continents, thus initiating a form of co-operation which will not be of slight effect on the renewal of law.

The first reaction to the rules of traditional law came however from the countries of Latin America; witness the vehement speech made by

Mr. Seijas, a former Venezuelan minister, at the 1891 Session of the Institut de droit international at Hamburg, which was no mere display of bad temper. Evidence of this too is the appearance of the Calvo Clause, excluding recourse to international adjudication in favour of internal remedies, on which the jurists of Latin America have never compromised, because of their lack of confidence in diplomatic protection as conceived by traditional law and the practices of western nations. This reaction on the part of the Latin American States would, moreover, explain their opposition from 1948 onwards to the draft insurance guarantee agreement proposed by the United States, providing for the exercise of diplomatic protection by that power without local remedies having been exhausted.

This attitude on the part of the Hispanic States, which is shared by the Afro-Asian States, is the more readily understandable if the extra-legal forms and means to which diplomatic protection formerly had recourse are borne in mind. It will be recalled that the claims of great States and their nationals abroad often led, during the period preceding the renewal of the law consequent upon two world wars and the creation of a means of international adjudication, to acute conflicts and to acts of deliberate violence going so far as armed intervention and permanent occupation, or to demonstrations of force, against which the Drago doctrine, which was endorsed by the Pan-American Conference of 1906 and has since become one of the basic principles of Latin American international law, has, since 1926, reacted not without success. Recourse to force, subject to an offer of arbitration, was nevertheless tolerated by The Hague Peace Conference of 1907, which admitted intervention sub modo by virtue of the Porter Convention, against which Convention Drago and his Latin American colleagues vainly protested at the Conference. This was not the least of the contradictions which attended it, contradictions which bespeak the still predominant influence of the colonialist era. Accordingly, one is entitled to suspect certain arbitral decisions of having been agreed to or accepted under duress, those decisions having been preceded by ultimata or menaces or by a deployment of force more or less in the spirit of the said Conference, which was struggling to free itself from a tyrannical tradition.

* * *

The development of Latin American thought concerning diplomatic protection and its limits must be particularly stressed in the present discussion, on account of the influence which it can have on the development of that institution. This thought is at present centered on the following aspects of the problem: A. The 20 States of South and Central America all reject the rule laid down by Vatel and endorsed by the Permanent Court of International Justice, according to which the right of diplomatic protection is "to ensure, in the person of its subjects, respect for the rules of international law". They hold it to be a fiction, which one of their most eminent jurists, Garcia Robles, has described as "a product of Hegelian influence, resulting from the expansionism of the nineteenth century". And all these States, at inter-American conferences, in the writings of publicists, in the positions adopted by govern-

ments, are united in their efforts for its elimination, on the understanding that the individual's status as a subject of the law is to be recognized thus enabling him to seek legal redress himself, and not under the cloak of his national State. But before what tribunal? Before an American regional tribunal. The resolution submitted to the Inter-American Conference at Buenos Aires and adopted almost unanimously reads: "American legal controversies should be decided by American judges * * * and a correct understanding of acts pertaining to the Americas is more readily to be obtained by Americans themselves".

* * *

B. The States of Latin America remain firmly attached to the Calvo Clause, which they habitually insert in contracts entered into with foreign undertakings. Their constitutions and laws generally make it compulsory. Their doctrine with regard thereto, founded upon the two principles of equality between States and non-intervention, was forcefully expressed by Judge Guerrero, a former President of the Court, in the report which he submitted on behalf of the Sub-committee set up by the Committee of Experts of the League of Nations to study the responsibility of States. Several non-American countries were not hostile to this point of view. China, Holland and Finland were frankly favourable to it. Finally, the United States, which had found in Borchard a vigorous defender of the thesis that the individual cannot dispose of a right which, according to Vatelian doctrine, is that of the State and not his own, allowed itself to be won over, with the inauguration of the "good neighbour" policy of F.D. Roosevelt, to the doctrine of its southern neighbours.

C. The Calvo Clause, which on the other side of the Atlantic is regarded merely as a compromise, was destined to prepare the way for the adoption of the Calvo doctrine, which is aimed at nothing less than the abolition of unilateral diplomatic protection in order to substitute for it a protection exercised by the collectivity on the basis of human rights.

The path towards this unconcealed objective is certainly a long and arduous one; its success seems bound up with the progress of mankind towards an inter-American or international organization less removed than the United Nations from the concept of the Super-State.

* * *

It was the more necessary to recall these features of American law in that other States are treading the same path towards the limitation of diplomatic protection. The States of Africa and of Asia, since they too have come to participate in international life, share the same concerns,—as witness the proceedings of the International Law Commission. At its Ninth Session in 1957, Mr. Padilla Nervo stated that: "* * * the history of the institution of State responsibility was the history of the obstacles placed in the way of the new Latin American countries—obstacles to the defense of their * * * independence, to the ownership and development of their resources, and to their social integration." And he added:

> "With State responsibility * * * international rules were established, not merely without reference to small States but against them." And Mr. El-Erian, of the United Arab Republic, stressed the twofold consequence of the privileged condition accorded to nationals of Western countries in their relations with the countries of Africa or Asia, which on the one hand had led to the system of capitulations and on the other afforded a pretext for intervention in the domestic affairs of States.

The similarity of the essential views and objectives of the States of the three continents of America, Africa and Asia, and the action they are able to take to develop a positive international law of world-wide ambit, will tend to direct them toward a universalist concept of law and bring them back to a system of international adjudication which will no longer be of an exclusive nature but will, through its effective composition, meet the wishes expressed in the United Nations Charter, which would have it represent the main legal systems and principal forms of civilization of the world. It is in the light of these preliminary considerations that the connected problem of diplomatic protection and the jus standi of the applicant State should have been approached.

* * *

TYPES OF ECONOMIC INTERESTS TREATED AS ENTITLED TO DIPLOMATIC PROTECTION

Perspective. Here the focus is on what types of economic interests the state of nationality or other state entitled to make the claim will recognize and the host state will accept as constituting a taking of property. In many situations there is no problem in this regard. There is common agreement that land, physical things (artifacts), patents, copyrights, bank balances and other book assets are property for nationalization claims purposes. At the other extreme, the mere prospect of having made a gain is not property. When a business enterprise is taken from an alien the manner in which he holds his ownership interests therein may become important in the context of the present inquiry. In the field of direct foreign investment in minerals extraction and disposal for profit, the civil and the common law tend to have different viewpoints as to whether authorizations to explore, mine or drill, and remove create interests in property. In the common law world they do. The recipient of the authorization either has an estate in determinable fee simple in the subsurface, an incorporeal hereditament (profit à prendre), or a lessee's rights under a mining lease. But in most of Latin America, all subsurface minerals property pertains to the state, and the state is not authorized to alienate such property. A concession contract in such a country is not a grant of a real property interest; it is a contract with the state under which the private party is licensed to explore, extract and market.

* * *

In nationalization cases valuation is often a serious problem. However, in several nationalizations in Latin America the regime in control

of the state has not contested its general responsibility to pay compensation, or even the amount, but has sought to offset the claim with charges for alleged back taxes, improper exploitation or illegality ab initio of removals, despite the good faith nature of the alien's operation. Whether such situations will fall into the category of denial of justice or be dealt with as defenses to taking cannot now be foretold.

GENERAL CREDITORS' CLAIMS: POLICY OF UNITED STATES DEPARTMENT OF STATE

6 Moore, Digest of International Law 707 (1906).

* * *

How far it may be justifiable or expedient formally to press all the claims upon the French Government for immediate payment is a consideration to be distinguished from the clear opinion which is entertained of their intrinsic justice. Wherever they originated in compulsory measures practiced upon the claimants, they are entitled to a full and immediate interposition of their Government; but where the bills have been received by virtue of voluntary contracts, whether with the agents of the French Government or individuals, the receivers, having regard, as they must have had, to the degree of credit and punctuality ascribed to that Government * * * any calculation and consequent disappointment ought not to be permitted to embarrass their own Government by binding it to pursue very pointed measures for their relief.

* * *

You appear not fully to have understood your powers and duties under the law of nations in regard to claims of American citizens on foreign governments. I can not explain these more clearly than by extracting a few sentences from a letter dated on the 11th November, 1847, and addressed by this Department to Vice-President Dallas, in answer to an application made by him in behalf of an American citizen: * * * "It has been the practice of this Department to confine its official action in the recovery of indemnity from foreign governments to tortious acts committed under their authority against the persons and property of our citizens. In the case of violation of contract, the rule has been not to interfere, unless under very peculiar circumstances, and then only to instruct our diplomatic agents abroad to use their good offices in behalf of American citizens with the Governments to which they are accredited. The distinction between claims arising from torts and from contracts is, I believe, recognized by all nations, and the reasons for this distinction will readily occur to your own mind." This letter was carefully considered and adopted by the President and the entire Cabinet. I might add, that if this were not the rule, governments, and especially our Government, would be involved in endless difficulties. Our citizens go abroad over the whole world and enter into contracts with all foreign governments. In doing this they must estimate the character of those with whom they contract and assume the risk of their ability and will to

execute their contracts. Upon a different principle, it would become the duty of the Government of our country to enforce the payment of loans made by its citizens and subjects to the government of another country. This might prove exceedingly inconvenient to some of the States of this Union as well as to other sovereign States.

* * *

BOND HOLDERS' CLAIMS

8 Whiteman, Digest of International Law 933 (1967).

In response to a letter requesting information on steps which the United States Government could take to protect the interests of United States bondholders affected by the default of the Government of Cuba on payments of principal and interest on bonds, the policy of the Department of State with regard thereto was explained as follows:

> A default in the payment of principal or interest on bonds of foreign governments is considered by the Department primarily a matter for direct negotiation and settlement by the American bondholders or their representatives and the foreign government concerned. The Department is, however, always ready to facilitate such negotiations and settlements when possible, but it has been its consistent policy, repeatedly stated by various Secretaries of State, generally to decline to intervene in the enforcement of such obligations, except under very unusual circumstances, as, for example, where American nationals are discriminated against in connection with payments made by a foreign government on its obligations.
>
> It was because of this policy that the Government in the fall of 1933 encouraged the creation of the Foreign Bondholders Protective Council, a private nonprofit organization, with the view that it would assist the numerous and scattered American holders of defaulted foreign government securities in the protection of their interests. The Council has offices at 90 Broad Street, New York, New York. As it functions entirely independently of the Government, this reference to it is, of course, made without responsibility on the part of the Department.
>
> The Department will consider the bonds to which you have referred in the event that a general settlement of claims against Cuba becomes feasible or in the event that unusual circumstances arise with respect to the bonds, such as those mentioned above.

* * *

* * * [Foreign Bondholders Protective Council, Inc.] was formed in 1933 by its original directors upon request of Mr. Cordell Hull, Secretary of State, Mr. W.H. Woodin, Secretary of the Treasury, and Mr. Charles H. March, Chairman of the Federal Trade Commission, who expressed the need for "an adequate and disinterested organization for the protection of American holders of foreign securities," this problem being of

such "great and urgent importance to American investors, and of such public significance as to make its proper handling a public service."

The White House announcement to the press on October 20, 1933 stated that the making of satisfactory arrangements and protecting American interests was "a task primarily for private initiative and interests. The traditional policy of the American Government has been that such loan and investment transactions were primarily private actions, to be handled by the parties directly concerned. The Government realizes a duty, within the proper limits of international law and international amity, to defend American interests abroad. However, it would not be wise for the Government to undertake directly the settlement of private debt situations."

As a consequence, the Council was incorporated December 13, 1933 under the laws of the State of Maryland as a non-stock, non-profit organization. Among the purposes for which the corporation was formed is that of protecting the rights and interests of American holders of publicly offered dollar bonds issued or guaranteed by foreign governments and their political subdivisions.

* * *

SAUDI ARABIA v. ARABIAN AMERICAN OIL CO. (ARAMCO)

Arbitration Tribunal, 1958.
27 Int'l L.Rep. 117, 168, 170, 171 (1963).*

[This was an arbitration by an ad hoc panel pursuant to an agreement between the Arabian American Oil Co. (Aramco), a Delaware corporation, and the State of Saudi Arabia. A 1933 concession arrangement grants the company's predecessor in title (a company with a slightly different name and organized in California) " * * * the exclusive right * * * to explore, prospect, drill for, extract, treat, manufacture, transport, deal with, carry away and export petroleum * * * " within an "Exclusive Area" which included islands, territorial waters and all offshore areas as to which the Saudi State has or may claim dominion. In 1954 Aristotle Socrates Onassis made an agreement with Saudi Arabia under which Onassis' Saudi Arabian Tankers Company (Satco) was granted " * * * the right of priority to ship and transport oil and its products exported from Saudi Arabia to foreign countries by way of the sea * * *." This priority was conditioned upon a first priority for shipment by concessionaries up to the extent they actually engaged in the regular transportation of Saudi Arabian oil before December 31, 1953. Aramco asked the tribunal to declare the contracts in conflict and the second a nullity as to Aramco, i.e. that Aramco have an unlimited right to ship oil from Saudi Arabia. A majority of the panel did so declare. The appointee of Saudi Arabia dissented.

* * *

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The law in force in Saudi Arabia did not contain any definite rule relating to the exploitation of oil deposits, because no such exploitation existed in that State before 1933. This lacuna was filled by the 1933 Concession Agreement, whose validity and legality under Saudi Arabian law are not disputed by either side. The present dispute only concerns the effects of the provisions contained in the Agreement. The Concession Agreement is thus the fundamental law of the Parties, and the Arbitration Tribunal is bound to recognize its particular importance owing to the fact that it fills a gap in the legal system of Saudi Arabia with regard to the oil industry. The Tribunal holds that the Concession has the nature of a constitution which has the effect of conferring acquired rights on the contracting Parties. * * *

In so far as doubts may remain on the content or on the meaning of the agreements of the Parties, it is necessary to resort to the general principles of law and to apply them in order to interpret, and even to supplement, the respective rights and obligations of the Parties.

* * *

Aramco's right of ownership in the oil it extracts and the oil derivatives it produces is not expressly mentioned in the 1933 Concession Agreement and it has been questioned by the Government, although the latter admits that the Company does possess private rights of a sacred character. In the course of the oral hearings, the Government claimed that this omission was intentional and that neither one nor the other Party had any absolute right of ownership in the oil. Aramco has no such right, it was argued, because it is not entitled to enjoy and dispose freely of the object of the Concession. Under Moslem law, it cannot base its alleged right of ownership on the fact of prior discovery and extraction of the oil because the right of the first discoverer in Hanbali law is not an exclusive right and is only attributed to Moslems and to non-Moslems who are among the residents of the Moslem State (Ahl al Dar); Aramco, it was further argued, cannot claim to be the first discoverer of the oil by virtue of its exclusive right to explore the vast area reserved to it in the Concession [because]: as no one else had the right to explore and prospect, Aramco's privilege would destroy the rules of Hanbali law according to which the first discoverer cannot prevent others from taking their needs of the mineral resources he has discovered.

But these rules, evolved some centuries ago in respect of mineral deposits other than oil, have precisely been supplemented by the 1933 Concession Agreement, ratified by Royal Decree No. 1135 in the proper exercise of the powers vested, under Hanbali law, in the Ruler of the State. The right to sell the products of the conceded oil deposits is not disputed by the Government, for it is explicitly mentioned in Article I of the 1933 Concession, as follows: "It is understood, however that such right does not include the exclusive right to sell crude or refined products within the area described below or within Saudi Arabia." It follows, by an inescapable argument a contrario, that the concessionaire has the exclusive right to sell outside Saudi Arabia. This right of sale,

which entails a transfer of title, implies a recognition of Aramco's right of ownership in the oil and oil products.

* * *

In conclusion, this analysis shows that, in Saudi Arabian law as in the laws of Western Countries, the oil concession is an institution which implies an authorization by the State, on the basis of a statute or of a contract, and necessarily entails the grant to the concessionaire of property rights in the oil. As a result of this, the Concession, even in the absence of an express clause to that effect, confers upon Aramco the right to dispose of the oil. Because of this fundamental similarity, the Tribunal will be led, in the case of gaps in the law of Saudi Arabia, of which the Concession Agreement is a part, to ascertain the applicable principles by resorting to the world-wide custom and practice in the oil business and industry; failing such custom and practice, the Tribunal will be influenced by the solutions recognized by world case-law and doctrine and by pure jurisprudence.

As regards the international effects of the Concession, such as the effects of the sale and transport of the oil and oil products to foreign countries, and in particular the f.o.b. sales, the Tribunal holds that these effects are governed by the custom and practice prevailing in maritime law and in the international oil business. Because of the American nationality of the concessionaire, a particular importance must be ascribed, in this connection, to the custom and practice followed by producers in the United States and their buyers all over the world. This does not mean that American law, as the law of the nationality and of the domicile of one of the Parties, should be given any priority in relation to the law of Saudi Arabia, as the national law of the grantor and the law of the place of exploration. What the Tribunal intends to take into account is only the world-wide practice adopted in the oil industry and business. The Trihunal holds that public international law should be applied to the effects of the Concession, when objective reasons lead it to conclude that certain matters cannot be governed by any rule of the municipal law of any State, as is the case in all matters relating to transport by sea, to the sovereignty of the State on its territorial waters and to the responsibility of States for the violation of its international obligations.

* * * [Dissenting opinion omitted.]

TEXACO OVERSEAS PETROLEUM CO. AND CALIFORNIA ASIATIC OIL CO. v. THE GOVERNMENT OF THE LIBYAN ARAB REPUBLIC

Dupuy, Sole Arbitrator, 1977.
Award on the Merits, 1977.
53 Int'l L.Rep. 389, 431 (1979).*

[An excerpt from the arbitral award on a different point is at p. ___. The question here is whether, under the choice of law provision in the concession contracts, these contracts are to be governed by Libyan law or international law. The applicable provision read: This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.]

* * *

B. The Law Governing the Arbitration

11. The Arbitral Tribunal must now state precisely what law or what system of law is applicable to this arbitration, it being understood that the parties themselves are entitled freely to choose the law of procedure applicable to the arbitration and it is only, as is the case here, in the absence of any express agreement between them that the Arbitral Tribunal must determine the law or system of law applicable to the arbitration. Two solutions are theoretically possible:

12. (a) The first solution, which was adopted with respect to the arbitration between Sapphire International Petroleum Limited and the National Iranian Oil Company (NIOC), consists in submitting the arbitration to a given municipal law which will generally, but not necessarily, be that of the place of arbitration * * *. [The Sole Arbitrator rejected this alternative.]

13. (b) All the elements of this case support, on the contrary, the adoption of a second solution which is to consider this arbitration as being directly governed by international law.

* * *

[Reasoning and arbitral precedents omitted. The Sole Arbitrator then developed the following thesis.]

32. For the time being, it will suffice to note that the evolution which has occurred in the old case law of the Permanent Court of International Justice is due to the fact that, while the old case law viewed the contract as something which could not come under international law because it could not be regarded as a treaty between States, under the new concept treaties are not the only type of agreements governed by such law. And, although they are not to be confused with treaties, contracts between States and private persons can, under certain

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conditions, come within the ambit of a particular and new branch of international law: the international law of contracts.

33. As Dr. F.A. Mann wrote: "* * * [I]n regard to treaties between international persons, the nature and subject matter of which frequently are not substantially different from contracts between international and private persons, those legal rules have been, or are capable of being, and, in any event, must be developed. The law which is available for application to the one type of contractual arrangement can, without difficulty, be applied to the other group of contracts."

* * *

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1. ***Question.*** What is the holding? That concessions contracts are economic interests of aliens protected by international law? Or that the parties may choose international law to govern?

2. ***Management-service contracts with the state.*** As an alternative to foreign direct investment in enterprises within the territory, some developing countries are paying for foreign skills, technology and, to some extent, capital, by making contracts with foreign enterprise for the conduct of a particular type of economic operation on a fee basis. For example, Mexico, despite its state-owned oil industry and the full rigor of a constitutional prohibition on any kind of foreign-owned capital interest in oil and gas in place, has made many contracts with foreign oil companies for exploration and production of oil and gas. The foreign companies are usually paid an agreed percentage of the net returns from the operation, but they have only contract rights with the host state.

As to espousal of claims based on management-service contracts, so far there has been too little experience with unilateral cancellation, outside of contract stipulations, for any clear trend to have developed as to whether such cancellations would fall into the category of interests of aliens for which espousal is accepted or into that for which espousal is not generally recognized. It is likely that the foreign investment history of such arrangements (that of having developed as alternatives to foreign private sector entrepreneurial activity based on ownership of the means of production) will incline both capital-exporting and capital-importing states to regard management-service contracts as eligible for espousal—if, of course, the receiving country does not under Calvo clause doctrines or otherwise deny the validity of diplomatic protection in any case.

3. ***Question.*** Your client has been offered a management-service contract in a state where the constitution requires a Calvo clause undertaking from a foreign investor. Would you advise your client to reject the offer out of hand? Why or why not?

THE REQUIREMENT OF TAKING FOR A PUBLIC PURPOSE

BANCO NACIONAL DE CUBA v. SABBATINO [a]

United States Court of Appeals, Second Circuit, 1962.
307 F.2d 845, 865–68.

WATERMAN, Circuit Judge. [Rejecting the Act of State defense *in limine,* the Court of Appeals decided that the Cuban nationalization violated international law and hence that the purchasers for value of sugar subsequently produced in the nationalized mills would have to pay the ousted owners for it.]

* * *

Several authorities have announced that confiscation of the property of the nationals of a particular country without the payment of compensation when done as an act of retaliation is contrary to international law. The American Branch of the International Law Association's Committee on Nationalization of Property has stated: "[U]nder International law, a State may not take foreign interests as a measure of political reprisal." Lord McNair declared in regard to Indonesian seizures of Dutch property during the dispute between the Netherlands and Indonesia over control of Dutch New Guinea:

> "In my opinion the absence of a *bona fide,* social or economic purpose involving the property nationalized is vital and alone suffices to render unlawful the [Indonesian] Nationalization Act of 1958 * * *".

And in Anglo–Iranian Oil Co. v. S.U.P.O.R. Co., Italian Civil Court of Rome, 1954, [1955], the court stated: "Italian courts must refuse to apply in Italy any foreign law which decrees an expropriation, not for reasons of public interest, but for purely political persecutory, discriminatory, racial and confiscatory motives."

Unlike the situation presented by a failure to pay adequate compensation for expropriated property when the expropriation is part of a scheme of general social improvement, confiscation without compensation when the expropriation is an act of reprisal does not have significant support among disinterested international law commentators from any country. And despite our best efforts to deal fairly with political and social doctrines vastly different from our own, we also cannot find any reasonable justification for such procedure. Peacetime seizure of the property of nationals of a particular country, as an act of reprisal against that country, appears to this court to be contrary to generally accepted principles of morality throughout the world.

The appellant seeks to justify retaliatory confiscation by the Cuban government by asserting that the United States was the first offender against international law by an attempt to coerce Cuba through the

a. The Supreme Court reversal of this decision is at 376 U.S. 398 (1964) and in ch. 8, *supra* at 627.

reduction of American purchases of Cuban sugar. If the United States had seized Cuban assets in this country without compensating the owners, we might find some merit in this contention, for then Cuba would be treating American nationals exactly as the United States was treating Cuban nationals. But, whether she was wise or unwise, fair or unfair, in what she did, the United States did not breach a rule of international law in deciding, for whatever reason she deemed sufficient, the sources from which she would buy her sugar. We cannot find any established principle of international jurisprudence that requires a nation to continue buying commodities from an unfriendly source. Accordingly it follows that the amendment to the Sugar Act of 1948 did not excuse Cuba's prima facie breach of international law. * * *

BARCELONA TRACTION, LIGHT AND POWER CO., LTD. (BELGIUM v. SPAIN)

International Court of Justice, 1970.
[1970] I.C.J. Rep. 3, 168.

Separate Opinion of Judge JESSUP.

* * *

16. In connection with the instant case, the question arises from the argument that there can be no international right to damages for shareholders indirectly injured by damage to the company in which they hold shares, since no such right is generally established in municipal law. Much reliance is placed upon the proposition that under most systems of municipal law, shareholders have no rights in or to the assets of the corporation until after it is dissolved or wound up. Shareholders' suits are indeed provided by law in the United States and somewhat less extensively in Great Britain. In the United States "The derivative stockholder-plaintiff is not only a nominal plaintiff, but at the same time a real party in interest. He sues not solely upon a corporate cause of action but also upon his own cause of action". The provisions for shareholder suits in the European countries seem to be somewhat less favourable to the shareholder. But the trend in France is toward more protection of shareholders, as Judge Gros points out.

17. Although the concept of corporate personality is a creature of municipal law, none of the theories evolved in that frame of reference can be relied on universally to explain the legal relations surrounding that "technical legal device". * * * I would paraphrase and adapt a dictum from a recent decision of the Supreme Court of the United States in an anti-trust case: the International Court of Justice in the instant case is "not bound by formal conceptions of" corporation law. "We must look at the economic reality of the relevant transactions" and identify "the overwhelmingly dominant feature". The overwhelmingly dominant feature in the affairs of Barcelona Traction was not the fact of incorporation in Canada, but the controlling influence of far-flung international financial interests manifested in the Sofina grouping.

It may well be that the new structures of international enterprise will be increasingly important, but any glance at the world-wide picture today shows that non-governmental corporations still have a major role to play. That is why so many new States, and the United Nations itself, encourage the investment of private capital.

The Right to Extend Diplomatic Protection to Corporate Enterprises

18. The decision of the Court, in this case, is based on the legal conclusion that only Canada had a right to present a diplomatic claim on behalf of Barcelona Traction which was a company of Canadian nationality. My own conclusion is that, for reasons which I shall explain, Canada did not have, in this case, a right to claim on behalf of Barcelona Traction. As a matter of general international law, it is also my conclusion that a State, under certain circumstances, has a right to present a diplomatic claim on behalf of shareholders who are its nationals. As a matter of proof of fact, I find that Belgium did not succeed in proving the Belgian nationality, between the critical dates, of those natural and juristic persons on whose behalf it sought to claim. The Belgian claim must therefore be rejected.

* * *

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1. ***Creeping nationalization.*** It is sometimes difficult to find a positive act of nationalization such as a statute or decree. Major political changes in the host country may alter the whole investment climate in reliance on which the investment was made. Or the tax laws of the host country may become much more severe. The zeal with which the police power is used may increase. At some point, in some situations, a design of harassment and discrimination against all, or a particular, foreign investment may become sufficiently clear as to be the basis of formal or informal diplomatic remonstrance by a state entitled to espouse the interests of the investor affected. But it is extremely difficult for such diplomatic actions to go to the point of claiming a constructive taking of the alien's economic interests thus making the objection one under international law.

In a few instances, such as in that of a deliberate course of police intimidation of foreign enterprise, some states of nationality have declared that the conduct of the host state was a constructive taking. Other states have been disinclined to make claims based on constructive nationalization. Why ever not?

2. ***Questions.*** From the standpoint of a host state, if a foreign investment has become internally unpopular or undesirable, why should the state nationalize instead of squeezing the foreign interest out? Would the host state not have an easier time internationally if it followed the latter course? Would the Hickenlooper amendments [see 22 U.S.C. § 2370(e)(1) and (2)] be activated by a program of tightening the noose to the point of practical strangulation of the foreign enterprise, but without taking title? Mexico has developed some refined ways of

inducing foreign enterprises, such as the American sulphur industry in Mexico, to scale down the foreign stock ownership through sale at fair prices. The inducement in the sulphur case was to cut down almost to zero on export licenses for sulphur, most of which was sold in the world market, not in Mexico. After the American interests sold down to a minority position, export licensing on a large scale was resumed. Eventually the American interest sold out entirely.

The fundamentals in a nutshell. The basic rules for international claims settlements are set out in a number of useful sources. Whatever the instrumentality or means of settlement, the major rules usually followed are: a. Local (nationalizing state) remedies must have been exhausted, if any exist in law and are not clearly unavailable in fact. b. The private claimant must have had the nationality, through a genuine link, of the espousing state at the time of the taking. This rule creates obvious problems where dual or corporate nationality is involved. In the settlements of the nationalizations that occurred in socialist states in Eastern Europe after World War II, sensitive issues arose as to persecuted persons who had had the nationality of the taking state at the time of the taking but had been naturalized in other states before the claims settlement.

c. The claimant must have continued to be a national of the espousing state down to the time of espousal, and possibly to the time of settlement. This rule has also created certain stresses of a politico-moral nature.

d. The most widely recognized remedy is compensation. Restitution or invalidation of title to the nationalized property has not been granted by international adjudication as a clear alternative to compensation possibly because international cases are not presented in the form of suits against private parties purchasing from the nationalizing states. However, some national courts have given these remedies in cases involving such parties, but others have not.

e. The doctrine of sovereign immunity bars suits against the taking state in the courts of another state.

f. Internationally the state authorized to espouse the claim has the power to bar it in whole or in part by arrangement with the taking state, even though no—or no adequate—compensation has been obtained.

g. Use of force by the espousing state to redress the injury suffered by the owner whose economic interests are taken in violation of international law is illicit under the United Nations Charter and the Charter of the Organization of American States. Also, for political reasons, it is extremely unlikely today that intervention in pursuit of such redress would be undertaken. The aborted British–French action at Suez, 1956, in redress of the nationalization of the Suez Canal by the United Arab Republic, is likely not to be often imitated.

WAIVER BY PRIVATE PARTY

OWNERS OF THE TATTLER (UNITED STATES) v. GREAT BRITAIN

Arbitral Tribunal, Great Britain–United States, 1920.
6 U.N. Rep. Int'l Arb. Awards 48 (1955).

[The Canadian authorities in Nova Scotia arrested and detained a fishing vessel of United States nationality on charges of having engaged in fishing in violation of an 1818 treaty between the United States and Great Britain, which in 1886 became internal law in Canada, then and at the time of this suit still a British dominion. The Tattler was released upon the payment of a fine and the signing by the private party of a waiver of further claim.]

* * *

The record shows that by an agreement made at Liverpool, Nova Scotia, April 15, 1905, the owners entered into the following undertaking: "In consideration of the release of the American schooner Tattler of Gloucester, Mass., now under detention at the port of Liverpool, Nova Scotia (on payment of the fine of five hundred dollars, demanded by the Honourable, Minister of Marine and Fisheries of Canada, or by the Collector of Customs at said port), we hereby guarantee His Majesty King Edward the Seventh, his successors and assigns, represented in this behalf by the said Minister, and all whom it doth or may concern, against any and all claims made or to be made on account of or in respect to such detention or for deterioration or otherwise in respect to said vessel or her tackle or apparel, outfits, supplies or voyage, hereby waiving all such claims and right of libel or otherwise before any courts or Tribunal in respect to said detention or to such or any of such claims or for loss or damage in the premises." It has been observed by the United States Government that on the same day the owners notified the Canadian authorities that the payment of the said sum of $500 was made under protest.

But neither this protest nor the receipt given by the Canadian authorities for the $500 contains any reservation to, or protest against, the guarantee given against "any and all claims made or to be made on account of or in respect to such detention". It does not appear, therefore, that the waiver in the undertaking of any claim or right "before any court or tribunal" was subject to any condition available before this tribunal. It is proved by the documents that the consent of the British Government to the release of the vessel was given on two conditions, first, on payment of $500, and, second, on the owners undertaking to waive any right or claim before any court, and the protest against the payment does not extend and can not in any way be held by implication to extend to this waiver. This protest appears to have been a precautionary measure in case the Canadian authorities should have been disposed to reduce the sum. Any protest or reserve as to the waiver of the right to damages would have been plainly inconsis-

tent with the undertaking itself and would have rendered it nugatory if it had been accepted by the other party.

On the other hand, it has been objected that the renunciation of and guarantee against any claims are not binding upon the Government of the United States, which presents the claim. But in this case the only right the United States Government is supporting is that of its national, and consequently in presenting this claim before this Tribunal, it can rely on no legal ground other than those which would have been open to its national.

For these reasons

This Tribunal decides that the claim relating to the seizure and detention of the American schooner Tattler * * * must be dismissed.

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1. ***Settlement acceptable to the private claimant.*** States usually espouse the claims of their nationals only because the claims have not otherwise been settled. If after causing or threatening to cause diplomatic problems, a claim is settled by the respondent state and the private claimant, the settlement is instinctively accepted as final. The potential plaintiff state's officials breathe a sign of relief and go on to other business. This is clearly so if there is no related but independent plaintiff-state claim and if the settlement is reached before formal espousal has been made. Technically this would not be so for a settlement made after espousal, but the resistance to a second settlement that the respondent state would surely interpose makes the technicality rather illusory. The state of nationality, however, will tend to be sensitive to the interests of its national as against undue pressure or duress in the settlement itself.

2. ***Waiver as a condition precedent to entry as a foreign contractor or investor; the Calvo clause problem.*** Some Latin American states in their constitutions, by statute, or by executive action make it a condition precedent to the entry of a foreign contractor or direct investor that the alien undertake at the time of entry and in consideration therefor not to invoke the diplomatic protection of the state of his nationality and to accept non-discriminatory national treatment as his sole basis of right. Contractually, this is an anticipatory waiver of claims. The foreign minister of Argentina who gave his name in the latter part of the last century to the Calvo doctrine, which the clauses seek to implement, grounded the doctrine firmly on a negation of any right of diplomatic protection inhering in states of nationality and on a denial of the existence of an international minimum standard.

Calvo clauses raise these questions: (i) may the private party bind or bar the state of his nationality (ii) if the promisor, again the private party, breaches his promise and goes tattling to the state of his nationality, what happens as to: (a) the investor vis-á-vis the state to which he gave his promise, (b) any independent right of action that the state of nationality otherwise might have had?

The questions posed do not have clear and satisfactory answers in either doctrinal writings or in international arbitrations or adjudications. Analytically, these questions raise the issue whether the notion that a nationalization claim is an injury to the state of espousal is an expression of a fundamental rule of customary international law, or whether it is really merely a doctrine of logical convenience, to get around underdevelopment of individuals' rights in customary international law.

Capital exporting states other than the United States seem to have been only rarely troubled by Calvo clauses. So far this device for subjecting the foreign investor to greater host state control has not spread throughout the developing half of the world. But recall the separate opinion of Judge Ammoun in Barcelona Traction p. 1134.

In diplomatic correspondence and in the position of at least one of its appointees to arbitral tribunals, the United States has rejected the notion that the international cause of action of the United States could be compromised by an agreement between a foreign state and a United States citizen. United States Commissioner F.K. Neilsen dissented vigorously in the International Fisheries Case, U.S.–Mexican General Claims Commission 1926 * * *. There a majority of the arbitral body followed the general line of a previous case in the same arbitral series (U.S.–Mexico General Claims) to the effect that a Calvo clause undertaking must be given a reasonable and circumspect interpretation. Such an interpretation includes these elements: (i) the undertaking covers only the economic and technical aspects of the contract or investment venture, not the general rights of alien private persons; (ii) a Calvo clause does not mean that the private party must abstain from pursuing international legal remedies for denial of procedural justice or outrageous conduct by the host state; (iii) a state's rights under international law cannot be taken away by a contract to which it is not a party; (iv) where, in an arbitration involving a Calvo clause-affected claim, the plaintiff state acts strictly on behalf of its national and the national does not resort to (or exhaust) his local remedies but instead complains to his government and seeks espousal, provisions in the arbitration agreement that exhaustion of remedies will be waived do not apply. That is, a waiver of exhaustion between the states parties to the agreement to arbitrate does not cover non-exhaustion in Calvo clause cases.

Consult the 1987 Restatement 713, Comment *g*, and Reporters' Note 5. Both the arbitral decisions referred to above and state practice seem to negate the view that Calvo clauses are nullities in international claims law and practice. And there is some evidence that in United States diplomatic practice the presence of a Calvo clause is a factor in determining either willingness to espouse or the degree and intensity with which the diplomatic protection function of the Department of State is discharged. This is where the legal trail ends.

3. ***Problem.*** An American investor makes a Calvo clause investment in State X. Later the investment is nationalized without compensation satisfactory to the investor. The investor complains to the

Department of State but does not pursue his remedies in X, which is under a military dictatorship that has made a big national issue out of this particular nationalization. Strictly on the bases of the two Hickenlooper amendments, one requiring the President to cut off foreign assistance to a country that does not give reasonable assurance of settling a nationalization claim in accordance with international law within six months of the taking and the other ordering the elimination of the act of state doctrine in Sabbatino-type nationalization cases, insofar as alleged violations of international law are concerned, what should be the effects, if any, of the disregard by the investor of his Calvo clause promises?

4. ***Question.*** Would it be reasonably accurate to say that the Hickenlooper amendments are hard-nosed, developed state responses to a too-clever developing state doctrinal device for making international law irrelevant in nationalization cases?

Espousal by a state of a claim on behalf of a person (also called the extension of diplomatic protection) requires the existence between the claimant and the state of a genuine link between the claimant and the state of a genuine link (see the *Nottebohm Case,* Ch. 9, p. 685). Usually it is the link of nationality. And the link must exist at the time of the taking or other injurious act by the defendant state. Claims of dual nationals of the states involved are also dealt with in Chapter 9.

Standing to Claim involves two often-litigated preconditions: first the existence of the required link between the injured party and the espousing state at the time of the taking. It is also assumed but not often provable from decisions, that loss of the link by a change of nationality before diplomatic settlement is sought (but after the taking) cancels espousal. What about a change of nationality after the taking and after the espousal but before the settlement? The second element of Standing to Claim is requirement of the exhaustion of other remedies before resorting to the assertion of an international claim. This will be considered briefly later in this Chapter, in addition to the question whether there has been a taking, as distinguished from strict regulation. This is sometimes referred to as the "problem of creeping nationalization".

ESPOUSAL OF CORPORATE CLAIMS

General requirement of effective nationality. Judge Jessup discusses this requirement in the Barcelona Traction Case, [1970] I.C.J.Rep. 3, at 182. [A portion of his opinion follows.]

> 38. There is no question that, under international law, a State has in general a right to extend its diplomatic protection to a corporation which has its nationality, or national character as it is more properly called. The proposition raises two questions:
>
> (1) What are the tests to determine the national character of a corporation?
>
> (2) Assuming the appropriate tests are met, must that national character be "real and effective" as shown by the "link" between the corporation and the State, just as, in the Nottebohm case, this Court decided that a certain claim to nationality is not enough in all situations to justify a State in extending its diplomatic protection to a natural person?
>
> 39. There are two standard tests of the "nationality" of a corporation. The place of incorporation is the test generally favoured in the legal systems of the common law, while the siège social is more generally accepted in the civil law systems. There is respectable authority for requiring that both tests be met.
>
> It is not possible to speak of a single rule for all purposes. The tests used in private international law have their own character.
>
> Commercial treaties and claims conventions often contain their own definitions of which companies shall be considered to have the nationality of a State for purposes of the treaty. The tests used for such purposes may be quite different—even in the practice of the same State—from the tests used for other purposes. For example, the "control" test was widely used to determine the enemy character of property during war, but it is not established in international law as a general test of the nationality of a corporation. On the other hand, control may constitute the essential link which, when joined to nationality, gives the State the right to extend diplomatic protection to the corporation. It is a familiar fact that the laws of certain States provide favourable conditions for companies incorporating therein, especially in relation to taxation. Canada is one such State, Lichtenstein is another. In the United States, many companies find it advantageous, for various reasons, to incorporate in Delaware or New Jersey. Charters secured for such reasons may be called "charters of convenience".
>
> 40. The Judgment of the Court of Nottebohm, Second Phase, in 1955, has been widely discussed in the subsequent literature of international law particularly with reference to the so-called "link theory" by which the effectiveness of nationality may be tested. It has been argued that the doctrine is equally applicable in the case of ships flying "flags of convenience" and in relation to the diplomatic protection of corporations. I have maintained the view that it should apply in both those situations.
>
> 43. It has also been argued that the Court should not pass judgment on the question whether there existed the necessary link between Canada and Barcelona Traction without hearing argument on behalf of Canada. Canada might have sought to intervene in the instant case under Article 62 of the Statute, but it did not do so. It is said that after judgment is pronounced in this case of Belgium v. Spain, Canada might find some jurisdictional ground to found an application to institute a case of Canada v. Spain. It is known that no such jurisdictional ground now exists. It seems quite unreal to suppose that Spain would now agree with Canada upon a compromise submitting to the Court a Canadian claim on behalf of Barcelona Traction, thus exposing Spain to the new hazard of being required to pay some two hundred millions of dollars of damages.

But if the Court were properly seised of an application by Canada, it would have to take cognizance of the fact that following Article 59 of the Statute, "The decision of the Court has no binding force except between the parties and in respect of that particular case". Had the Court endorsed the application of the link principle to juristic persons, in its present decision in Belgium v. Spain, Canada could have argued against that conclusion in the hypothetical case of Canada v. Spain, or might have relied on Spanish admissions that Canada was entitled to protect the company.

44. It seems to be widely thought that the "link" concept in connection with the nationality of claims, originated in the International Court of Justice's Judgment in Nottebohm. I do not agree that in that instance the Court created a new rule of law. Indeed the underlying principle was already well established in connection with diplomatic claims on behalf of corporations. To look for the link between a corporation and a State is merely another example of what is now the familiar practice of "lifting the veil". The practice of such States as the United States and Switzerland had already given weight to the proposition that a corporation would not be protected solely because it was incorporated in the State, i.e., had the State's nationality; some other link was required and that link usually was related to the ownership of shares. Such abstention, being as it were "against interest", has special probative value.

Three years after the decision in Nottebohm, the Italian–United States Conciliation Commission, under the presidency of the late Professor Sauser Hall, in the Flegenheimer case stated:

> The right of challenge of the international court, authorizing it to determine whether, behind the nationality certificate or the acts of naturalisation produced, the right to citizenship was regularly acquired, is in *conformity with the very broad rule* of *effectivity* which dominates the law of nationals entirely and allows the court to fulfill its legal function and remove the inconveniences specified. (Emphasis supplied.)

* * *

BARCELONA TRACTION, LIGHT AND POWER CO., LTD. (BELGIUM v. SPAIN)

International Court of Justice, 1970.
[1970] I.C.J.Rep. 3.

[In this case, the parent company in the corporate complex involved was incorporated in 1911 in Canada; but after the First World War approximately 85% of its shares came to be held by Belgian nationals, largely through complicated arrangements involving some very large Belgian holding companies. Belgium wished to be allowed to show that its nationals as shareholders had been seriously harmed by actions of the Spanish state after the Spanish Civil War. These included, according to the Belgian memorials in an earlier ICJ case dropped in 1961 in expectation of a diplomatic settlement: denial from 1940 on of foreign exchange licenses to the Traction Company and some of its Spanish subsidiaries to permit service on bonds payable in pounds sterling; a 1948 bankruptcy proceeding in Spain brought by Spanish purchasers of "defaulted" sterling bonds of which the Traction Company itself had not received fair notice; an unfair time limit on appeal in the bankruptcy case; and the eventual passage of very substantial influence over the corporate structures in Spain to one Juan March.

Although the memorials do not mention the matter in just this way, March, known widely as the "Match King" of Spain, was often reported to have been a significant financial supporter of Franco's insurgency against the Spanish Republic and known as a highly skilled and secretive financial operator. The essence of the Belgian claim on the merits in the case that follows would have been that Belgians had been the victims of foreign exchange, bankruptcy and related official actions that squeezed out the Belgian equity investment in the Barcelona Traction corporate complex. A portion of the opinion of the court appears below.]

31. The Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office.

32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

36. * * * [I]t is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity.

> This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.

It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

46. It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not ipso facto justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.

50. Turning to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law—the distinction and the community between the company and the shareholder—which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

51. On the international plane, the Belgian Government has advanced the proposition that it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself. In strict logic and law this formulation of the Belgian claim to jus standi assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State.

58. * * * [T]he process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

85. The Court will now examine the Belgian claim from a different point of view, disregarding municipal law and relying on the rule that in inter-State relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the State. As the Permanent Court said, "The question whether the * * * dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint." (Mavrommatis Palestine Concessions, Judgment; Nottebohm, Second Phase).

* * *

89. Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

90. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.

92. Since the general rule on the subject does not entitle the Belgian Government to put forward a claim in this case, the question remains to be considered whether nonetheless, as the Belgian Government has contended during the proceedings, considerations of equity do not require that it be held to possess a right of protection. It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals,

shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.

93. On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

94. In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection. Account should also be taken of the practical effects of deducing from considerations of equity any broader right of protection for the national State of the shareholders. It must be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test: it would seem that the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection. The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations. In that field, protection by the national State of the shareholders can hardly be graduated according to the absolute or relative size of the shareholding involved.

95. The Belgian Government, it is true, has also contended that as high a proportion as 88 per cent. of the shares in Barcelona Traction belonged to natural or juristic persons of Belgian nationality, and it has used this as an argument for the purpose not only of determining the amount of the damages which it claims, but also of establishing its right of action on behalf of the Belgian shareholders. Nevertheless, this does not alter the Belgian Government's position, as expounded in the course of the proceedings, which implies, in the last analysis, that it might be sufficient for one single share to belong to a national of a given State for the latter to be entitled to exercise its diplomatic protection.

96. The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might be claimed that, if the right of protection belonging to the national

States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company. Study of factual situations in which this theory might possibly be applied gives rise to the following observations.

* * *

100. It is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, jus standi is conferred on the Belgian Government by considerations of equity.

* * *

103. Accordingly, The Court rejects the Belgian Government's claim by fifteen votes to one, twelve votes of the majority being based on the reasons set out in the present Judgment.

* * * [Declarations, separate opinions and dissenting opinion omitted.]

Characterization of the theory of action against the taking state. Some writers characterize a state that has violated international law (either in the taking itself or by failing to pay compensation) as having been guilty of tortious conduct. Others say that the theory of action is analogous to unjust enrichment, inasmuch as the taking state acquired property without paying for it. The first theory covers both injuries to aliens in their persons and their economic interests while the second does not. Historically, both types of injuries have given rise to international responsibilities, in some instances in the same case. The tort theory, therefore, has the utility of providing a conceptual basis for both situations. The unjust enrichment theory as to takings of economic interests, if followed in strict analogy to Anglo–American quasi-contract, also precludes an ab initio (at taking) concept that the wrong is the taking, not the withholding of compensation.

It should be borne in mind that both these characterizations draw heavily upon analogies to municipal legal systems, and that the analogies cannot be pushed very far beyond the fundamental concepts involved. As is well known, what is tort, with a whole array of sub-rules as to duty, proximate cause, damages, and the like, to a common law lawyer is not quite the same thing as civil responsibility to a civil law lawyer. And while legal systems agree that unjust enrichment should be redressed in some ways in some situations, the doctrines of quasi-contract and quantum meruit at common law are not of universal acceptance. Thus, it would seem inadmissible to derive conclusions about the remedies that international law provides for the taking of an alien's economic interest in violation of international law by logical deduction of explicit rules from these characterizations. If there is an international tort or an international cause of action for unjust enrichment it should be regarded as sui generis, rather than as a detailed transformation of national law into international law.

The remedy of compensation. There is common agreement that compensation ought to be sufficient in value to make the forcibly disinvested alien whole. The basic problem is *what value* of *what.* Valuation is an extremely difficult problem in domestic legal systems, and in such systems, too, there are questions as to what types of interests, expectations and prospects should be included. A fairly common problem in the international claims arena is as to the valuation of the interests of an oil company lost by the cancellation of its concession. Its physical installations raise only the problems of technique and criteria for fixing the value in money of what has been taken, not that these are simple. (Replacement value? Original cost depreciated? What kind of depreciation? etc.) But what of known but not extracted reserves of oil and gas in place? What of speculative value as to reserves not yet known? There is a natural tendency for claimants to put high valuations on what they have lost by nationalization and an equally natural tendency of the respondent state in any type of claims settlement proceeding to minimize the damage suffered.

Eventually some money value is going to have to be arrived at. On an individual case basis this may be done by party or diplomatic bargaining, a finding of the damages by an arbitral tribunal or a court (perhaps assisted by a fact-finding aide), or agreement of the parties to engage a professional and disinterested valuation expert to determine true value. In instances where a state has engaged in wholesale nationalization, as when Yugoslavia became socialist, a very great many claimants with many different types of losses exist. In such situations the settlement may take the form of the acceptance by the espousing state of a global or lump sum in complete satisfaction and waiver of all the claims included within the scope of the negotiation. The espousing state would, of course, find it necessary to analyze all the claims it had received as to amounts claimed, types of property involved, etc. and come to an overall negotiating figure that it would then use in bargaining with the other state concerned. (In a sense such an approach is not unlike the settlement out of court of a class action in the United States.)

In the Yugoslavian claims settlement negotiations of 1948–49, the United States Department of State received (as a result of published notice) the claims of United States citizens against Yugoslavia for the nationalization program carried on in that country. These submissions were then examined to determine espousibility by the United States and to estimate the degree of inflation or over-statement that might exist in particular claims. During the course of this operation, also, there were consultations with claimants and groups of claimants to explain the process and to seek general concurrence that a lump sum figure of such and such amount (to be divided ratably among the claimants in the proportion of total lump sum recovery to total eligible claims) would be acceptable. Eventually the United States decided that it could accept $17 million in gold in complete settlement and waiver of a total of espousible claims that, before analysis for overstatement of value, totaled $42 million. After the negotiation of an executive agreement with Yugoslavia for settlement along these lines, the Congress authorized the use of the value of the gold received for the benefit of the private claimants and set up an administrative body, now the Foreign Claims Settlement Commission, to pass upon the individual claims as to eligibility under the terms of the agreement and to award money recoveries.

The remedy of compensation is adjectivally stated in the classic United States formulation as "prompt, adequate and effective." The three adjectives are the subject of somewhat wishful further descriptions in standard sources for expression of United States viewpoints on what international law requires.

One of the American trilogy of adjectives, "effective," expresses a clear preference for compensation in freely convertible foreign exchange instead of compensation in inconvertible local currency. In the real world of today, the effect of this requirement, if strictly adhered to, would be to prevent a state short of foreign exchange from nationalizing aliens' interests even under programs of social reform. But, of course, it is not adhered to in such cases, beyond a kind of discounted foreign exchange receipt in quittance under lump sum agreements to pay in convertible monetary assets. Payment over time, as by the issuance of government or government-guaranteed bonds, is in state practice prompt enough and effective enough to be acceptable.

Finally, it should be noted that the nationalization of a going enterprise is a business disaster, and compensation under any criteria that the taking state would consider accepting is almost always below the real value of the economic loss. This reality properly justifies the classification of claims settlement as a species of salvage. It is important for lawyers to get salvage for their clients, but the law of salvage is hardly the best body of law to provide a secure and lasting basis for foreign investment that wants to stay in business.

Restitution, invalidation of title and other specific recovery of property as remedies; cross-reference to Chapter 6. The question whether customary international law has developed remedies for violations of an international minimum standard in addition to the remedy of fair compensation in state to state proceedings becomes

pertinent at this point in consideration of what the injured private party's attorney can do. The cases bearing on the remedies of specific restitution, invalidation of the title derived from the nationalizing state, and other possible types of specific recovery of property have been dealt with in Chapter 6 as a necessary aspect of the act of state doctrine. Is it reasonable to conclude, from the leading cases bearing on this issue in Chapter 6, from the Supreme Court of the United States, the House of Lords, and the Supreme Court of Texas, that the normal principle that a state may control title to property having situs in its territory has prevailed? If so, have we seen the end of the pursuit into world commerce by the dispossessed former owners of hot oil, sugar, copper, tobacco, and whatever? Did the lawyers who sought so vigorously to equate a state with a thief at common law, act in the name of customary international law in innocent expectation that national courts would discover international law their way?

Investment insurance. The Marshall Plan (1948) was not only the world's first major foreign assistance program; it also broke new ground in providing that qualified private sector investors (mainly United States companies) could, for fees of approximately ¾ to 1% of the principal per type of risk, receive the promise of the United States to reimburse them for certain types of non-business losses, such as from nationalization without adequate compensation, non-convertibility of earnings in soft currencies into dollars and damages resulting from hostilities. The investment guaranty, as it was then called, was designed to encourage the outflow of capital from the United States' private sector to help rehabilitate the private sectors of the countries in Europe that were to benefit from the Marshall Plan. (The Soviet Union was included in the Marshall Plan's general invitation to participate, but it declined for itself and its dominated satellites.)

When, approximately a decade later, the United States began to engage for the first time in significant bilateral assistance to the world's poorer and developing countries, the investment guaranty program was extended to them, first for the above three risks, slightly expanded in the third instance (that of physical damage from hostilities, to include losses due to civil insurrection). By that time the writing of investment guaranties for developed countries had stopped. There had been no losses in Europe, but the amounts for which guaranties nonetheless were being sought were becoming too large to be prudently managed on the resource base Congress was willing to commit. In 1969 Congress took the investment guaranty program out of the United States Foreign Assistance Administration (USAID) and turned it over to a wholly-owned government corporation, the Overseas Private Investment Corporation (OPIC); see 22 U.S.C.A. §§ 2191–2200a.

The investment insurance program simplifies the problem of the foreign investor as to getting compensation for new investment, provided the coverage is available. However, there is considerable hostility in Latin America to United States (and probably other foreign country) investment insurance. In part this resistance arose from the insistence of Congress in earlier years on a precondition that an investment-receiving country have entered into a bilateral agreement with the United States accepting the scheme and recognizing the right of the United States government to be subrogated to any covered claims it might discharge. Legislatures balked in a number of Latin countries as to contract subrogation and its implicit assertion of the international minimum standard. The Andean Investment Code binds the states members of the Andean Common Market (ANCOM) not to give foreign investors better than national treatment (Art. 50), and its Article 51 provides: "In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors." 16 ILM 138 (1977).

These limitations do not apply literally to investment guaranties or insurance by multipartite assistance agencies, such as the International Finance Corporation of the World Bank Group. For some time the staff of the latter worked on a multipartite investment insurance plan which is in effect. We have heard reports that the former restrictions are being lifted in various Latin-American countries. In the North-American Free Trade Agreement (NAFTA), approved in December 1993 by the United States Congress, Mexico has accepted terms for the entry and treatment of direct foreign investment that are in startling contrast to her past. Foreign ownership of interests in the petroleum industry, however, are excluded.

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1. ***The possibility of new foreign investment arrangements.*** The preceding material in Section B of this chapter deals with the jural pathology of direct foreign investment in the present international legal system. Better treatment of investment diseases, as by better opportunity for authoritative and neutral settlement of investment disputes under existing international law, would help. Also, clarifications and substantive modifications in the rules themselves might reduce fears, suspicions and tensions in both capital exporting and capital importing states. It is rather striking to note in this regard how little trouble creditor investments seem to give. Why? Is it because they are not very much protected by the international legal system, or is there some other reason? Would it help if for international purposes foreign equity investment should come to be regarded as limited rather than perpetual ownership, that is, to arrange the rules so that the foreign ownership investor is entitled to x times his total investment and then must get out?

Another factor that is coming more and more to planning attention in regard to direct foreign ownership investment, is that of the effect of development itself upon the stability of investment relationships. In general, investment disputes between the world's industrialized, rich countries are very few, except for the administration of prior restraints on entry in France and Japan and for some antitrust problems, especially with the United Kingdom and possibly other Commonwealth countries. It is between the private sector ownership investors of rich

countries and the governments, politicians and publics of the less well-developed countries that most of the problems arise. To a considerable extent they seem to be related to differences in the levels of managerial skills of the foreign companies and the host country public administrators. But technological advances as host countries develop may tend toward the eventual tranquilization of the present general investment situation between the rich and poor halves of the planet and the evolution of more effective legal rules for the governance of relationships between capital exporting and capital receiving countries.

Codification efforts toward new rules for foreign investment have been made. Several proposed codes for foreign investment, to come into effect as law-making international agreements, have been made by groups within developed countries. In general these proposals have found little favor in developing countries. Why? Some developing countries individually have provided rules through legislation and administrative practice. These range from prior restraints and foreign ownership maxima to provisions designed actually to attract foreign investment, either generally or into lagging sectors of the national economies. The countries in the Andean Group within the Latin American Free Trade Association (LAFTA) apply a complete system of regulation designed to put into effect nationally in each of them a uniform basic law on foreign investment. All of these efforts are parts of a quest for rules for foreign investment of greater precision and sophistication than provided by the vague principles of customary international law, which as we have seen sound more in salvage than in prevention.

2. ***Bilateral treaties involving direct foreign investment.*** Some general aspects of the legal status of foreign investment have long been dealt with in general commercial treaties, usually referred to in United States practice as FCN (friendship, commerce and navigation) treaties. In Asakura v. City of Seattle, a Japanese pawnbroker was protected under an FCN bilateral against a municipal ordinance forbidding aliens from engaging in that business. More detailed investors' rights provisions exist in later FCN treaties with other developed countries, where, generally speaking, such enumerations are not often needed. More recently, particularly vis-à-vis developing countries, the United States has vigorously pursued detailed agreements limited to foreign business investment issues. Some other capital exporting countries attempt the same types of arrangements. Such treaties provide for national and most favored nation treatment for foreign investors of the nationality of the parties, on a basis of reciprocity. The term "investment" is broadly defined and includes intellectual and industrial property rights, expectations under contracts, and re-invested earnings. Compulsory arbitration is often sought. The international minimum standard, capital-exporting country version, is explicit; and the United States tries to get the compensation formula stated as "prompt, adequate, and effective." Israel and a few other developing countries where historically foreign investment has not been controversial or prominent have entered into such treaties. But it is still slow going with the classic opposition, particularly in Latin America. Several treaties of the new

sort negotiated by the United States and developing countries still await coming into effect some years later.

A particularly useful survey of the later type bilateral investment treaties, is Gudgeon, Valuation of Nationalized Property under United States and Other Bilateral Investment Treaties, Ch. III, Lillich (ed.), The Valuation of Nationalized Property in International Law, Volume 4 (1987), pp. 101 et seq.

Read and Discuss the Treaty of Friendship, Establishment and Navigation Between the United States and Belgium of February 21, 1961, 14 U.S.T. 1284, 480 U.N.T.S. 149, in the Doc. Supp.

Multipartite efforts. Over the past forty years many proposals for multipartite investment codes have been put forward: the German bankers' plan, OECD formulations, even the failed Havana Charter for an international trade organization. The arrangement that follows is the only success, so far as it goes. In the Uruguay GATT Round, the trade-in-services agenda item included some proposals for service-related establishments abroad. The Uruguay Round was completed and signed on December 15, 1993.

3. WHAT IS HAPPENING AS TO THE INVESTMENT DISPUTE SETTLEMENT PROCESS?

The classic procedure of invoking espousal of the claim by the claimant's state of nationality, and thus elevating the matter to one between states and possibly triggering a doctrinal dispute on issues of customary international law, is giving way to a new procedure. The new process involves claimant party versus defendant state proceedings where disputes about the content of customary law are avoided by the nature of the arrangement used, even though principles derived from customary law are accepted by the parties, as, for example, the nature of the taking, levels of compensation, standing, and the like.

Instead of involving his foreign office, a claimant today is apt to propose or accept arbitration, either ad hoc, governed by a prior agreement at the time of the entry of the business investment, or provided at the option of the parties by either an international organization, or one of a number of non-governmental arbitral groups, such as the American Arbitration Association.

Within this range of options, the trend in investment disputes that involve developing countries as defendants is to use the facilities of the International Centre for the Settlement of Investment Disputes (ICSID), an organ of the World Bank which within the Bank is linked to the legal affairs office of the institution. Where the dispute is more "commercial" than "developmental", the resort might be to the arbitral rules and procedures of the United Nations Commission for International Trade Law (UNCITRAL).

ICSID publishes numerous useful materials related to foreign investment matters of a legal nature and is generous in their distribution. Of particular utility is a two-volume publication, Legal Framework for the Treatment of Foreign Investment (1992). Volume I of this publication includes a useful survey of sources about direct foreign investment, including lists of multilateral and bilateral investment treaties, tables on expropriations and compensation therefor, and an argument (Part III, at 147 ff) for the application to party-foreign state contracts of the customary law principle applicable between states, *Pacta Sund Servanda*, considered in Chapter 13.

EXCERPT FROM SHIHATA*, TOWARDS A GREATER DEPOLITICIZATION OF INVESTMENT DISPUTES: THE ROLES OF ICSID AND MIGA **

* * * Like the World Bank, with which it is closely associated, or the Multilateral Investment Guarantee Agency (MIGA or the Agency), which I will describe later, ICSID must be regarded as an instrument of international policy for the promotion of investments and of economic development. The main features of the system ICSID's founders devised for this instrument include its voluntary character, its flexibility and its effectiveness.

1. ICSID's *Voluntary Character*. ICSID's facilities are available on a voluntary basis. States eligible to join ICSID (members of the World Bank and states invited to sign the ICSID Convention under its Article 67) are obviously free to decline to do so. Their decision has no bearing on their relations with the World Bank itself. Moreover, ratification of the ICSID Convention does not constitute an obligation to use the ICSID machinery. That obligation can arise only after the Contracting State concerned has specifically agreed to submit to ICSID arbitration a particular dispute or class of disputes. In other words, the decision of a state to consent to ICSID arbitration is a matter within the sole discretion of each Contracting State. Under Article 25(4) of the ICSID Convention, any Contracting State may in addition notify ICSID, either at the time of ratification or at any time thereafter, of the class or classes of disputes that it would or would not consider arbitrable under ICSID's auspices. However, only a few Contracting States have made such a notification. Saudi Arabia has indicated that it intends to exclude investment disputes relating to "oil and pertaining to acts of sovereignty" and Jamaica has excluded disputes relating to "minerals or other natural resources." Papua New Guinea has specified that "it will only consider submitting those disputes to the Centre which are fundamental to the investment itself" and Turkey has indicated that it will only consider submitting to ICSID disputes arising out of investments that have been approved in Turkey and do not relate to rights in land.

Within this framework, parties have considerably more freedom to determine whether their transaction is suitable for ICSID arbitration

* Vice President and General Counsel, World Bank; Secretary–General, ICSID.

** World Bank Publication in monograph; footnotes deleted; pp. 6–7, 13.

than might be assumed from the limitation of the Centre's jurisdiction to investment disputes of a legal character. The ICSID Convention does not define the term "investment," and this deliberate lack of definition has enabled the ICSID Convention to accommodate not only traditional types of investment in the form of capital contributions, but also new types of investment—including service contracts and transfers of technology.

Disputes submitted to the Centre concerning traditional types of investment have included disputes relating to the exploitation of natural resources, such as bauxite, timber and petroleum; industrial investments, such as the manufacture of fibers and of bottles, natural gas liquefaction, and aluminum production; a shrimp-farming joint venture; and the construction of hotels, tourist centers, and urban housing. Disputes relating to new types of "investment" have included disputes arising out of agreements for the construction of a chemical plant on a turnkey basis, coupled with a management contract, a management contract for a cotton mill, a contract for equipping of vessels for fishing and training their crews, technical and licensing agreements for the manufacture of weapons, and a branch operation of a bank. Most of these cases are related to genuine contractual disputes concerning the interpretation of investment agreements or matters of performance. Only a few concern unilateral termination of investment agreements, e.g. in the form of outright nationalization or the revocation of investment licenses.

4. EXHAUSTION OF LOCAL REMEDIES

The ICSID Convention gives investors direct access to an international forum and assures them that the refusal or abstention of the state party to a dispute to participate in the proceedings after it has given its consent cannot frustrate the arbitral process. But the ICSID Convention (Article 26) also provides that a Contracting State may, as a condition of its consent to ICSID arbitration, require prior exhaustion of local remedies. This condition may be specified in various ways. It could, for instance, be stipulated in the investment of agreement, as has been done in agreements concluded by Latin American countries.

5. DIPLOMATIC PROTECTION

As to diplomatic protection, the ICSID Convention takes a radical position. It was recognized at the time the ICSID Convention was finalized that: When a host state consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his state to espouse his case and that state should not be permitted to do so.

This fundamental consideration, which is another aspect of the exclusivity of the ICSID system, finds its expression in Article 27 of the ICSID Convention. That provision expressly prohibits a contracting

state from giving diplomatic protection, or bringing an international claim, with respect to a dispute which one of its nationals and another contracting state have consented to submit to ICSID arbitration.

FRIEDMANN AND BEGUIN, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES 23 (1971) *

* * * [The joint venture] cannot be regarded as a panacea. It is a device to be adopted, rejected, or modified after a sober consideration of the many legal, psychological, and technical factors prevailing in a given situation. Confidence between the partners will overcome the most difficult obstacles; lack of confidence will destroy the most perfect devices. As a major negative factor, we mentioned disparity of outlook between the foreign and local partners:

> * * * In joint ventures between industrially developed countries, such as the United States, Britain, West Germany, the Netherlands, Italy, or Sweden, there is a certain community not only of tradition and of scientific, technical, and legal standards, but there has also been more experience with responsible investment practices and legal supervision, although such standards have often evolved only after disastrous experiences with unscrupulous speculators. In many of the less developed countries, this stage has not yet been reached in the business environment. * * *

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1. ***Joint ventures between the private sector in market economy countries and socialist states.*** The joint venture is being used increasingly as an alternative to licensing, exporting, and management-service contracts where the private sectors in market economy states and socialist states seek to do business with each other. In the normal (private sector to private sector) joint venture the foreigners and the locals jointly own a corporation. How do you suppose the joint venture is structured where in the host state private ownership of the means of production is forbidden? The People's Republic of China has relaxed Marxist doctrine pragmatically. Direct foreign investment, with or without joint-venture linkages, is now commonplace in the Russian Federation, Ukraine, and a number of the newly-independent states once part of the Soviet empire.

2. ***Multinational enterprises (MNEs).*** In the last 30 years there has been great growth in the size and number of corporate families (parents and foreign subsidiaries) that carry on economic activity on multi-country, regional, or even global, bases. Aside from the influence of fashions in thought about business structure, why have the joint

* Reprinted with the permission of the Columbia University Press.

venture, earlier, and the MNE now, raised so many expectations as to preferred forms of direct foreign investment?

Experienced observers know well that the classic American parent-wholly owned foreign subsidiary structure is tagged as very foreign in most host countries; and in socially volatile ones, such as the developing and highly nationalistic states of Latin America, the label can lead to uncomfortable results. Thus, from the perspective of reducing or preventing transnational investment conflicts, the issue as to the MNE is one of credibility. Is the MNE really something new that does not deserve to be feared, controlled or discriminated against as both foreign and especially dangerous? Or is the MNE just a new name for an old and basically unchanged and increasingly controversial foreign investment structure?

One difficulty the MNE image is apt to have, in developing countries at least, but possibly in others as well, is that some self-styled MNEs—and they fit the definition quoted above also—have been take-over conglomerates. Foreign take-over of the best indigenous enterprise is always politically unpopular in the host state. When to this there is added the controversies that swirl around the basic assumption in justification that undefined and largely still personalized asserted management skills make conglomerates economically and socially desirable, the damage that the asserted linkage can do to the general idea of MNEs is substantial. Another relationship that comes into play at this point is whether the worlds of today and tomorrow (short range) have put aside as no longer relevant the "Curse of Bigness" of late nineteenth century populism (and the late Louis D. Brandeis). MNEs are big; a little business MNE is almost unimaginable. Has business learned how to be big, yet agile, adaptive and efficient at the same time? Here new doctrines of management technology and earlier folk-doubts may face a moment of truth before long. Or, if not intellectual confrontations, then antitrust ones.

In the United States MNE parent corporations are not without domestic problems. Organized labor complains that MNEs are largely responsible for runaway plants that take jobs away from American workers and bring in foreign made goods under freer trade auspices. Others complain that certain self-styled MNEs conspire against, and seek to involve the United States government in pressuring certain foreign governments. Congress may have still to face what it will do about proposed legislation against imports here of goods made abroad by American-owned foreign companies. Some observers have seen in some patterns of European Economic Community antitrust enforcement action a bias against large American companies with numerous subsidiaries (some of them by take-over) within the EEC. On the other hand, others say that the industrialized Europeans and the Japanese have enthusiastic ideas of their own about the further use of MNEs. It is sometimes added that more true MNEs are based in Europe—and have been for some time—than in the United States, because Europeans, more than the Americans, have found it expedient in past to share participations in capital at the top—and sometimes at lower—levels within the structure of a corporate family.

Student users of these materials—and some of their teachers—will in their professional lifetimes probably see how the foregoing issues and problems work themselves out. Will one straight line projection or its opposite occur? Or will evolution take a now unforeseen twist? Meanwhile, the profession of international lawyering is already considerably involved with the MNE as a concept, a rhetoric, or a reality. More and more the term TNE (Transnational Enterprise) is used. Why?

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6. REDUCTION OF TRANSNATIONAL INVESTMENT CONFLICT

Prior Restraints on Entry

It was noted earlier in this chapter that historically there have been more hindrances and prohibitions on the movement of merchandise across frontiers (trade) than as to the movement of business capital. However, some states control entry of foreign businesses by the requirement of licenses to enter. France for some time has required large direct foreign investments to apply for entry permits. The Latin-American States of the Andean Common Market developed and put into effect an elaborate prior restraint system. * * *

Reports at the April, 1993 annual meeting of the American Society of International Law, not yet published, indicated marked relaxation of business-entry controls. The earlier restraints are now seen as the waning of hostility toward foreign investment in Latin-America that was generated by situations that have either improved or become irrelevant. See, supra, § B–1. Generally, as to its background, outlook, and terms see Oliver, The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment, American Journal of International Law 763 (1972).

Profile lowering devices. In the United States and in a number of other countries the legal profession, through practitioners specializing in international business transactions, is influential in the structuring of foreign investments. That clients prefer to be told how they can come somewhere near achieving their objectives, rather than to be told what they cannot do, is a reality here as in other sectors of practice involving prospective operations. Knowledge of the existing rules of the international legal system and of the lines along which these rules may evolve is highly important. It is also important that the lawyer be innovative, sensitive to the psycho-political setting in the potential host country and free of ideological prejudice. In particular, it is useful for him to consider ways in which the business venture itself can be organized and operated so as to avoid to the extent possible shifts for the worse in the investment climate after the client has become irrevocably committed to the venture, as by making a foreign investment in fixed assets. The fundamental principle of economics that such an investment is assuredly retrievable only for its scrap or salvage value should not be overlooked.

Among the possibilities that modern foreign investors ought to be induced to consider, in particular circumstances, are:

a. Management-service contracts as an alternative to ownership interests. Some countries have already limited the foreign investor to the former in the extractive industries and public utilities.

b. Joint ventures.

c. Wider offerings of stock in the host-country operating company to investors of that country, i.e. a departure from the pattern so often found in the past of complete foreign stock ownership, except for qualifying shares, usually three percent or less of the total stock in that company. Such preponderance is not necessary for control.

d. Due regard to national and regional preferences that foreign investors not dominate particular sectors of the economy, such as defense-related industries, telecommunications, etc.

e. For the extractive industries, the possibility of negotiating the country-company sharing of the proceeds of the business at different ratios during the life of the concession, particularly if the term is a fairly long one. In many instances minerals concessions now giving the preponderant return to the country were originally contracted for on the basis of a far lower participation by the host, and as time went on pressures built up for changing the sharing that sometimes caused crises in the relationship, and even nationalizations under emotionally heated circumstances. It has been suggested that with the utilization of improved techniques of economic forecasting new concessions might be originally negotiated to provide for increasing the host share of the proceeds at successive stages in the life of the concession.

f. Acceptance of partial disinvestment down to substantial minority stock ownership. See Hirschman, How to Divest in Latin America, and Why, Princeton Essays in International Finance (No. 76, 1969). However, experience shows that foreign business capital will not flow if the foreign element does not have control through the period of 100% payout.

g. The multinationalization of the foreign ownership, thus reducing the association of the venture with any single foreign nationality. Oliver, Speculations on Developing Country Reception of Multinational Enterprise, 11 Va.J. of Int'l Law 192 (1971).

h. Disassociation from particular nationalities by removing the parents' corporation control centers to relatively innocuous offshore places, usually in new, small, rule-of-law states. Does this tactic have a downside?

Other possibilities involving legal structuring exist and still others will doubtless develop in the future. Outside the lawyer's sphere of specialization, but related, are managerial practices as to the use of nationals of the host country in executive suites as well as in the labor force, corporate good citizenship in the host country, maximum use of products of that country in the conduct of a manufacturing or sales business and the like.

Chapter 16

PEACEFUL RESOLUTION OF DISPUTES AND THE USE OF FORCE IN THE INTERNATIONAL SYSTEM

SECTION A. THE PEACEFUL RESOLUTION OF DISPUTES IN THE INTERNATIONAL SYSTEM

At its 44th Session, in 1989, the General Assembly declared 1990–1999 to be the U.N. Decade of International Law. Objectives were to further the acceptance of the principles of international law and to promote methods for the peaceful settlement of international disputes. In the modern era of nation-states since the treaties of Utrecht and Westphalia, international law has attempted to resolve disputes by means short of war in several ways. Inspired in part by legal and theological precepts of "*Just War,*" aggressive war was proscribed, means of peaceful resolution of disputes were developed, and rules mitigating the violent effects of war were promulgated.

Modalities and techniques for the peaceful resolution of disputes were instituted through the Hague Peace Conferences of 1899 and 1907, the Bryan Treaties, the Kellogg–Briand Pact, and the League of Nations. This early history is examined in this section, culminating in a review of attempts peacefully to resolve disputes under the provisions of Chapter VI of the U.N. Charter, including fact-finding and conciliation, good offices, mediation and arbitration. Finally, this chapter describes the international community's attempts to maintain conditions of peace and justice through the use of force short of war: economic boycott and United Nations "peace-keeping" under Chapter VII of the Charter. Chapter Seventeen, infra, completes the circle, exploring the traditional and residual rights of states to go to war.

For the most part, international disputes are resolved by negotiation between the disputants. In this way, on a day-to-day basis, internation-

Mediation: When consultation fails to prevent a problem and negotiation fails to resolve it, a third party may be able to intervene to resolve the impasse, helping the parties create a solution acceptable to each of them. This is offering "good offices." The third party has no power or authority to force a settlement, such as in binding arbitration. He attempts to help the parties see solutions which will be mutually advantageous or at least an acceptable alternative to continuing the dispute. The mediator may also be charged with investigation and development of proposals for consideration. This is called "conciliation."

Conciliation: A commission is set-up by disputing parties. The commission may be permanent, to resolve ongoing disputes on a given subject, or, may be ad hoc. The commission is charged to investigate the dispute or incident and to establish the facts as a neutral observer. We will examine the minimally successful attempt to utilize conciliation in disputes in the early part of the 20th century. More recently, the General Assembly has adopted a plan, *U.N. Draft Rules for the Conciliation of Disputes Between States*, Nov. 28, 1990, 30 ILM 229 (1991), which we have included in the Doc. Supp.

Adjudication: If the above methods fail, nations may resort to international adjudication either in the International Court of Justice, discussed in Chapters 1, 10, and 11, or in domestic courts, examined in Chapters 1, 10, 11, and in 14. Other aspects of peaceful resolution are related to fact-finding and the success of the peaceful means attempted often depends on them. These include: jurisdiction, applicable law, effect or nature of outcomes (e.g., binding or non-binding), acceptability of the various procedures (waxing or waning, for example), and workability.

1. FACT FINDING AND DISPUTE RESOLUTION UNDER THE HAGUE CONVENTIONS AND LEAGUE OF NATIONS

For detailed historical analysis, see Firmage, Fact-Finding in the Resolution of International Disputes—From the Hague Peace Conference to the United Nations, [1971] Utah L.Rev. 421; and, Firmage, The 1993 Kellogg Lectures, War, Peace & Faith, delivered at the Episcopal Divinity School in Cambridge, Mass. (1993) from which the following material was drawn.

The history of peaceful resolution of disputes through the Hague Conventions and the League of Nations is often seen as being negative, because the League and its member states failed to prevent the Second World War. While the League and its members failed adequately to confront aggressor states in the 1930's, the League was successful to some degree in resolving some disputes in Europe following the disintegration of imperial systems of government after the First World War. Then as now, contending ethnic and national groups threatened the peace. The League and its member states had somehow to redraw the map of Europe. Techniques and instruments of peaceful resolution were developed which may once again be useful in allowing contending parties in disputes to have available the means for peaceful resolution.

The enduring quest of the peacemaker has been to substitute peaceful means of dispute resolution for violent self help. The horizontal and uncentralized nature of the international system has lessened the capacity of international law to punish illegal violence and provide adequate means of peaceful resolution of disputes. There are few hierarchical, vertical, or centralizing factors in the international system to enforce its norms upon aberrant states.

Within this context of relative immaturity and weakness, the international system, nevertheless, has developed some institutional procedures to accomplish the peaceful resolution of disputes. For the most part, these procedures—good offices, conciliation, inquiry or fact-finding, negotiation, mediation, arbitration and judicial settlement—have counterparts within municipal systems. While this listing of techniques ranges from political or diplomatic to judicial, one process—inquiry or fact-finding—is instrumental to both.

Fact-finding has a common relationship to resultant conclusions of law, policy, or accommodation in dispute settlement whether the process of resolution is of a juridical or a diplomatic nature. Modern techniques of fact-finding in the process of the peaceful resolution of international disputes have an evolutionary history dating from the latter part of the last century. International commissions of inquiry have existed from before the Hague Conventions through the period of the Bryan treaties and the League of Nations to the less formal fact-finding bodies frequently created by the United Nations.

The Hague Conventions Through the League of Nations. The Hague Conventions of 1899 and 1907: Significant institutional development of international commissions of inquiry as a technique in the peaceful resolution of disputes began with the Hague Conventions of 1899 and 1907, although informal international commissions of inquiry had been employed before. Seven commissions of inquiry were established under the two Hague Conventions. The commissions all possessed the following characteristics: (1) resort to the commissions was voluntary; (2) only minor disputes were referred to the commissions; (3) each commission was *ad hoc;* (4) each commission was constituted so as to insure neutral dominance; (5) the report was recommendatory only; (6) commissions could investigate only factual differences. The Hague Convention of 1899 was invoked in only one dispute—the "Hull," or *"Dogger Bank," case,* where the commission's report, though not binding, was implemented by the Parties. Russia accordingly paid damages.

The Bryan Treaties: Between 1913 and 1915 the United States signed over 30 bilateral treaties, all entitled "Treaty for the Advancement of Peace," with other American states and with several European states. The force behind the negotiation of the treaties was William Jennings Bryan, who made his acceptance of the office of Secretary of State dependent upon the integration of his concept of commissions of inquiry into the foreign policy of the Wilson administration. While there are obvious similarities between the Hague and Bryan Commissions, the

6. The manifest desire of the membership to work together is a new source of strength in our common endeavour. Success is far from certain, however. While my report deals with ways to improve the Organization's capacity to pursue and preserve peace, it is crucial for all Member States to bear in mind that the search for improved mechanisms and techniques will be of little significance unless this new spirit of commonality is propelled by the will to make the hard decisions demanded by this time of opportunity.

* * *

14. Since the creation of the United Nations in 1945, over 100 major conflicts around the world have left some 20 million dead. The United Nations was rendered powerless to deal with many of these crises because of the vetoes—279 of them—cast in the Security Council, which were a vivid expression of the divisions of that period.

15. With the end of the cold war there have been no such vetoes since 31 May 1990, and demands on the United Nations have surged. Its security arm, once disabled by circumstances it was not created or equipped to control, has emerged as a central instrument for the prevention and resolution of conflicts and for the preservation of peace. Our aims must be:

- To seek to identify at the earliest possible stage situations that could produce conflict, and to try through diplomacy to remove the sources of danger before violence results;
- Where conflict erupts, to engage in peacemaking aimed at resolving the issues that have led to conflict;
- Through peace-keeping, to work to preserve peace, however fragile, where fighting has been halted and to assist in implementing agreements achieved by the peacemakers;
- To stand ready to assist in peace-building in its differing contexts: rebuilding the institutions and infrastructures of nations torn by civil war and strife; and building bonds of peaceful mutual benefit among nations formerly at war;
- And in the largest sense, to address the deepest causes of conflict: economic despair, social injustice and political oppression. It is possible to discern an increasingly common moral perception that spans the world's nations and peoples, and which is finding expression in international laws, many owing their genesis to the work of this Organization.

U.N.Doc. A/47/227 and S/2411 (17 June 1992), reprinted in, 31 I.L.M. 953 (1992).

Query: Do the recent plans improve on the old? Why? Why not?

SECTION B. THE USE OF FORCE BY THE UNITED NATIONS

1. EVOLUTION OF LAW AGAINST USE OF FORCE BY STATES:

a. Conceptual and Philosophical Introduction. Portions of this introduction were adapted from Firmage, Summary and Interpretation, concluding Chapter in International Law of Civil War 405–428 (Richard Falk, ed. 1971); Firmage, Kellogg Lectures, 1993 supra at 7–8.

Section A, On Peaceful Resolution of Disputes, precedes this section on the use of force by the United Nations, because we see it as being primary. Chapter VI of the U.N. Charter provides for a system of non-violent dispute resolution through fact-finding, good offices, negotiations, and mediation. There is a provision for binding third-party decisions through arbitration and judicial resolution through the International Court of Justice. The United Nations also has powers that go beyond techniques of peaceful resolution of disputes. Where the League of Nations was limited merely to recommending action, Chapter VII of the U.N. Charter allows the latter, with Security Council approval, to use force ranging from economic boycott and sanction to initiating war against an aggressive state. This section focuses on Chapter VII and provides opportunity to analyze the use of force and its limitations under the United Nations Charter.

At the end of the Cold War we face a fractionalized world of rival ethnic groups, racial, tribal, religious and national factions in conflict similar to conditions before and after the First World War. In the aftermath of that epochal confrontation, we saw the disintegration of major imperial and multi-national ethnic and linguistic systems leading to ethnic and national conflict. The aftershocks also gave birth to the Bolshevik Revolution, with profound consequences for Asia and Europe. In post-war Germany, hyper-inflation and political reaction to defeat in war brought the rise of Adolph Hitler and National Socialism. After World War II, the United Nations was created with the hope that peaceful resolution of disputes would be more feasible. The U.N. was to provide a mechanism to control violence. Soon, however, the world became divided into two, perhaps three, blocks. The Cold War dominated international law, including that relating to the use of force. The violence unleashed in World War II was only transmuted at its end as Cold War followed—overt, covert, and by proxy.

The disintegration of the former Soviet Union and the end of the Cold War provides an opportunity for the international system to function more efficiently. We now have an opportunity for peaceful resolution of disputes and an amelioration of violence to a degree not enjoyed by the leaders of nations at least since World War I. Now, however, with the disintegration of multi-ethnic states in Yugoslavia and the Soviet Union, the forms of violence which preceded and followed World War I confront us again. We now face violence among Hindu and

Muslim in India and Pakistan; Serbs, Croats and Muslims in Bosnia; Armenians and Azeris in the Caucuses; Tamils and Sinhalese in Sri Lanka; and Israelis and Palestinians in the West Bank, the Hutus and the Tutsis in Rwanda, to mention but a few.

A paradox of the nuclear era is that the existence of nuclear weapons has suppressed in some circumstances massive violence with conventional weaponry of the magnitude, at least, of World War II. The nature of war in our time has tended to be internecine: wars of national liberation, civil wars, ethnic and religious conflict. Now, with the breakdown of the last imperial system to survive both world wars, and the disintegration of multi-ethnic states associated with the former Soviet Union and Communism, ethnic or tribal war, internal war and civil strife are increasingly the sorts of conflict which will challenge the peace.

Solutions are not readily available. International law, when faced with the issue of third-party involvement in civil strife, has two competing lines of authority. One line of precedent allows third-party intervention in civil strife upon the invitation and in aid of the incumbent government, at least until a status of belligerency is achieved by the insurgent forces. When belligerency is reached, international law requires neutrality by third party states. The other line of cases simply requires neutrality on the part of third parties throughout the course of civil strife. There is a bias favoring incumbent governments in the former line of authority. One of the reasons for this bias is that incumbent governments perform certain invaluable services for the international community. Such an approach places value in a modicum of order provided by the incumbent government that allows for the provision of services and minimal amenities for citizens and non citizens. For a decentralized and horizontal system of law such as international law, the municipal government provides an essential role. Unlike a mature municipal system of law, with a vertical hierarchy of lawmakers, judges and police, the international system depends upon sovereign, independent incumbent governments to assure even minimal order. Do Protocols I & II change this?

But in periods of radical transformation and disintegration of old systems, this conceptually clean analysis becomes messy. When incumbent governments collapse, choosing an "incumbent" from among the various contenders may be impossible. And even if an incumbent can be identified, conditions can become so chaotic that the services normally performed by the incumbent government to earn the bias in its favor by the international community cannot be accomplished. In this situation, there is little reason to favor an incumbent.

Exceptions to the non-intervention principle exist, although colonial abuses have tarnished, if not destroyed the integrity of such exceptions. It is contended that third parties may intervene for humanitarian reasons, for example, when an incumbent government abuses its own citizens or the citizens of other states. The legality of humanitarian intervention is hotly debated and we will present the various arguments for your consideration. Protocols I and II to the 1949 Geneva Convention provide means to control internal warfare and international warfare in circumstances not covered by the Geneva Convention proper.

The neutrality principle also embodies the recognition that violence, including violent intervention in civil strife in another state, is rarely as successful, as determinative or as easily contained and terminated as it may have seemed initially. The world community has struggled with this issue in modern history for nearly a century—from the Hague Peace Conferences of 1899 and 1907, through the League of Nations, to the activities of the United Nations today. The United Nations has taken action in Suez, the Congo, Korea, Cyprus, in the Greek Civil War, in the war between India and Pakistan, in the creation of the State of Israel, and, most recently in Cambodia, the Persian Gulf War, Somalia, Rwanda, the territory of the former Yugoslavia, and Haiti.

The ending of the Cold War offers the first chance since the inception of the United Nations for a system of international dispute resolution truly to work. If the international system is to move beyond the present level of almost total reliance upon nation states either to keep the peace or to break it, as they wish, then international institutions of law must be strengthened. The accomplishments of this century provide a foundation for peace. The machinery of the Hague Conventions of 1899 and 1906 was used in the successful resolution of maritime disputes. The League of Nations and later United Nations fact-finding groups and other institutions for peaceful resolution of disputes enjoyed considerable success in resolving conflicts, including border disputes, disputes among racial, ethnic, and national groups recently freed from imperial governmental joinder and disputes involving the protection of human rights of ethnic and religious minorities in newly created states following the disintegration of imperial and colonial systems after World War I. These newly created states following through 1930 successfully redrew the map of Europe and quite possibly arrested war among rival ethnic and religious groups, particularly in the Balkans. These successes, presented in Section A of this chapter, unfortunately and unfairly, have been eclipsed in our minds by the spectacular failure of the League and the major states of the world, in or out of the League, to deal with the aggressor states of the 1930s: Japan in Manchuria; Germany; Italy and Portugal in the Spanish Civil War; and later in those directs acts of aggression in Poland and Czechoslovakia that led to World War II. This section moves from Chapter VI actions to Chapter VII actions, presenting the law relating to the use of force by the United Nations.

b. Early Historical Development and Legal Authority

International Organizations:

The League of Nations. The Covenant of the League did not outlaw war as such. Instead, it sought to obligate states to resort to methods of peaceful settlement; in turn, members of the League agreed under certain circumstances not to resort to war. See in particular the following articles of the Covenant: *Article 12* ("* * * they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council."); *Article 13* ("The Members of the League agree that they will carry out in full good faith any award

that may be rendered, and that they will not resort to war against a Member of the League which complies therewith."); *Article 15* ("If a report by the Council is unanimously agreed to by the Members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies . . .")

These qualified commitments against waging war should be contrasted to the language of the Peace Pact of Paris and *Article 2(4)* of the United Nations Charter. Also to be contrasted with *Article 2(4)* of the Charter is *Article 10* of the Covenant, in which members of the League undertook to "respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League." The mechanisms for enforcing the ambiguous and qualified obligations not to wage war were contained in *Article 10* of the Covenant (" * * * the Council shall advise upon the means by which this obligation shall be fulfilled") and in *Article 16* (the provisions for collective measures by the members of the League in the event a member of the League should "resort to war in disregard of its Covenants under Article 12, 13 or 15").

The United States did not become a member of the League of Nations. The Covenant of the League was an integral part of the Treaty of Versailles. When it was submitted to the Senate for its advice and consent, Senator Henry Cabot Lodge led the Senate to the adoption of a number of reservations, notably one to Article 10, to the effect that the United States would not assume an obligation to preserve the territorial integrity or political independence of any country unless "in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide." Stone (ed.), Wilson and the League of Nations 98 (1967). President Wilson refused to accept the Lodge reservations. As a result, the treaty (with the Covenant) was rejected by the Senate.

As for the effect of the Covenant on the unilateral use of force by states and the efforts of the League to restrain that force, it can only be stated that the results were dismal.

MORGENTHAU, POLITICS AMONG NATIONS 290

(4th ed., 1967).*

* * * Collective measures of enforcement under Article 16 were applied in only one of the five cases in which undoubtedly a member of the League resorted to war in violation of the Covenant. With regard to the Sino-Japanese conflict that started in 1931, the Assembly of the League found unanimously that "without any declaration of war, part of the Chinese territory has been forcibly seized and occupied by the Japanese troops," and that far-flung hostilities, initiated by Japan, had

taken place between troops of the Chinese and Japanese governments. Yet the Assembly found also that Japan had not resorted to war in violation of the Covenant and that, therefore, Article 16 did not apply.

During the Chaco War of 1932–35, when Paraguay continued hostilities against Bolivia in violation of the Covenant, many members of the League limited the arms embargo, originally imposed upon both belligerents, to Paraguay. This was a discriminatory measure falling far short of the spirit and the letter of the first paragraph of Article 16. When Japan, which by then had resigned from the League, invaded China in 1937, the Assembly found that Japan had violated the Nine Power Treaty of 1922 and the Briand-Kellogg Pact, that Article 16 was applicable, and that the members of the League had the right to take enforcement measures individually under that provision. No such measures were ever taken. When the USSR went to war with Finland in 1939, it was expelled from the League by virtue of Article 16, paragraph 4, but no collective action of enforcement was taken against it.

In contrast to these cases, the Assembly found in 1935 that the invasion of Ethiopia by Italy constituted resort to war within the meaning and in violation of the Covenant and that, therefore, Article 16, paragraph 1, was to apply. In consequence, collective economic sanctions against Italy were decided upon and applied. Yet the two measures, provided for by Article 16, paragraph 1, that offered the best chance of making international law prevail under the circumstances and that in all probability would have compelled Italy to desist from its attack upon Ethiopia—namely, an embargo on oil shipments to Italy and the closure of the Suez Canal—were not taken. "However," as Sir H. Lauterpacht puts it, "although the sanctions of Article 16, paragraph 1, were formally put into operation and although an elaborate machinery was set up with a view to their successive and gradual enforcement, the nature of the action taken was such as to suggest that the repressive measures were being adopted as a manifestation of moral reprobation rather than as an effective means of coercion."

[To sum up]: the attempts at establishing a centralized system of law enforcement under Article 16 of the Covenant by saying that in most cases that would have justified the application of sanctions, sanctions were not applied at all. In the sole case in which they were applied, they were applied in such an ineffective fashion as virtually to assure both their failure and the success of the recalcitrant state.

It should also be noted that the League system had a measure of success in the 1925 crisis between Greece and Bulgaria, noted supra, and failures in Japanese invasion of Manchuria, the Spanish Civil War, and the German Reich's invasions of the Rhineland (1936), Austria (1938), Czechoslovakia (1939), and Poland (1939).

COVENANT OF THE LEAGUE OF NATIONS, JUNE 28, 1919

1 Hudson International Legislation 1 (1931).

* * *

ARTICLE XVI

Should any Member of the League resort to war in disregard of its covenants under Article 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members which are co-operating to protect the covenants of the League.

* * *

Questions: How does Article 16 of the League Covenant compare with the enforcement mechanisms in the U.N. Charter? As you read the material in this section (focusing on a series of crises, which eventuated in the use of force), ask yourself whether the result in each situation would have been different under the League Covenant or the U.N. Charter. Is "balance of power" the immutable "iron law of politics," which still [if it ever actually did] fits our "anarchic world of incorrigible power seekers," as the realists maintain? Are there viable alternative views?

TRAVAUX—PREPARATOIRES FOR THE PEACE PACT OF PARIS (THE KELLOGG-BRIAND PACT)

[1928] 1 Foreign Relations of the United States 32 (1942).

French Draft of Treaty for the Condemnation and Renunciation of War as an Instrument of National Policy

The President of the German Empire, the President of the United States of America, the President of the French Republic, His Majesty the King of England, Ireland and the British Dominions, Emperor of India, His Majesty the King of Italy, His Majesty the Emperor of Japan:

Equally desirous not only of perpetuating the happy relations of peace and friendship now existing among their peoples, but also of avoiding the danger of war between all other nations in the world.

Having agreed to consecrate in a solemn act their most formal and most definite resolution to condemn war as an instrument of national policy and to renounce it in favor of a peaceful settlement of international conflicts, expressing, finally, the hope that all the other nations of the world will be willing to join in this humane effort to bring about the association of the civilized peoples in a common renunciation of war as an instrument of national policy, have decided to conclude a treaty and to that end have designated as their respective plenipotentiaries:

* * *

The President of the German Empire:

The President of the United States of America:

The President of the French Republic:

His Majesty the King of Great Britain, Ireland and the British Dominions, Emperor of India:

His Majesty the King of Italy:

His Majesty the Emperor of Japan:

who, after exchanging their full powers found to be in good and due form have agreed on the following provisions:

Article One

The High Contracting Parties without any intention to infringe upon the exercise of their rights of legitimate self-defense within the framework of existing treaties, particularly when the violation of certain of the provisions of such treaties constitutes a hostile act, solemnly declare that they condemn recourse to war and renounce it as an instrument of national policy; that is to say, as an instrument of individual, spontaneous and independent political action taken on their own initiative and not action in respect of which they might become involved through the obligation of a treaty such as the covenant of the League of Nations or any other treaty registered with the League of Nations. They undertake on these conditions not to attack or invade one another.

Article Two

The settlement or solution of all disputes or conflicts of whatever nature or origin which might arise among the High Contracting Parties or between any two of them shall never be sought on either side except by pacific methods.

Article Three

In case one of the High Contracting Parties should contravene this treaty, the other Contracting Powers would ipso facto be released with respect to that Party from their obligations under this treaty.

Article Four

The provisions of this treaty in no wise affect the rights and obligations of the Contracting Parties resulting from prior international agreements to which they are parties.

Article Five

The present treaty will be offered for the accession of all Powers and will have no binding force until it has been generally accepted unless the signatory Powers in accord with those that may accede hereto shall agree to decide that it shall come into effect regardless of certain abstentions.

* * *

[Reply by Kellogg], Washington, April 23, 1928.

* * * In its present form the French draft treaty is wholly unacceptable to the United States since it cannot in any respect be regarded as an effective instrument for the promotion of world peace. It emphasizes war, not peace, and seems in effect to be a justification rather than a renunciation of the use of armed force. The United States will sign no treaty of the nature now under discussion which cannot reasonably be expected to lessen the danger of an outbreak of war and thus promote the cause of world peace.

* * *

There seem to be six major considerations which the French Government has emphasized in its correspondence and in its draft treaty, namely, that the treaty must not (1) impair the right of legitimate self-defense; (2) violate the Covenant of the League of Nations; (3) violate the treaties of Locarno; (4) violate certain unspecified treaties guaranteeing neutrality; (5) bind the parties in respect of a state breaking the treaty; (6) come into effect until accepted by all or substantially all of the Powers of the world. The views of the United States on these points are as follows: (1) Self-defense. There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.

* * *

KELLOGG

GENERAL TREATY FOR RENUNCIATION OF WAR AS AN INSTRUMENT OF NATIONAL POLICY OF AUGUST 27, 1928

46 Stat. 2343, 94 L.N.T.S. 59 (1929).

Article I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

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1. ***Parties during World War II and Current Status.*** The Pact of Paris, TS 796; 2 Bevans 732; 94 LNTS 57, signed at Paris, August 27, 1928, entered into force for the United States on July 24, 1929. It is still in effect and, in 1993, has 66 adherents. Treaties in Force lists the parties and includes a disclaimer that the Department has not passed upon the effect of war on any of the treaties in the compilation.

2. ***Why was the Pact of Paris a futile bar to war?*** Even before the outbreak of World War II, armed conflict had been carried on by Japan in China, by Germany, Italy and the USSR in Spain, and by Italy in Ethiopia. Was it ever vindicated?

3. ***Was the Pact of Paris vindicated in any way in World War II?*** How was it to be enforced? Did it have an "enforcement clause"? Would it have been appropriate to include one? Was it vindicated at Nuremberg? For war crimes trials and related material, see Chapter 11.

BROWN, UNDECLARED WARS

33 American Journal of International Law 538, 540 (1939).*

* * *

We see, therefore, in the light of theory and practice, that the problem of the undeclared war remains largely an academic one which involves considerations more ethical than legal. And this is true also of the self-denying declaration embodied in the General Treaty of 1928 for the Renunciation of War, generally entitled the Kellogg Pact. This agreement, while purporting to renounce the use of war, really consecrated the vague and dangerous right of self-defence. The various signatories explicitly reserved the right to resort to war and to judge for

* Reprinted with the permission of the American Society of International Law.

themselves "whether circumstances require recourse to war in self-defence." Within four years of the signing of this Pact occurred three breaches of the Pact, namely, the aggression by Russia against China in 1929, the occupation of Manchuria by Japan in 1931, and the invasion of Colombia by Peru in 1932. The more recent instances of warlike acts by Japan, Germany, and Italy are too vividly in mind to require comment. It is necessary, however, to stress the lamentable and unforeseen consequence of the Kellogg Pact in encouraging aggressor nations hypocritically to avoid any formal declaration of war in order to elude the constraints of this pious declaration.

Still another most unexpected inducement to avoid a formal declaration of war, as revealed in the case of the conflict now going on between Japan and China, has been the natural desire to escape the disabilities of recent neutrality legislation of the United States, whereby the shipment of arms and munitions of war to belligerents is automatically forbidden. The question presents itself whether, in the absence of a formal declaration of war by either side, it should not be incumbent on neutral nations to brush all legal niceties aside and openly acknowledge a state of war where the laws of war and neutrality should apply. Nations intent on peace and determined to uphold the reign of law have a solemn duty to avoid any implied connivance in the evasion of international obligations. Neutrality is not merely to conserve national interests, but also to preserve an impartial rôle which may enable a nation to affirm with vigor the responsibilities and rights of peoples under international law.

The situation is certainly a most unhappy one. It is stultifying to discover that an idealistic agreement such as the Kellogg Pact, and neutrality legislation conceived for a generous purpose, should actually conduce to the fiction of the undeclared war. * * *

Questions: What are the reasons behind a requirement that war be declared? Did it serve as a caution to a nation of the awesome act contemplated? Did the Nuremberg Charter, Trials and Judgments have any effect on the Law relating to the Use of Force among states or the role of international alliances or organizations in relation to illegal use of force by states? Were these occurrences more important than the old rule requiring declaration of war? Less? The same? The Nuremberg Trials are discussed in Chapter 11, *on Individual Responsibility*, supra, and the role of the above-mentioned items considered in Chapter 17, Use of Force by States, infra.

CHARTER OF THE UNITED NATIONS

Turn to your Documentary Supplement and analyze articles 2(1) & (4), 7, 25, 39, 41, 42, 43, and 51.

JOST DELBRÜCK, A FRESH LOOK AT HUMANITARIAN INTERVENTION UNDER THE AUTHORITY OF THE UNITED NATIONS

67 Ind.L.J. 887, 889–91 (1992) (footnotes omitted) *

I. The Principle of Nonintervention Under General International Law and Under the UN Charter in Cases of Grave Human Rights Violations

* * *

The principle of nonintervention is deeply enshrined in general international law. It has its legal basis and legal policy foundations in the principles of the sovereignty and equality of states, the constitutive elements of the international legal order. Recognition of sovereignty—the independence and freedom of states from any external dominance in the determination of their domestic and foreign policies and the equality of states under law—excludes, in principle, the permissibility of interventions by third parties.

The scope, however, of the prohibition against intervention in the internal or domestic affairs of states is still controversial. On the one hand, there are those who support a broad construction of the concept of nonintervention that is based on a corresponding expansive interpretation of the concept of sovereignty. If sovereignty not only is to denote the legal independence and self-determination of states, but also is supposed to have a substantive meaning in the real world of international relations, it is argued, it must be protected from violations as a matter of law. Hence, a principle of nonintervention commensurate in scope to that of the principle of sovereignty must be recognized under international law. * * * [Some] advocate a restrictive interpretation of the principle of nonintervention. They argue that a broadly construed concept of sovereignty and a corresponding broad interpretation of the principle of nonintervention no longer meet the demands of the growing internationalization of states' responsibilities for the maintenance of international peace and security as well as for the protection of human rights. If such growing international responsibilities are recognized as a matter of law, sovereignty must be viewed as legally more limited than in the past. This, in turn, must result in a restrictive interpretation of the scope of the principle of nonintervention, leaving room for international interventions in the domestic affairs of states—if not generally, then at least under certain well-defined circumstances.

Qualifying the permissibility of international interventions in this way, however, indicates that within this second school of thought there is * * * no consensus as to the criteria or the circumstances allowing for interventions. Nor is there general agreement as to what kind of actions taken in the course of interventions could be considered legal; that is, whether such interventions could be carried out by the use of (military) force or whether they must be restricted to measures short of the use of force. According to widespread opinion, the general prohibi-

tion against the use of force under international law does not allow for unilateral forcible interventions by individual states even for the purpose of rescuing citizens of third states, or their own, from threats to their lives and physical safety. That is to say, so-called humanitarian interventions, once accepted as legal, are widely viewed as illegal today. Countermeasures even against grave and massive human rights violations are, for good reason, considered to be restricted to economic and diplomatic sanctions below the threshold of the use of force: Allowing military enforcement measures based on the "isolated" decisions of individual states would lead to an erosion of the general prohibition against the use of force and against "dictatorial interference[s]." Since the assessment of the factual situation, the determination of the appropriate means to be applied, and the execution of the intervention would all be administered by the intervening state, the door to purely arbitrary intervention, that is, acts of aggression in disguise, would be wide open.

In a world community heeding diverse values and pursuing different, often antagonistic, interests, it is easy to conceive of states invoking all kinds of justae causae as a justification for intervention. This objection to a more liberal regime governing the law of intervention need not necessarily hold true if interventions in the internal affairs of a state that commits grave human rights violations are decided on the basis of an orderly and lawful procedure and are executed by an international organization such as the UN as the representative of the international community of states. The question is, therefore, what the authority of the UN is in this regard. * * *

What do you think of Delbrück's proposition?

LETTER FROM EDWARD R. STETTINIUS, SECRETARY OF STATE OF THE UNITED STATES, TO PRESIDENT HARRY TRUMAN

13 United States Department of State Bulletin 77, 80 (1945).

Summary of Report on Results of San Francisco Conference

* * *

It will be the duty of the Security Council, supported by the pledged participation, and backed by military contingents to be made available by the member states, to use its great prestige to bring about by peaceful means the adjustment or the settlement of international disputes. Should these means fail, it is its duty, as it has the power, to take whatever measures are necessary, including measures of force, to suppress acts of aggression or other breaches of the peace. It will be the duty of the Security Council, in other words, to make good the commitment of the United Nations to maintain international peace and security, turning that lofty purpose into practice. To that end the Council will

be given the use and the support of diplomatic, economic and military tools and weapons in the control of the United Nations.

* * *

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1. ***The Grand Design.*** The Charter of the United Nations forbade the use of force by states (Article 2(4)), save in the limited area of self-defense (Article 51). A near monopoly of force was reposed in the Security Council, under Chapter VII, in which the Council was empowered to respond to the dramatic conditions of Article 39 ("any threat to the peace, breach of the peace, or act of aggression") by resort to the powerful measures of Articles 41 and 42, including armed forces at its disposal under the terms of Article 43, especially "immediately available national air-force contingents" (Article 45). It was a vision of many in 1945 that the military forces of the United Nations Security Council would restrain any nation that disturbed the peace following World War II.

The language of Charter article 2(4) comprehensively prohibits the use of force, replacing and surpassing the Kellogg–Briand Pact, which prohibited the use of war as a political tool. The language, however, has traditionally been read more narrowly, to prohibit the use or threat to use force only to the international arena. Thus, in Article 39, read in pari materia, the terms "breach of the peace," "aggression," and "threat to the peace" were interpreted to have only international application and implication. As you read the following material, ask whether the situations created by apartheid in South Africa and the racism in Southern Rhodesia were treated by the Security Council consistently with this traditional view? *See,* Oscar Schachter, International Law in Theory & Practice 110 (1991). Are these terms of articles 2(4) and 39, still used the same way today? Has there been a change since the end of the Cold War? Also, consider this issue when reading the material in this chapter on the Gulf War, Somalia, and the former Yugoslavia. Can the U.N. intervene militarily without a finding that there is a threat to international peace and security? Does the Secretary-General have authority to call for military action of any kind? Can the Ad Hoc Tribunal for the former Yugoslavia call for the Security Council to sanction a nation that does not deliver a fugitive for Prosecution? Its rules call for this. See ch. 11, *supra.*

The international legal system is decentralized; the primary international law enforcement vehicle remains the state. The notion of statehood includes the characteristic of autonomy, which includes integrity of territory and freedom from intervention or coercion. It also includes notions of reciprocity, legal equality, and general adherence to international law by sister states. Failure to respect these values and interests may allow retorsion, reprisal, and self-defense. Traditionally, the state had a right under international law to use force, even to go to war, for purposes of law enforcement (liberum ius ad bellum). Does this right still exist, or has international law eliminated it and replaced it

with the U.N. Security Council's authority in Chapter VII of the Charter and the residual right of individual and collective self-defense under article 51? This state-based use of force is considered in Chapter 17, *infra,* but it is important to remember that states are the engine even for United Nations efforts to "keep the peace" or to "make peace" by use of force. Keep these issues in mind as you read the following material and note the interrelationship of the "system" envisaged under the U.N. Charter and the role of individual states or other international organizations such as NATO.

2. ***What went wrong?*** The Charter was grounded in a belief and a hope: the belief that only with the cooperation of the great powers could the United Nations succeed, and the hope that because they had cooperated in war they would continue to do so during the peace (hence, the veto). That cooperation was not forthcoming. An immediate effect of the fragmentation of great power policy was the failure of the powers to make the agreements called for in Article 43; the council thus did not have at its disposal the forces projected at the United Nation's founding. See Sohn, Basic Documents of the United Nations 89 (2nd ed. rev'd, 1968), especially Note at 98, detailing U.S.–Soviet disagreements over size and the relationships of the various force contributions to be made by the permanent members of the force.

A further factor of significance in the appraisal of the Charter provisions for dealing with threats to the peace is the fact that world tensions have taken new shapes since the days of World War II. The disintegration of old empires and the rise of the self-consciousness of formerly subject peoples have brought new demands on U.N. organs.

3. ***Scope of § B of this chapter.*** Section B is concerned with several principal themes that have become significant because of the foregoing political factors: first, the ways in which the United Nations has accommodated to the fact that the Security Council's monopoly of force has not worked as it was designed; and second, the development of the power of the United Nations to use its authority to assist the drive of subject peoples toward self-determination. After the Gulf–War, the events in Somalia and the former Yugoslavia, do you think that the Secretary–General's vision of having U.N. military forces ready to prevent or stop breaches of the peace is realistic? What are the alternatives? Has the Security Council begun to exercise its power? Is a more broadly constituted NATO an alternative, after the Cold War? How does the Ad Hoc Tribunal for the former Yugoslavia fit into this discussion?

2. COLLECTIVE MEASURES IN THE USE OF FORCE

a. Korea

(1) ***Background.*** Korea was one of the pre-World War II states that found itself divided at the end of the war. As recounted above, the United Nations was unsuccessful in its effort to unite the country and its divisions hardened into a Republic of Korea in the south (whose government was established by elections supervised by the United Nations) and

a People's Republic in the north claiming jurisdiction over all of Korea. The North Korean invasion of the south precipitated a United Nations response. For discussion of attempts at Peaceful Resolution, *see* Section A of this Chapter. The resolutions adopted by the Council immediately following the North Korean attack on June 25, 1950, provided the authority for collective military action. They would doubtless have been vetoed by the USSR, but the Soviets were absent from the Council, having voluntarily left their seat vacant in protest over the Council's refusal to seat the Chinese communists instead of the Chinese nationalists. First, in an emergency meeting of the Council, S.C. Resolution 82 was adopted on June 25th, expressing grave concern over the "armed attack on the Republic of Korea by forces from North Korea" and "determin[ed] that this action constitutes a breach of the peace * * *." It also called for "the immediate cessation of hostilities * * *" and for the "authorities in North Korea to withdraw forthwith their armed forces to the 38th parallel." Resolution 82 also requested the previously created Commission on Korea: "to communicate its fully considered recommendations on the situation with the least possible delay," "to observe the withdrawal of North Korean forces to the 38th parallel," and "to keep the Security Council informed on the execution of this resolution." Finally, it called upon member states to "render every assistance to the U.N. in the execution of the Resolution and to refrain from giving assistance to the North Korean Authorities."

On June 27th, the Security Council met again and issued Resolution 83, which reiterated that it had determined that the "armed attack upon the Republic of Korea by the forces from North Korea constitutes a breach of the peace" and called "for an immediate cessation of hostilities" and for "the authorities in North Korea to withdraw forthwith" to the 38th parallel. It noted that the North Korean forces had not withdrawn and that "*urgent military measures are required to restore international peace and security*" and recommended "*that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.*"

On July 7th, 1950, the Security Council welcomed the prompt and vigorous support it had received. It recommended that all members providing military forces and other assistance, "*make such forces and other assistance available to a unified command under the United States of America,*" requested that the United States "designate the commander of such forces," authorized the use of the U.N. flag along with the various flags of the participating states, and requested the United States to provide the Security Council with periodic reports. Consider the S.C. Resolutions, which are in the Documentary Supplement.

Notes/Questions:

1. ***How was this similar or different from the situation in Bosnia–Herzegovina? What was the legal basis for the Security Council's action?*** Resolution 82 (1950) determined that the armed attack by North Korea constituted a "breach of the peace," using the language of Article 39 of the Charter, although neither Article 39 nor

from Croatia. On the same date, *Resolution 780* called for international relief institutions to investigate and to compile statistics on the widely reported "ethnic cleansing." Also in October 1992, military flights were prohibited over Bosnia & Herzegovina (*S.C.Res. 781 (1992)* [this was later extended in *S.C. Resolution 816, March 31, 1993*] and in November 1992, a naval blockade of the Danube River and the Adriatic Sea was imposed [*S.C.Res. 787 (1992)*].

In December 1992, the Security Council called for 700 peacekeeping troops (including U.S. forces) to be deployed to Macedonia as a preventive measure. Bell–Fialkoff, *A Brief History of Ethnic Cleansing,* 72 For.Aff. 110 (1993); William Pfaff, *Invitation to War,* 72 For.Aff. 97 (1993); Meron, *The Case for War Crimes Trials in Yugoslavia,* 72 For.Aff. 122 (1993).

Chapter 17

THE USE OF FORCE BY STATES

INTRODUCTION

1. ***What is the law today governing the use of force by states?*** This question will be explored in the context of a number of instances in which states have used force unilaterally or, even though collectively, outside the aegis of the United Nations. This raises another question: to what extent did the creation of the United Nations and promulgation of the U.N. Charter change the law relating to the use of force?

a. Law Designed to Discourage or Control the Use of Force Prior to the United Nations: Since the emergence of the nation-state

and the international law that developed around the system of states, notions of autonomy, territorial integrity, sovereignty, and equality have been paramount. The use of force to violate those state interests violated international law as well.

When we speak of actual armed conflict, we need to distinguish two notions: the law governing resort to armed conflict, *jus ad bellum,* and that governing the conduct of armed conflict, *jus in bello.* Also, since Hugo Grotius wrote his classic, *De Jure Belli Ac Pacis* (1646), international law has been divided into the law relating to peace and that relating to war. Keep these distinctions in mind as you read the material in this chapter. Antiquity saw its own control of the use of force, generally ordained by holy law and powerful leaders. Force and war were "legal" when and if consistent with the will of deity. The Code of Manu (Law of the ancient Hindus), Law 91, provided that a king who fights his foes in battle should not "strike one who has climbed on an eminence, or a eunuch, nor one who joins the palms of his hands (in supplication), nor one who (flees) with flying hair, nor one who sits down, nor one who says 'I am thine;" 92: "Nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight, nor one who is fighting with another (foe);" 93: "Nor one whose weapons are broken, nor one afflicted (with sorrow), nor one who has been grievously wounded, nor one who is in fear, nor one who has turned to flight; (but in all these cases let him) remember the duty (of honorable warriors) * * *." Sun Tzu said: "[T]reat your captives well, and care for them. *Chang Yü*: all the soldiers taken must be cared for with magnanimity and sincerity so that they may be used by us * * *. Generally in war the best policy is to take a state intact; to ruin it is inferior to this * * *." In 634 A.D., Calif Abu Bakr charged the Moslem Arab Army invading Christian Syria: "Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman * * *."

Pascal thought, "unable to strengthen justice they have justified might; so that the just and the strong should unite, and there should be peace, which is the sovereign good * * *." St. Augustine (354–430), who contributed to the creation of the Christian doctrine of "just war," argued that *"just war"* could be fought to avenge the injuries caused by an enemy who has refused to make amends, to punish those wrongs, and to restore the status quo. Thomas Acquinas argued that *just war* was appropriate when entered for a *just cause,* such as when the wrongdoer (enemy) was *subjectively guilty;* no objective manifestation of that guilt was necessary. When the nation-state arose, it was jealous of the religious authority making such decisions, so *just war* was linked to the *divine right* of kings and *sovereignty.* Wars between Christian nations were difficult to justify. The attempt at justification became the impetus for the development of the gradation of causes for using military force. *Just War* doctrine was *jus ad bellum* at its bottom, but it contained (and still contains) threads of *jus in bello.* For example, innocents were not to be subject to the violence of even a *just war.* In addition, proportionality formed a primary component of both *jus ad bellum* and *jus in bello.*

In the seventeenth and eighteenth centuries, Hugo Grotius and Emerich de Vattel attempted to secularize just war notions and to apply evidence of state practice. They actually merged religious and secular notions, distinguishing moral and legal principles (the first based on religion and the latter on nature). Grotius argued for a balancing approach by which the legality of the use of military force depended on self-defense, the defense of property and the protection of citizens. He argued against a rash use of war even for a just cause.

Professor Shaw argued that the Peace of Westphalia killed the *just war* in international law. [*See*, Shaw, International Law 539–541 (1986)]. Is Shaw's claim too strong? At most, does it apply to jus ad bellum? Just war includes, among other things, the distinction between combatant and non-combatant, care of wounded and sick prisoners, proportionality, necessity, and the requirement to attempt peaceful resolution.

Current law on the use of force is significantly more restrictive than that of the "classical period of international law," which lasted from antiquity through Vitoria, Suarez, Grotius, de Vattel, Jean Bodin and others up to World War I and the Kellogg–Briand Pact. Prior to that, war was the prerogative of the sovereign, then the right of the state. It was a legal means to promote the state's vital interests. The late nineteenth and early twentieth centuries saw an attempt to define war, first to control its conduct, later to outlaw it. Chapter 11 (on individual responsibility) presents the Hague Convention and associated regulations, which attempted to provide the (*jus in bello*) rules of warfare.

The first timorous step toward outlawing war was in the Hague Convention II (1907), which provided in article I that, "[t]he contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking, however, was not applicable when the debtor State refused or neglected to reply to an offer of arbitration, or, after accepting the offer, prevented any *compromis* from being agreed on, or, after the arbitration, failed to submit to the award * * *." The League of Nations gave impetus to the attempt to outlaw war. The League was aimed at "promot[ing] international co-operation and to achiev[ing] international peace and security." Indeed, the League Covenant provided that the "resort to war in disregard of [a Member's] covenants * * * [shall cause it] *ipso facto* [to] be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations * * *." Bowett notes that the League's approach to achieving this was based on disarmament (art. 8), a collective guarantee of each member's independence (art. 10), pacific settlement of disputes and the outlawry of war (arts. 11–15), and sanctions for violation of these

principles (arts. 16 & 17). Bowett, The Law of International Institutions 17–18 (4th ed. 1982). *See,* Chapter 16, *supra,* on *Peaceful Resolution of Disputes and the Use of Force in the International System.* Finally, the Pact of Paris (Kellogg–Briand Pact) (July 24, 1929) in articles I and II, renounced war "as an instrument of national policy in [the Parties] relations with one another * * * [and that] the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

b. The Law Today: Today, the law of the U.N. Charter along with earlier treaties such as the *Kellogg–Briand Pact* and customary rules live on. Since the end of World War II and the advent of the United Nations, reprisals have been rigorously limited to non-military countermeasures, and the former right of a sovereign state to use military force as a law enforcement measure has been abrogated. Most authorities consider the use of force now to be legal only pursuant to self-defense under article 51, or as a measure of collective security under Chapter VII of the Charter. ***Two issues are central to the search for an answer to the question of what the law is today:*** (1) did the failure of the Security Council of the United Nations to use its theoretical near monopoly of force (during the Cold War after the Korean Conflict) affect not merely the practice of states but also the substance of the law governing the use of force by states? (2) Has the resurgence of the Security Council had an impact on the lawful use of force by states? Chapter 16 presents the law and history of the use of force by the United Nations and provides background for the development of these questions in this chapter.

c. Limited Bibliography: Christopher L. Blakesley, Terrorism, Drugs, International Law and the Protection of Human Liberty (1992); Wormuth & Firmage, To Chain the Dog of War (2d ed. 1989); Henkin, How Nations Behave (2d ed. 1979); Schachter, International Law in Theory and Practice (1991); Dinstein, War, Aggression and Self–Defense (1988); L.C. Green, Essays on the Modern Law of War (1985); 'Gardam, Proportionality and Force in International Law, 87 A.J.I.L. 391 (1993); Grew, History of the Law of Nations: World War I to World War II, in 7 Encyclopedia of Public International Law 252 (Rudolf Bernhardt ed. 1984); Henkin, et al. Right v. Might: International Law and the Use of Force (1991); Shaw, International Law 539–541 (1986); M. Khadduri, War and Peace in the Law of Islam (1955); Sun Tzu, The Art of War 75–77 (S. Griffith trans. 1963); The Laws of Manu (*Translated* by G. Butler, with extracts from seven commentaries, Sacred Books of the East Series, Delhi 1962). Wilson, International Law and the Use of Force by National Liberation Movements (1988); Law and Force in the New International Order (Damrosch & Scheffer, eds. 1991); Cassese, Violence and Law in the Modern Age (Greenleaves trans. 1988).

Debate. *Boyle*: In the modern world of international relations, the only legitimate justifications and procedures for the perpetration of violence and coercion by one state against another are those set forth in the U.N. Charter. The Charter alone contains those rules which have been consented to by the virtual unanimity of the international community that has voluntarily joined the United Nations. These include and are limited to the right of individual and collective self-defense in the event of an "armed attack" as prescribed by article 51; chapter 7 "enforcement action" by the U.N. Security Council; chapter 8 "enforcement action" by the appropriate regional organizations acting with the authorization of the Security Council, as required by article 53; and the so-called "peacekeeping operations" organized under the jurisdiction of the Security Council pursuant to chapter 6, or under the auspices of the General Assembly in accordance with the Uniting for Peace Resolution (1950), or by the relevant regional organizations acting in conformity with their proper constitutional procedures and subject to the overall supervision of the Security Council, as specified in chapter 8 and articles 24 and 25. *"Remarks on Problems of the Law of Armed Conflict in Lebanon,"* Proceedings of the 77th Annual Meeting, AJIL 223 (1983).

Reisman: There is no need to recite yet again the desuetude of the collective security arrangements envisioned in the Charter. Intractable conflicts between contending public order systems with planetary aspirations paralyzed the Security Council. The UN Charter's mechanisms often proved ineffective. * * *

* * *

A sine qua non for any action—coercive or otherwise—I submit, is the maintenance of minimum order in a precarious international system. Will a particular use of force enhance or undermine world order? When this requirement is met, attention may be directed to the fundamental principle of political legitimacy in contemporary international politics: the enhancement of the ongoing right of peoples to determine their own political destinies. That obvious point bears renewed emphasis for it is the main purpose of contemporary international law: Article 2(4) is the means. The basic policy of contemporary international law has been to maintain the political independence of territorial communities so that they can continue to express their desire for political community in a form appropriate to them.

Article 2(4), like so much in the Charter and in contemporary international politics, rests on and must be interpreted in terms of this key postulate of political legitimacy in the 20th century. * * * *"Coercion and Self-Determination: Construing Charter Article 2(4),"* 78 AJIL 642, 643 (1984).

Schacter: "The difficulty with Reisman's argument is not merely that it lacks support in the text of the Charter or in the interpretations that states have given Article 2(4) in the past decades. It would

introduce a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or to the goal of self-determination. The implications of this for interstate violence in a period of superpower confrontation and obscurantist rhetoric are ominous. That invasions may at times serve democratic values must be weighed against the dangerous consequences of legitimizing armed attacks against peaceful governments. * * * It is no answer to say that invasions should be allowed where there is no abuse and only for the higher good of self-determination. In the absence of an effective international mechanism to restrain force, individual governments would have wide latitude to decide on the 'reality' of democracy and self-determination in various countries. The test one side would favor would not be acceptable to others. Ideological confrontations would sooner or later become clashes of power. These considerations are so evident that we can be quite sure that governments will not adopt the suggested reinterpretation of Article 2(4) as law. Not even its espousal by a powerful state would make it law. In short, it is not, will not and should not be law. * * * *"The Legality of Pro-Democratic Invasion,"* 78 AJIL 645, 649 (1984).

2. ***Sources of the law governing the use of force by states.*** Discourse about the law governing the use of force has, until recently, almost exclusively referred to the United Nations Charter, in particular to Articles 2(4) and 51. In the case of *Nicaragua v. United States,*[a] the International Court of Justice decided that, in spite of the United States' reservation to the compulsory jurisdiction of the Court excluding in certain circumstances disputes arising under a multilateral treaty (i.e., the Charter), the Court could decide the claim of Nicaragua under customary international law governing the use of force:

> 176. As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.
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> 177. * * * [E]ven if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle: on the contrary, it considered it to be clear that certain other articles of the treaty in question "were * * * regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" (I.C.J. Reports 1969, p. 39, para. 63). More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.
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> 179. It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content. * * *

3. ***The principle of non-intervention as customary international law.*** The term "intervention" has factual, political and legal connotations. Common to all three meanings, in the context of international affairs, is the series of overriding or dominant influences of one state upon the will or capabilities of another state, particularly as to events and conditions in the latter. In the history of Latin American relations prior to the coming into being of the United Nations and the

a. The full name of the case is Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), [1986] I.C.J. Reports 14. The case is more fully set forth at 1323. As to the case before the International Court of Justice on jurisdiction, see Chapter 1, p. 53.

Organization of American States, the opposition by Latin America to the penchant of the United States to land the Marines to protect American lives and property, and for other purposes viewed as good by the United States, coalesced into a principle of non-intervention. While some writers of that period contended that this principle was one of general international law, others viewed it as a political principle without legal content that ought eventually to be stated as a rule of international law. Since the creation of the United Nations, legal discourse has, with increased frequency, engaged the term. Does it now have legal meaning; if so, what is its scope?

The Charter of the United Nations does not apply the term in describing the rights and duties of states with respect to the employment of physical force. As seen, Article 2(4) forbids the use of force directed "against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." The existence of an act of aggression (not intervention), if found by the Security Council, triggers certain permissible United Nations responses, but even aggression is not in terms forbidden to states. It is from Article 2(7) of the Charter of the United Nations that emanations have emerged forbidding intervention by states although, in its terms, that provision is directed toward the organization rather than its members: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state * * *." This provision is buttressed in the Charter by broadly stated principles: self-determination of peoples, Article 1(2); sovereign equality of states, Article 2(1).

In elucidation of this principle, the Assembly declared: "No State or group of States has the right to intervene directly or indirectly, for any reason whatever in the internal or external affairs of any other State." And further: "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State." In the Nicaragua case, the Court stated its recognition of this principle as a matter of international law and defined its content to some extent:

> 202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (I.C.J. Reports 1949, p. 35), and international law requires political integrity also to be respected. Expressions of an opinio juris regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended

> that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the opinio juris of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States. In the Corfu Channel case, when a State claimed a right of intervention in order to secure evidence in the territory of another State for submission to an international tribunal (I.C.J. Reports 1949, p. 34), the Court observed that:
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> > "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (I.C.J. Reports 1949, p. 35.)
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> 203. The principle has since been reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated, e.g., General Assembly resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law." However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United States representative.

205. Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions: first, what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law? As regards the first problem—that of the content of the principle of non-intervention—the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of

foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua's complaints against the United States, and those expressed by the United States in regard to Nicaragua's conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

[The Tribunal ultimately decided that the conduct of the United States constituted intervention and violated international law, including the customary rule against the use of force. It was not justified by any conduct by Nicaragua, and that the United States "should immediately cease and refrain from any action restricting, blocking, or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines." Article 51 was held not to justify U.S. conduct. Did the Tribunal hold that the United States violated article 2(4)? For more discussion of the *Nicaragua Case*, including its text, see p. 1323, *infra*.

SECTION A. THE USE OF FORCE UNDER THE UNITED STATES CONSTITUTION AND OTHER LAWS

A state operates within the strictures of both international law and its own domestic law, as we saw in Chapter 14 (the law of international agreements and the Constitution). You will recall that a *monist* will argue that these are one and the same and that international law controls. On the other hand, a *dualist* argues that they are two separate systems, each of which functions within its own domain, albeit with mutual impact. The drafters of the United States Constitution, not without vitriolic debate, developed a sophisticated system of powers both shared and separate. The brilliant mix was aimed at protecting against any one branch of government developing too much power. A major arena of focus of this admixture was that of foreign affairs and especially the use of force. The U.S. Constitution went beyond Montesquieu or any other European Separation of Powers luminary. It provided an intricate balancing, refined by the clear understanding that if any one branch gained a monopoly on the use of force (even that applied abroad),

that branch could endanger the Republic. The framers understood that what is allowed to be done abroad, especially by our agents, eventually affects the national community, as well. The Constitution grants to the Congress the decision for war or peace. The President, as Commander in Chief, may respond in self-defense to sudden attack. Scrutinize the following Constitutional provisions and the writings to see whether you agree.

Read the United States Constitution article I, sections 8 & 9; article II, sections 1, 2; Article III, sections 1, 2, 3; Article IV, section 4; and Article VI, found in Documentary Supplement.

4. ***The War Powers.***

WORMUTH & FIRMAGE, TO CHAIN THE DOG OF WAR

298–300 (2d ed. 1989) (footnotes omitted).*

[W]e are not told under what conditions a virtuous state might resort to force and war in order to preserve or extend itself. No doctrine of just war appears, though it is possible to argue that the Constitution's references to the law of nations incorporated some such notions. Rather, the framers realized that the reasons [for deciding] to go to war must be left for every generation to work through within the political branches of government. Whether we should go to war and under what conditions were political questions. But the way we go to war was not. The procedural means were carefully stipulated. If these procedural means were wisely chosen in the first place, and if modern technology does not render them anachronistic, then we ignore this, under the ideologically fueled heat of the moment, at our peril. At various times in our history, our self-righteous assurance of our own virtue and our own infallibility has led us to ignore these procedures in favor of a total commitment to our perceived ends, however self-destructive.

Precisely because of their fear of one person's fallibility, the framers of our Constitution separated the power to decide for war from the power to conduct it. The power to initiate war, except for sudden attack upon our country, was lodged exclusively in the Congress. The President was confined to conducting war once Congress had decided upon such a course.

The assumptions behind this separation of war power are as vital to us two hundred years later as they were when these ideas were penned in Philadelphia. The executive or monarchical inclination to make war impulsively, without deliberate debate among a sizeable and varied body of people, was thought by many to have contributed to decades of war that ravaged Europe. War came almost to be the natural condition, interrupted rarely by periods of peace.

The framers thought that by denying to the President the monarchical power of raising armies and deciding for war, and placing such powers in the Congress, the sensitivities of the people who had to fight such wars and pay for them would be reflected through their representa-

tives. In other words, the condition of peace, not war, would be considered to be normal. The biases and presumptions of law and government, the inertia factor, were placed on the side of peace. Those who advocate war have a burden of persuasion not easily borne. Only after open debate in a deliberative body, a process intentionally meant to prevent precipitous, cavalier action, will the state move from peace to war.

A number of factors have eroded these constitutional checks against war. Two world wars and a depression in this century have moved much power in government from the deliberative body—Congress—to the executive. Certain advantages of administration and dispatch are obvious. But the costs of executive abuse—Watergate, Iran and Nicaragua, and executive war in Korea and Vietnam—have been devastating. Apparently, government based upon an assumption of perpetual crisis fulfills its own presumption.

More than half of the United States population now living have not known peace in a very real sense. We have been subject to a Cold War since World War II ended. Previous generations have enjoyed peace at least between wars. Now almost every problem, domestic and foreign, is considered within a matrix of Cold War. Hatreds that in times past were intentionally set loose in time of war were mercifully confined within the period of war—1914–18, 1941–45. Now endemic fear is maintained through generations.

Administrations preach hatred and suspicion of foreign foes for domestic political advantage as much as for preparedness actually to be able to meet an enemy. A military-industrial complex has become a permanent part of an economic structure addicted to massive military spending. With governmental officers who all too often join the companies with whom they dealt with in government, these industries perpetuate themselves without regard for the national interest. In decades past a peacetime economy for a discrete time would change temporarily to build instruments of war and then quickly revert to the productivity of peace. Now our scientists and engineers are increasingly drawn into producing the technology of war while the infrastructure of our economy, from our factories to our transportation systems, erode and our spending for social needs is squeezed below the minimal requirements of social justice.

The war power of Congress is an institutional means of controlling the inclination to make war [precipitately,] presumptuously. For us today, this provision is a structural, horizontal check on war—while arms control measures and the laws of war hit at vertical, singular issues. Even in 1789, Thomas Jefferson noted insightfully: "We have already given * * * some effectual check to the dog of war by transferring the power of letting him loose, from the executive to the legislative body, from those who are to spend to those who are to pay." Congress exclusively possesses the constitutional power to initiate war, whether declared or undeclared, public or private, perfect or imperfect, de jure or de facto. The only exception is the power in the President to respond self-defensively to sudden attack upon the United States. Three points

also follow from constitutional text, our history, and pragmatic necessity. First, power over foreign relations was meant by the Framers to be jointly held by the Congress and the President. Today much congressional direction and control have been allowed to wither by congressional default and presidential usurpation.

Second, the existence of nuclear weapons and missile delivery systems reinforces this original understanding, not the reverse. The argument by presidents and presidential counselors that the President must have the power to wage nuclear war instantaneously because of nuclear missile delivery time of a few minutes simply does not hold when weighed against the cosmic implications of nuclear war. These implications favor more rather than less institutional restraint, collegial decision rather than the potential frailty and impetuosity of one human being who decides for or against the continuation of human society and, possibly, the human species.

Third, Congress possesses the power, through control over expenditure, appointment, the direction of foreign policy, the government of the armed forces, censure of the President and, if necessary, impeachment, to reassert its substantial power in foreign relations and its singular power to decide for peace or war. This position—that Congress possesses the sole power to decide for war or peace—is supported with absolute clarity of intent of the founding fathers. And our history, while checkered with congressional ratification of presidential acts and by presidential abuse and congressional malfeasance on occasion, clearly reveals the norm of congressional control and presidential dependence in the decision for war and peace. This was so through the Indian wars, the Whiskey Rebellion, the Barbary pirates, and the Civil War, and from our endemic preoccupation with intervention in the Caribbean to our border crossings into Mexico and Canada. Our pattern continued through two world wars until Korea and Vietnam.

James Madison noted that "the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." Even Alexander Hamilton, the advocate of presidential power in the Philadelphia Convention, nevertheless recognized that the President's power "would amount to nothing more than the supreme command and direction of the military forces," since the President lacked the British Crown's authority to declare war and raise armies. The power given Congress rests upon the constitutional text that Congress be empowered to "declare war and grant letters of marque and reprisal." This entails the power to decide for war declared or undeclared, whether fought with regular public forces or by privateers under governmental mandate. While letters of marque and reprisal originally covered specific acts, by the eighteenth century letters of marque and reprisal referred to sovereign use of private and sometimes public forces to injure another state. It was within this context that the constitutional framers vested Congress with the power to issue letters of marque and reprisal. Clearly, only Congress has the constitutional power to wage overt or covert war by private parties as well as by the armed forces * * *. *See also*, Firmage, Rogue Presidents and the War

Power of Congress, 11 Geo.Mason L.Rev. 79, 80–82 (1988); Firmage, Book Review Essay: The War Power, 59 G.W.L.Rev. 1684, 1690–91 (1991). Were/are there any limits on *how* the president conducts war? If so, what are they?

Franck and Weisband note that especially after World War II, up until the Vietnam War and Watergate, the President gained predominance in the foreign policy arena, especially where there was a risk of or actual war. This had been achieved, "by a zealous patriotic rallying behind the Presidential colors * * *" Franck & Weisband, FOREIGN POLICY BY CONGRESS 3 (1979).

H. KOH, THE NATIONAL SECURITY CONSTITUTION

117–18 (1990).*

[The reasons may] be grouped under three headings, which not coincidentally mirror general institutional characteristics of the executive, legislative, and judicial branches. First, and most obviously, the president has won because the executive branch has taken the initiative in foreign affairs and has often done so by construing laws designed to constrain his actions as authorizations. Second, the president has won because, for all of its institutional activity, Congress has usually complied with or acquiesced in what the president has done, through legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will. Third, the president has won because the federal courts have usually tolerated his acts, either by refusing to hear challenges to those acts or by hearing the challenges and then affirming presidential authority on the merits.

This simple, three-part combination of executive initiative, congressional acquiescence, and judicial tolerance explains why the president almost invariably wins in foreign affairs. Indeed, this three-part reasoning enters directly into the calculus of an executive branch lawyer asked to draft a legal opinion justifying a proposed foreign affairs initiative. If asked, for example, whether the president can impose economic sanctions on Libya or can bomb Colonel Qaddafi's headquarters, the president's lawyer must answer three questions: (1) Do we have the legal authority to act? (2) Can Congress stop us? and (3) Can anyone challenge our action in court? Or, to use the framework outlined above: (1) Do the Constitution and laws of the United States authorize the president to take this executive initiative? (2) If the executive branch takes the initiative, will Congress acquiesce? and (3) If Congress does not acquiesce and challenges the president's action (or if a private citizen sues), will the courts nevertheless tolerate the act, either by refusing to hear the challenge or by hearing it and ruling in the president's favor?

* * *

Negative reaction to the Vietnam War and to Watergate caused Congress ultimately to react, by way of the Joint War Powers Resolution.

Does the Resolution practically further its stated objective of reasserting congressional power to decide for war or peace? Consider the following:

WORMUTH AND FIRMAGE, TO CHAIN THE DOG OF WAR

12–16 (1989) (footnotes omitted).*

The President has become more than the executor of the laws; she or he is now the leader of a party and of the nation. There have been similar developments in other countries—de Riencourt has written of an evolution toward executive aggrandisement of power in *The Coming Caesars*. But our system of checks and balances has thus far proved to be an insuperable obstacle to the permanence of American Caesarism. Attempts have been made to revive the Stuart conception of an emergency power of the King, which John Locke recognized under the name of prerogative. In his dissenting opinion in the *Steel Seizure Case*, Chief Justice Fred Vinson spoke vaguely of "the leadership contemplated by the Framers" and claimed a limited emergency power for the President. "With or without statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act." In 1971 Secretary of State Rogers asserted that "in emergency situations, the President has the power and responsibility to use the armed forces to protect the nation's security." The only evidence he cites is the framers' agreement that under the Constitution the President might use the armed forces to repel a sudden attack on the United States, since such an attack would initiate a state of war without a congressional joint resolution.

Of course the existence of an emergency does not redistribute the powers of government allocated by the Constitution. In 1869, Justice Miller held that the action of the secretary of war (imputed to the President)—accepting without statutory authority bills of exchange in order to buy necessary supplies for the army—was illegal. Miller remarked, "We have no officers in this government from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." The two dissenting justices argued that the statute authorizing the secretary to make contracts implicitly authorized him to accept the bills. Miller also wrote the unanimous opinion in United States v. Lee, decided in 1882, an ejection action against two army officers in possession of the Lee estate in Virginia. Miller said:

> Shall it be said, in the face of all this, * * * that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority, because the president has ordered it and his officers are in possession? If such be the law, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

And in 1935, in Schechter Poultry Corp. v. U.S., Chief Justice Charles Evans Hughes said for eight justices (the ninth wrote a separate, concurring opinion), "Extraordinary conditions do not create or enlarge governmental power."

Of course it is true that a government of limited and divided powers does not grant an instant decision for every question that anyone, or even a large number of people, may believe requires instant decision. The price we pay for renouncing autocracy is the absence of autocracy.

Locke's prerogative, the "power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it," if it had endured, would have overthrown his whole system. Albert v. Dicey described the solution to problems of emergency that eventually emerged in English law: "There are times of tumult and invasion when for the sake of legality itself the rules must be broken. The course which the government must then take is clear. The ministry must break the law and trust for protection to an act of immunity."

American law followed the same course. [First] *Appollon,* [sic] decided unanimously in 1824 by the Supreme Court in an opinion by Justice Joseph Story. In 1820 Congress had levied a tonnage duty on French vessels. The *Appollon* was a French ship bound for Charleston, but on arrival off the port of Charleston the master learned that Congress had imposed the duty. He therefore sailed for Amelia Island, in Spanish territory, intending "to transship his cargo into the United States, and to receive from thence a cargo of cotton, without subjecting himself to the payment of the French tonnage duty." The collector of the port of St. Mary's caused the *Appollon* [sic] to be seized while in Spanish waters and brought to St. Mary's. The master of the vessel sued the collector for damages and recovered. Justice Story wrote:

> It cannot, however, escape observation, that this court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. * * * Whatever may be the rights of the government, upon principles of the law of nations, to redress wrongs of this nature, and whatever the power of Congress to pass suitable laws to cure any defects in the present system, our duty lies in a more narrow compass; and we must administer the laws as they exist, without straining them to reach public mischiefs which they were never designed to remedy. It may be fit and proper for the government, in the exercise of the high discretion confided to the Executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures which are not found in the text of laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the legislature will doubtless apply a proper indemnity. *Discuss this decision.*

The Prize Cases, decided in 1863, upheld the blockade of southern ports proclaimed by President Lincoln in 1861. Having held that the "sudden attack" of the seceding states instituted a state of war in which the President's action was constitutionally justified, Justice Grier said:

> If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every Act passed at the extraordinary session of the Legislature of 1861 * * *. And finally, in 1861 we find Congress "*ex majore cautela,*" and in anticipation of such astute objections, passing an Act "approving, legalizing and making valid all the acts, proclamations, and orders of the President, &c., as if they had been done under the previous express authority and direction of the Congress * * *."
>
> Without admitting that such an Act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*omnis ratihabitio et mandata equiparatur,*" this ratification has operated to perfectly cure the defect.

Limited retroactive acts of immunity were passed for the protection of Union soldiers during and after the Civil War and were upheld. In 1913 the Supreme Court upheld the governor general of the Philippines in a damage suit by an alien whom he had unlawfully ordered deported because the territorial legislature had subsequently passed an act saying that his action was "approved and ratified and confirmed, and in all respects declared legal, and not subject to question or review." Justice Oliver Wendell Holmes said for a unanimous Court that "it generally is recognized that in cases like the present, where the act originally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by the subsequent adoption of the act."

There is, then, a solution to the problem of emergency. If the President believes that the necessity is sufficiently great, he or she should act illegally and look to Congress for ratification of his actions. The President should not claim an emergency power to act against the law for the good of the nation, nor claim the exclusive right to determine what is good for the nation. In 1973 Congress administered a tardy rebuke for the actions of two Presidents in the War Powers Resolution, which reads in part:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territory or possessions, or its armed forces.

The War Clause of the Constitution reads, "The Congress shall have power * * *. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water * * *." The corresponding provision of the Articles of Confederation, under which the United States was governed from March 2, 1781, to 1789, said, "The United States in Congress assembled shall have the sole and exclusive power of determining on peace and war, except in the cases mentioned in the sixth article * * *." The sixth article authorized the states to

engage in war only if invaded or menaced with invasion by an Indian tribe. * * *

On May 29, 1787, Governor Randolph of Virginia presented to the Constitutional Convention a plan for a constitution * * * The seventh paragraph proposed "that a National Executive be instituted" and that the Executive "ought to enjoy the Executive rights vested in Congress by the Confederation." The Convention resolved itself into a committee of the whole to consider the Randolph plan. When the proposal to give the National Executive the executive powers possessed by the Continental Congress came before the Convention as a resolution on June 1, Charles Pinckney objected that "the Executive powers of [the existing] Congress might extend to peace & war which would render the Executive a Monarchy, of the worst kind, towit an elective one." James Wilson reassured him, "Making peace and war are generally determined by writers on the Laws of Nations to be legislative powers." James Madison conceded that the war power was legislative, but he nevertheless thought the resolution too broad. Rufus King noted: "Mad: agrees wth. Wilson in his definition of executive powers—executive powers ex vi termini, do not include the Rights of war & peace &c. but the powers should be confined and defined—if large we shall have the Evils of elective Monarchies * * *." Randolph did not defend his resolution but directed his advocacy to a plural executive. "A unity of the Executive he observed would savor too much of a monarchy." The resolution was not brought to a vote. Nevertheless the interchange seems to show a consensus that "determining on war"—which can only mean a decision to initiate war—was a legislative power.

Accordingly, the Committee of Detail distributed a printed draft constitution on August 6 providing, "The legislature of the United States shall have the power * * * To make war * * *." When this clause came up for debate on August 17, Pinckney opposed vesting the power in Congress; proceedings would be too slow. "The Senate would be the best depositary, being more acquainted with foreign affairs, and most capable of proper resolutions." Pierce Butler said that "he was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." This drew from Elbridge Gerry the rejoinder that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." Butler's motion received no second.

Butler was the only member of the Convention ever to suggest that the President should be given the power to initiate war. But Madison and Gerry were not quite satisfied with the proposal of the Committee of Detail that the legislature be given the power to make war. They moved to substitute *declare* for *make*, "leaving to the Executive the power to repel sudden attacks." The meaning of the motion was clear. The power to initiate war was left to Congress, with the reservation that the President need not await authorization from Congress to repel a sudden attack on the United States. The reservation on sudden attacks met with general approbation, but there was a difference of opinion as to whether the change of language effected the desired result. Roger Sherman of Connecticut opined: "The Executive shd. be able to repel

and not to commence war. 'Make' much better than 'declare' the latter narrowing the power [of the Legislature] too much." The records of the Convention noted that George Mason of Virginia "was agst giving the power of war to the Executive, because not [safely] to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but he was for facilitating peace. He preferred *'declare'* to *'make.'*" Madison's motion was carried by a vote of seven states to two. Then King observed that the verb *make* might be interpreted as authorizing Congress not only to initiate but also to conduct war, and Connecticut changed its vote, so that the verb *declare* was adopted by a vote of eight to one.

This is all the information we have on the debate. On the same day Congress was given the power to "make rules concerning captures on land and water," and on September 5, it was given the power to "grant letters of marque and reprisal." This completed the war clause.

The declaration of war in 1812 said, "That war be and the same is declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories * * *." The same form was followed in all subsequent declarations of general war.

Emerich de Vattel, the most influential writer on the law of nations * * * at the time of the adoption of the Constitution, called such a declaration a "declaration of war pure and simple." It was desirable because it gave notice to the adversary, to neutral nations, and to the subjects of the sovereign initiating the war. It ought properly to be preceded by a "conditional declaration of war"—an ultimatum demanding the satisfaction of grievances—which would first offer an alternative to war. But it was possible to enter into the state of war without making either a conditional declaration or a declaration pure and simple. The state under attack was automatically at war. And by omitting the declaration, the attacking state gained the advantage of surprise.

The Dutch jurist Bynkershoek, writing in 1737, said: "Writers on the law of nations have laid down various elements that are essential in a lawful war, and among these is the requirement that a war should be openly declared either by a special proclamation or by sending a herald; and this opinion accords with the practices of the modern nations of Europe." But compliance with this practice, he said, was "not demanded by any exigency of reason." "War may begin by a declaration, but it may also begin by mutual hostilities." In 1779, in the case of the *Maria Magdalena,* the British High Court of Admiralty held that the fact of hostilities made war.

> Where is the difference, whether a war is proclaimed by a Herald at the Royal Exchange, with his trumpets, and on the Pont Neuf at Paris, and by reading and affixing a printed paper on public buildings; or whether war is announced by royal ships, and whole fleets, at the mouths of cannon? * * * If learned authorities are to be quoted, Bynkershoek has a whole chapter to prove, from the history of Europe, that a lawful and perfect state of war may exist without proclamation.

It has always been possible at British and American law to enter into war without a formal proclamation or the services of a herald. In the [U.S.], however, war cannot lawfully be initiated by the military or its commander but only by Congress. Consequently, although a formal declaration is unnecessary, there must be some legislative act directing the cannons to speak. One of the most respected jurists of the early days of the nation, Chancellor James Kent of New York, said:

> But, though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact * * *. As war cannot lawfully be commenced on the part of the United States without an act of Congress, such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration.

Chancellor Kent was following established usage when he interpreted *declare* to mean *commence.* The verb *declare* had much earlier acquired this secondary meaning. It did not cease to describe a formal public proclamation of hostilities, but it was used also to mean simply the initiation of hostilities, whether or not a formal proclamation was made. In 1552 Huloet's dictionary gave the definition: "Declare warres. *Arma canere, Bellum indicere.*" There are two meanings here: to summon to arms; to announce war.

In almost every monarchical state, the power to initiate war resided in the sovereign. In discussions of constitutional arrangements at municipal law, the terms *to declare war* and *to make war* came to be used interchangeably. And while a formal declaration should be made—on the basis of obligation, according to Vattel's interpretation of the law of nations, or on the premise of generosity and justice, according to Bynkershoek's—whether or not such a formal proclamation was made had no significance for the question of the residence of power to make war at municipal law.

Comyns' Digest, an authoritative work on English law first published in 1744, said, "To the king alone it belongs to make peace and war," and also, "the king has the sole authority to declare war and peace." In 1799 in the High Court of Admiralty, Sir William Scott said, "By the law and constitution of this country, the sovereign alone has the power of declaring war and peace." It will be recalled that in the debate in the Constitutional Convention quoted above, Gerry rephrased Butler's proposal that the President be given the power to "make war" as a motion "to empower the Executive alone to declare war." Hamilton spoke of Congress as "that department which is to declare *or make war.*" Henry Clay said that "the power of declaring war" did not reside with the executive but with the legislature, which was therefore "the war-making branch."

The question of the presidential power to initiate war can be approached in another way. Retorsion is the practice of peaceful retaliation on a foreign state. Congress has often passed acts of retorsion; in

1817, 1818, and 1820, Congress closed our ports to British shipping because the British navigation acts had restricted trade, allowing only British vessels to carry to British colonies in the Western Hemisphere. During this same historical period, decisions by Justice Story on circuit and by the Supreme Court both held that the executive has no inherent power to interrupt foreign commerce; this power belongs to Congress. If the President's authority over foreign affairs does not include the peaceful practice of retorsion, it can hardly justify the initiation of war.

It remains true that the President has dominated even the decision to initiate war in recent decades. But this course of events represents a departure from the balance actually struck by the framers; it is not a simple maneuver within the gray areas or spheres of apparently overlapping authority. For these reasons, congressional action during the last decade takes on particular significance. Congress not only repented of the blank check it handed the executive in the Tonkin Gulf Resolution by repealing the Resolution in 1971, but also took a series of steps to end the Vietnam War as well as to reassert congressional authority over war. Beginning in 1970, Congress enacted the Fulbright proviso, prohibiting the use of funds for military support of Cambodia, attached a similar prohibition to every subsequent military appropriation act, prohibited the construing of any American assistance to Cambodia as an American commitment to Cambodian defense, and prohibited the use of any appropriated funds for military operations in Cambodia. Finally, and most important, Congress passed through joint resolution (over presidential veto) the *War Powers Resolution of 1973.*

The Constitution also fails to address directly the question of whether Congress or the President has the power to end war, or "to make peace." While it is undisputed that a formal treaty of peace may only be concluded by the President after approval by the Senate, it is not clear from the Constitution whether either the President or Congress may unilaterally terminate hostilities. While the President, as commander in chief, has the effective power to end the deployment of troops engaged in conflict, it is also arguable that the power of Congress to declare war "is the power to decide for *war or peace,* and should imply the power to *unmake war* as well as to make it." * * * This potential conflict between the President and Congress is addressed to a limited extent by the War Powers Resolution. Under its terms, the President must remove American forces from hostilities, in the absence of statutory authorization or a declaration of war, if "Congress so directs by concurrent resolution." This provision reflects congressional commitment to its own power over war and its belief that the President has no independent war power that would allow legal retention of forces in conflict against the will of Congress. The provision leaves unanswered, however, the more difficult question on the scope of the President's power as commander in chief once war has been authorized by Congress. In theory, it seems that Congress should have the final decision as to whether American forces should be withdrawn from conflict, but it also seems likely that the decision will in practice be a cooperative one, requiring good faith and respect for coordinate branches by both sides.

The War Powers Resolution, 50 U.S.C. §§ 1541–1548.

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at 190–192; 194–95; 219–223 (1989).*

THE WAR POWERS RESOLUTION: The Resolution interprets presidential power to introduce American forces into hostilities as being limited to the power to respond to attack or to act pursuant to authorization by congressional statute or declaration of war. Presidential consultation with Congress is required "in every possible instance" before the introduction of American forces into hostilities or situations in which imminent involvement in hostilities is likely. The Senate report on its version of the War Powers Resolution makes clear the type of involvement that would be considered imminent.

> The purpose of this provision is to prevent secret, unauthorized military activities and to prevent a repetition of many of the most controversial and regrettable activities in Indochina. The ever deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. "advisors" to accompany South Vietnamese units on combat patrols; and in Laos, secretly and without congressional authorization, U.S. "advisors" were deeply engaged in the war * * *.

The President must report to Congress the "circumstances necessitating the introduction" and the "constitutional and legislative authority" for the introduction. Within sixty days of the submission of such a report, the President must terminate the use of American armed forces, unless Congress "has declared war or has enacted a specific authorization for such use," has extended the sixty-day period, or has been unable to meet because of armed attack upon the country. The requirement that congressional authorization be specific was recently upheld in the case of Crockett v. Reagan, an action brought by twenty-nine members of Congress to curb presidential action in El Salvador. In Crockett, the President argued that the passage of the International Security and Development Cooperation Act of 1981 impliedly authorized presidential military action in El Salvador. Although the district court dismissed the suit without reaching the merits, it correctly held that under Section 8(a) of the War Powers Resolution, congressional authorization cannot be inferred. Furthermore, far from being an unwarranted infringement on inherent presidential power, as some have claimed, * * * the sixty-day provision is arguably an unconstitutional delegation of congressional war power to the President. * * * The provision is the result of political compromises which were essential to assure the votes required to pass the Resolution. * * * Notwithstanding the sixty-day provision, the President must remove American forces from hostilities outside the "United States, its possessions and territories" if there has been no declaration of war or statutory authorization for the use of the armed

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forces in hostilities and if "Congress so directs by concurrent resolution * * *"

Of significance for judicial interpretation of the exercise of the war power, the Resolution stipulates that congressional authorization for the introduction of American armed forces into "hostilities or into situations where the involvement in hostilities" may not be "inferred from any provision of law," including "any appropriation Act, unless such provision specifically authorizes" such introduction. Nor shall such an inference be drawn from "any treaty" unless it is "implemented by legislation specifically authorizing the introduction" of military forces into hostilities or into situations likely to result in hostilities. These provisions were drafted to prevent a recurrence of judicial rulings like those near the end of the Vietnam conflict, which sustained the constitutionality of the war on the ground that Congress had ratified executive war making by means of military appropriations, extensions of the draft, and other supportive legislative acts.

In the future, it may be that Congress will remedy what it considers to be gross presidential abuse of power in the conduct of foreign relations by necessarily using the impeachment power weapon. The framers clearly held the view that misuse of power, including power exercised in the conduct of foreign relations, was itself a ground for removal of the President.

* * * Indeed, serious encroachment by the executive upon the constitutional prerogatives of another branch of government was one of the major evils to be protected against by the impeachment clause. The impeachment provision was seen by the framers as the therapeutic corrective by which the proper balance and check between the branches could be reestablished following abuse by one branch at the expense of the other.

* * *

Congress appears not to have learned the lesson of the Indochina War. After giving the President a blank check to embark on war and spending years in a struggle to extricate the country from the consequent war, Congress then enacted the War Powers Resolution of 1973, the recited purpose of which was to fulfill "the intent of the framers of the Constitution * * * and to insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities" but which actually endorsed future delegations of power. According to Section 8, entitled "Interpretation of Joint Resolution," the President may engage in hostilities if an act of Congress has authorized this, or if a treaty should be ratified and should be implemented by legislation authorizing the use of the armed forces. This section contemplates that Congress shall make advance authorizations in general terms and that the President shall have the power, although not the duty, of engaging in hostilities under such statutes. Section 8 also holds that the President and the Senate may make treaties promising to engage in hostilities in the future and that Congress may contemporaneously authorize the President to invoke the treaty and plunge the country into war at any time during the life of the

treaty. This hardly fulfills the intent of the framers. The War Powers Resolution considers it proper for the President to engage in war if at an earlier date, perhaps at a very much earlier date, Congress—necessarily acting in total ignorance of the future problem, of the future circumstances, and even of the future antagonist—has issued a blank check.

Other sections of the War Powers Resolution raise similar constitutional issues. For example, Section 3 is full of ambiguities that permit the President to usurp the power of Congress. This section, entitled "Consultation," requires the President to "consult" with Congress "in every possible instance" before involving United States troops in "hostilities," actual or imminent. To "consult" supposedly means more than to inform; it is said to require advice, opinion, and, when appropriate, approval. "Every possible instance" is intended to exclude only such dire circumstances as a hostile missile attack. And "hostilities" are meant to encompass any state of confrontation, whether or not shots have been fired, including the provision of non-combat advisors. But those vague guidelines do not pass the constitutional tests of specificity required for any delegation of Congress. As a result, Presidents have largely ignored the consultation requirement. [The "Consultation" on Grenada is enlightening].

According to testimony by a senior State Department official, the President signed the directive ordering the invasion at 6:00 P.M. on October 24. At 8:00 P.M. the President met with the bipartisan congressional leadership to inform them of his decision. The invasion began at 5:30 A.M. the next day. Although the administration contended that the evening meeting satisfied the consultation requirement, one ranking member of the Senate Foreign Relations committee who was not even invited to the meeting commented, "There is a world of difference between being consulted and being asked do we think this is wise or not, or being informed, saying we are doing this at 5 A.M. tomorrow."

One justification for the failure to consult may be lack of time. In justifying the secrecy surrounding the invasion of Grenada, President Reagan stated, "We knew that we had little time and that complete secrecy was vital to insure both the safety of the young men who would undertake this mission and the Americans they were about to rescue." While it may be that sometimes circumstances will require an expediency that provides little opportunity for discussion, even then the President could consult secretly with members of Congress, as is done with the staff and executive branch officers, so that the decision-making process can more closely follow constitutional procedure.

Related constitutional issues are raised by the reporting requirements of the War Powers Resolution. Section 4(a)(1) allows the President to use military force without congressional authorization so long as she or he "reports" to Congress within forty-eight hours of deployment. This reporting requirement in turn triggers the running of a limited sixty-day time period. Under Section 5(b) the unauthorized deployment may continue for a period of sixty days unless Congress acts to either extend the time period for an additional thirty days or terminate the deployment altogether.

In practice, presidential reporting under Section 4(a)(1) has been less than ideal. For example, following the invasion of Grenada and the deployment of the marines in Lebanon, President Reagan reported to Congress: * * * "In accordance with my desire that the Congress be informed on this matter, and consistent with the War Powers Resolution, I am providing this report on the deployment of the United States Armed Forces * * *. This deployment * * * is being undertaken pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief * * *."

In neither situation did the President refer to Section 4(a)(1). By failing to mention Section 4(a)(1) in either report to Congress, the President indicated that he did not recognize any duty to withdraw the troops within the sixty day period if Congress had not acted. In the case of Lebanon, the marines were stationed in Beirut for over a year without congressional authorization. According to the Reagan administration, the resolution's "clock" did not start ticking when the marines were deployed because they were merely defensive and were not engaged in hostilities or imminent hostilities.

In refusing to acknowledge the constitutionality of the War Powers Resolution, presidents have often relied upon their power to conduct foreign policy and their position as commander-in-chief of the armed forces. However, the President's authority with respect to the conduct of foreign relations is a collegial authority to be exercised in concert with, not contrary to, congressional foreign policy authority. Moreover, the President's constitutional authority as commander-in-chief is limited to direction and conduct of hostilities following a congressional declaration of war or other congressional authorization. In fact, at the time the War Powers Resolution became law, opponents of the resolution argued that Sections 4(a)(1) and 5(b) granted "a legal basis for the President's broad claims of inherent power to initiate war" that was not present previously under the Constitution. These opponents preferred a Senate proposal that sought to reaffirm the proper role of Congress, limiting the circumstances under which the President could deploy the armed forces to those recognized by constitutional law. Instead, these limitations appear in the precatory "Purpose and Policy" section of the resolution and have no legal effect on the President's power to commence war.

Thus, perhaps not surprisingly, the most strident critics of the War Powers Resolution do not attack it as an unconstitutional delegation of the war power of Congress, but as an unconstitutional infringement on the President's war power—a reflection of how heavily the "constitutional 'balance' of authority over warmaking has swung * * * to the President in modern times." [See Harold Koh's work]. Since the passage of the resolution, almost all of the presidents have argued that it is an unconstitutional restriction upon the inherent presidential powers. President Nixon vetoed the resolution with indignation; President Ford challenged its constitutionality; and President Reagan refused to concede that congressional authorization was required for his various military excursions, though he purported to comply with the resolution.

For example, on October 12, 1983, when President Reagan signed into law the Multinational Force in Lebanon Resolution, which authorized the continued participation of the marines in the Multinational Force for a period of eighteen months, he expressed grave doubts as to the constitutionality of certain of its provisions. His statement, highly representative of the general Executive sentiment towards the War Powers Resolution, is worth quoting at length: "I would note that the initiation of isolated or infrequent acts of violence against United States Armed Forces does not necessarily constitute actual or imminent involvement in hostilities, even if casualties to those forces result. I think it reasonable to recognize the inherent risk and imprudence of setting any precise formula for making such determinations. Nor should my signing be viewed as any acknowledgement that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in Section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired or that Section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States armed forces."

Thus, President Reagan refused to concede that congressional authorization is required before the President constitutionally can deploy the United States Armed Forces in situations like those in Central America, Grenada, Lebanon, and the Persian Gulf.

Still, of all the provisions of the War Powers Resolution, the most debated provision has been Section 5(c), which allows Congress, by concurrent resolution, to require the President to remove troops engaged in the hostilities abroad. A concurrent resolution does not require the President's signature, nor is it subject to veto. The power of Congress to have the last word—the so-called legislative veto—has often been challenged and finally was held unconstitutional in Immigration and Naturalization Service v. Chadha. The reasoning of that decision apparently invalidates Section 5(c) of the War Powers Resolution. The Senate subsequently sought to bring that section within constitutional limits by providing that any congressional action requiring the President to withdraw United States forces engaged in hostilities abroad must follow certain priority procedures that do not constitute a legislative veto.

Whether Congress is willing and able to reassert its proper constitutional role in deciding when to use the war powers remains to be seen. Its attempt to do so in the War Powers Resolution seems, at least in part, to have failed. The resolution is an overbroad delegation of the war power of Congress that essentially writes the President a blank check. Unfortunately, court challenges to such flagrantly unconstitutional delegations of the war power encounter substantial practical roadblocks. Both supporters and opponents of the War Powers Resolution agree that its constitutionality is not likely to be adjudicated. Those difficulties, however, should not obscure the clear status of the law: the Supreme Court has never held that Congress may delegate the power to initiate war to the President. Even the dictum in the Curtiss–

Wright case said nothing of the sort. And the dictum in Curtiss–Wright has neither [progenitors] nor progeny.

The rule against the delegation of legislative power is our only legal guarantee of the continuance of republican government. The Roman republic perished through delegation, and Ulpian wrote its epitaph, "What pleases the prince has the force of law, since by a royal law established concerning his sovereignty the people confers all its sovereignty and power upon him."

Michael Glennon's article, immediately below, addresses the questions: What is the record of the War Powers Resolution? What are its prospects for resolving the problems relating to balancing the need for quick and efficient presidential action in time of emergency and the danger of an "Imperial Presidency?"

MICHAEL GLENNON, THE WAR POWERS RESOLUTION: SAD RECORD, DISMAL PROMISE

17 Loy.L.A.L.Rev. 656, 658–59, 661, 664–65, 670 (1984) (fns. omitted).*

* * *

[Rep. Zablocki's] first principal conclusion—that "predictions that the Resolution would weaken the nation's ability to react to foreign policy crises have proven unwarranted"—is difficult to quarrel with. Arguments to the contrary are for the most part unsupported and unsupportable assertions resting upon the major premise that anything and everything done by a President to halt the international communist conspiracy must perforce be constitutional.

These reflexive proponents of unfettered Presidential discretion fundamentally misapprehend the separation of powers concept. In place of the "divisiveness" engendered by the War Powers Resolution they would substitute an "iron demand" of "cooperation" between Congress and the President—a cooperation that is, upon analysis, the cooperation of a valet with his master. Brandeis, Corwin, and other boat-rockers presumably are among those who would, if given the chance, have played into the hands of Hanoi and Moscow. "[C]ooperation should always be the goal." Whether one branch should play war-powers manservant to the other is perhaps an issue that could be argued either way, but it should suffice at this point to note that the question seems to have been ventilated and resolved in 1789. * * *

Representative Zablocki is correct in his first conclusion only because he is quite wrong in his second—the Resolution has not hampered the President's ability to react to foreign policy crises precisely because it has *not* served to "restore the balance in the rights and responsibilities of the Congress and the President in the decision to commit troops." To the contrary, it has proven virtually ineffectual in achieving that statutorily-stated objective. Zablocki observes that "there has been more non-

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compliance than compliance" by the executive branch. Although I am not certain that compliance or noncompliance can be neatly quantified, I quite agree that the record of executive branch adherence to the requirements of the Resolution has been dismal, and I am thus somewhat nonplussed by Zablocki's effusive assessment—set forth after a well-documented recounting of "halfhearted" consultation, inadequate reporting, and overall footdragging—that the product is "excellent," "workable" and that its "credibility * * * has never been higher." If credibility means the likelihood of compliance by future Presidents who, all things considered, would prefer to forget it, it seems to me that those chief executives will be on firmer ground than ever.

* * *

[The] failure of the Resolution's sponsors to articulate lucidly the reasons for its validity is disappointing because there exists a persuasive case for its validity. The argument is, in the sheerest outline, that the "fixed" powers approach to presidential power taken by the Supreme Court in *Curtiss-Wright, Pink,* and *Belmont* has given way to the very different "fluctuating" powers approach set forth initially by Chief Justice Marshall in *Little v. Barreme,* reiterated by Justice Jackson in *Steel Seizure Case,* and formally adopted by Justice Rehnquist in *Dames & Moore v. Regan.* Under the latter approach, the scope of the President's power is a function of the concurrence or non-concurrence of the Congress; once Congress acts, its negative provides "the rule of the case." That analytical framework, it seems to me, provides a general foundation for the congressional mandate of consultation and reporting as well as the imposition of a time limit upon the use of the armed forces in hostilities—all of which, in the absence of a statement by the Congress, might fall within a "zone of twilight."

* * *

* * * [A] reason for half-hearted compliance by the Executive is that fuller compliance has not been demanded—either legally by the Resolution, or politically by members of Congress. It vastly understates the problem to describe it * * * simply as a matter of "tepid congressional oversight." To cast the issue as one of oversight is to suggest that the need is merely for more hearings that generate more information. The problem has not been a lack of information, but Congress' failure to *act* on information—to act, specifically, by removing ambiguities in the Resolution and, more importantly, by living up to its responsibilities under the role it carved out for itself under the Resolution. At least three ambiguities have undermined [its] proper operation.

The Resolution should be amended to set forth a definition of "hostilities." In the absence of such a definition, officials of the executive branch and members of Congress engaged in a running argument whether United States military activities in Lebanon constituted "hostilities." When ten marines died in a twenty-day period after having been fired upon regularly by hostile forces, it seemed utterly disingenuous to claim, as the Reagan administration did, that the hostilities test was not met. Nonetheless, the term is not self-defining, and because the Resolution provides no guidance as to its meaning, a gradual escalation of hostilities can generate serious confusion as to the date on which the time limit is triggered. Similarly, there is no clear indication in the Resolution whether a variety of different activities are intended to fall within the "hostilities" test, such as exposure to minefields, missile attack, chemical or biological agents, or neutron rays. If Congress is serious about removing uncertainty and closing the door to semantic circumvention by the executive branch, it must define the term "hostilities."

Second, * * * consultation, time after time, has been perfunctory at best. This is true largely because the Executive has been allowed, time after time, to get away with perfunctory consultation. Aside from raising a political stink when such failure occurs—which congressional leaders have been loathe to do for fear of being mistakenly seen by the public as somehow critical of a military initiative—a Congress truly serious about consultation would amend the Resolution to specify precisely who is to be consulted, to make clear that "in every possible instance" does not include instances that present alleged security problems, and perhaps, to prohibit certain uses of the armed forces in the absence of genuine consultation.

Third, and most important, is the vagueness of the reporting requirement, which has led to the Resolution's virtual unraveling. Although the Executive's record here is clearly at odds with the Resolution's spirit, there is an argument to be made that presidential reports have complied with its letter. The reason is that there is in fact not one reporting requirement set forth in the Resolution, but three. Only one—that required by section 4(a)(1)—triggers the sixty-day time limit; those required by sections 4(a)(2) and 4(a)(3) are merely informational (although in the original House version of the Resolution they too triggered the time limitations). The problem arises in that the three situations overlap: facts that would require a report under section 4(a)(1) might also require a report under one of the two succeeding paragraphs, and the Resolution contains no requirement that the President specify which of the three reports he is submitting. Only the *Mayaguez* report (submitted after the military operations had terminated because they lasted less than forty-eight hours) referred expressly to section 4(a)(1). Consequently, the other reports effectively left unanswered the critical question: had the sixty-day time limit been triggered?

* * *

But these and other modifications of the Resolution will not, in themselves, "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities * * * [I]t has become clear that the Resolution's sponsors were naive to believe that any law could achieve that objective. The most that a statute can do, however artfully drawn, is to facilitate the efforts of individual members of Congress to carry out their responsibilities under the Constitution. To do that requires understanding, and it also requires courage: it demands an insight into the delicacy with which our separated powers are balanced, and the fortitude to stand up

to those who would equate criticism with lack of patriotism. For a Congress comprised of such members, no War Powers Resolution would be necessary; for a Congress without them, no War Powers Resolution will be sufficient.

Any judicial role? *What articles of the Constitution are relevant?* Consider the following review by Carl Landauer of Franck's Book, Political Questions/Judicial Answers, 87 A.J.I.L. 465 (1993): "Thomas Franck's new book provides an elegant and at times emotional argument against the use of the political question doctrine by U.S. courts to abstain from deciding cases that touch upon foreign policy. Troubled by the resulting lacuna in the rule of law, Franck writes: 'Judicial deference ignores the evident truth that in our system a law that is not enforceable by adjudicatory process is no law at all.' Accordingly, a 'foreign policy exempt from judicial review is tantamount to governance by men and women emancipated from the bonds of law'."

Franck begins by tracing the political question doctrine back to what he calls a "Faustian pact" entered into by John Marshall. Franck believes that in order to assert the Court's power of judicial review over other important realms, Marshall traded away its ability to decide cases in the realm of foreign policy. In essence, Marshall adopted a line of British case law segregating the foreign policy realm as being nonjusticiable as a "relatively inexpensive 'giveback' to throw to the political branches and the states". Franck then chronicles the development of Marshall's trade-off into a matter of orthodoxy for the federal judiciary, finding its crystallized form in Justice Sutherland's dicta in *Curtiss–Wright* in 1936. But, Franck notes, despite repeated invocation of the doctrine, many of the courts invoking it seemed not to have taken its teaching entirely to heart, for they would make pious references to the doctrine while nevertheless deciding the case on the merits or, after abstaining from adjudication, feel free to explain how the case should be decided on the merits. In all this, Franck discerns "a powerful whiff of hypocrisy." In essence, he sees a result-oriented judiciary intent on confirming the foreign policy decisions of the Executive, whether doing it on the merits or by judicial restraint in the particular case.

Having undercut the intellectual integrity of the courts voicing the political question doctrine, Franck concentrates his criticism on the rationales given for relying on it. To those who believe that judges are not competent to deal with the factual aspects of foreign affairs cases, Franck responds that foreign policy cases would not create especially difficult evidentiary problems for our "sophisticated federal judicial system". To those who believe that issues in foreign affairs create problems of applicable legal standards, Franck answers that courts are well practiced in dealing with vague areas of law. To those who believe that courts cannot interfere with foreign policy because the stakes are too high, Franck answers that most uses of the political question doctrine are not "in the midst of military hostilities, the one circumstance in which some form of judicial reticence might seem warranted", and he adds that the real harm to the national interest results from the refusal to apply legal standards to those conducting our foreign policy. To those who believe that the judiciary is in no position to confront the President, he insists that "judicial legitimacy depends on a willingness to challenge, when it is not justified to accommodate, political authority".

After these point-by-point responses to the federal judges who have used the political question doctrine in the realm of foreign affairs, Franck turns to the good news: the judges who refuse to dismiss foreign policy cases as nonjusticiable. Yet, despite the narrowing numbers of judges directly applying the political question doctrine, Franck points out that those who find foreign policy cases justiciable remain respectful enough to the doctrine to contrive some way to appear not to be directly violating it. Nevertheless, the list of cases in which the political question doctrine was not adopted is, for Franck, a source of encouragement. But Franck is encouraged, more than by this rather uneven record, by the German judiciary, which provides for him a usable model of a judiciary that, while giving German foreign-policy makers a good deal of latitude, refuses to allow foreign policy to be made outside the rule of law. And, after suggesting several strategies for judges in the United States similarly to provide room for the foreign-policy makers within the rule of law, Franck concludes with the moral force of his opening: "To make the law's writ inoperable at the water's edge is nothing less than an exercise in unilateral moral disarmament. It is a strategy urgently in need of judicial review".

* * *

WORMUTH & FIRMAGE, TO CHAIN THE DOG OF WAR

pp. 302–303 (1989).*

"Why the recent drift away from collegial determination of foreign policy direction by the President and Congress? One cause may be the modern technology of war. It has been suggested that nuclear weapons capable of continental destruction borne by missiles minutes from our shores make it essential that we be able to decide for war instantaneously, by one person, without debate or restraint."

However, it is [wrong] to equate collegiality with lack of effective, immediate response. Congress in the past has proven that it can quickly deliberate when required. One day after President Eisenhower asked Congress for authority to use American armed forces to protect Taiwan from attack by mainland China, the chairman of the House Rules Committee called up the resolution under a closed rule permitting only two hours of debate and no amendment. The House passed the resolution that same day.

But the belief that speed is essential in the event of a nuclear attack may be challenged. Precipitous action in response to an attack does not prevent or even mitigate the destruction we nevertheless suffer from the nuclear strike upon us. Even if we are obliterated by a massive salvo, we presumably can still respond by whatever remains of land-based

missiles of our own, plus submarine and air-launched missiles. Unless we plan to strike first, there is no situation beyond self-defense, which exists in any event in the President if we are under sudden attack, under which must we respond with alacrity.

Contrarily, with the evidence we now have of genocidal pandemic following nuclear war, with human society destroyed and human life in the balance, modern technology demands all the more our adherence to every institution we possess that ensures debate and reflection, negotiation, conciliation, and peaceful resolution of disputes. The founders' prescription that Congress possess the sole war power to chain the dog of war remains essential still.

FIRMAGE, BOOK REVIEW—ESSAY

59 G.W.L.Rev. 1684, at 1685–1688 (1991).*

The spectacular success of the American military in the war against Iraq not only obliterated the forces of President Saddam Hussein, but now threatens the same fate for those institutions and inclinations favoring peace and against war. The thoroughness of Iraq's defeat and the dispatch of its accomplishment, coupled with the unpredictably low number of Allied casualties, combined to produce unparalleled euphoria and nationalistic ardor. This spirit, exploited by politicians attempting to accomplish their own purposes in such a climate, seems to be leading toward a rash of nonsequiturs in the guise of conclusions regarding the efficacy of the military option to be drawn from this short but savage conflict.

The event in this portion of history that deserves our sympathetic attention is the ending of the Cold War. The collapse of the Berlin Wall in November 1989 saw the end of nearly a century of war, physical and mental. World War I initiated a form of war both global and total. Civilian populations became the primary victims of a war affecting the entire world. A system of world governance and society ended forever. The resulting forces of inflation, depression, war guilt, reparations, and dislocation inevitably produced World War II, an aftershock predictable in its consequence if not in its particularity and severity.

But the hatreds engendered by war that normally abate with its end instead were continued into a Cold War between the two nations that emerged as superpower rivals. Almost every conflict—decolonization, civil war, or local dispute—was perceived as involving this bipolar struggle between the USSR and the United States. Paradoxically, even while threatening to create violence and destruction on a scale never before known, the existence of nuclear weaponry helped in detering overt and massive violence between the superpowers. This corrosive rivalry, however, resulted in proxy wars and superpower intervention on opposing sides of civil wars throughout Asia, Africa, and Latin America. In addition, covert actions—too often covert from congressional approval and oversight, if not from the Soviet Union—were a characteristic of this time. Such violence, unacknowledged and often illegitimate, remains a corrosive element incongruous with principles of open debate and the rule of law within a democratic state.

Finally, may we have the opportunity to address impelling problems: the prevention of war, particularly nuclear war; the end of the arms race, nuclear and conventional; severely decreasing military spending, not only in the United States, but also in scores of nations throughout the world forced by peculiar logic to devote enormous sums for building large military forces whose main function more realistically seems to be the preservation of the incumbent regime from internal opposition rather than as a protection against external aggression. The war against Iraq could not be considered of the same historic importance if its geopolitical consequence—the replacement of a brutal Iraqi aggressor dictator in Kuwait in favor of the more benign, if medieval, Arabian oligarchy that had ruled this emirate—were the criterion. The national elation that has followed seemingly painless and decisive victory, however, has obscured the truly historic changes sweeping Eastern Europe and the Soviet Union, not only from the view of the American people but from the White House and congressional leadership.

Impelling reasons exist to question supposed lessons learned from the success of American arms. Our inclination both to objectify and personalize evil makes no more sense now than it did before the Allied victory. Even elimination of Saddam Hussein, standing alone, would produce no assurance that Iraqi alternatives for leadership will be less threatening to American interests than before. Iraq is in chaos and threatens to become fragmented beyond repair—another Lebanon. Shiite fundamentalist leadership, with Iranian influence, is not obviously in our best interest. Hussein's disappearance [would stop] far short of insuring stability in the Middle East as General Noriega's capture was from resolving drug traffic. We have moved through a dreary procession of devil figures in American mythology; from the Ayatollah Khomeini in Iran, General Noriega in Panama, Libya's Muammar Qadhafi to Hussein, without significantly affecting the real challenges that still must be met in this hemisphere or in the Middle East: preserving American interests abroad while respecting local sovereignty; guaranteeing Israeli borders and security; establishing and maintaining normal relations between the Arab states and Israel; and doing justice for Palestinian interests in the Middle East, including their possession of a homeland.

The real costs of the Gulf War are not yet visible to the American people: Iraqi casualties approaching mass slaughter, the country itself bombed into a preindustrial age, facing mass starvation and pandemic disease; Arab and Islamic hatred that will affect our relations for decades to come; an environmental disaster on a world scale never before known; [and] * * * a potentially disastrous weakening of our internal restraints against war, restraints presuming that peace is the norm and war the aberration, requiring anyone proposing war to bear an enormous burden of persuasion with the American people in national debate and consideration. In its place are we poised to bestow the war power on an American Caesar rather than to preserve and strengthen the constitutional decision to secure the peace by lodging the decision for war or peace within Congress—the democratic branch that must pay for the war and answer to the people for breaking the peace? Nationalistic euphoria surely will lead to a form of national hubris, corporate ego

inflation, followed by mistakes in judgment in the form of foreign adventurism, then meeting our own nemesis in whatever form—unless we abide by our own structural checks designed to avoid this very phenomenon.

Our war with Iraq was preceded by a healthy national debate culminating in the most impressive example of responsible congressional debate on the decision for war since the Second World War. But the seeming conclusiveness, the quick success, and the modest number of Allied casualties in the Gulf War have combined to give this decision for war an aura of wisdom and popularity with the people that undermines the perceived vision of those who opposed offensive action at that time before economic sanctions reasonably could be expected to work against Iraq.

Yet all the reasons for an institutional bias in favor of peace and against war remain. War represents the failure of diplomatic and peaceful means of dispute resolution in favor of savagery, distinguished only by a gossamer thin cloak of respectability because the violence is done by nation-state actors.

The conclusion that war, with all its violence, is a decisive and final resolver of the problems leading to war is almost always an illusion. Despite American success on the battlefield, the Iraqi war almost inevitably will turn out to be *no* exception to this rule. Most of the political and economic factors that led to the dispute still remain unresolved. Since the end of the war, Kurdish and Shiite minorities in Iraq have suffered enormous hardship, Saddam Hussein remains in power and continues his ruthless regime, and Kuwait is no closer to democracy than it was prior to August 1990. Ultimately, war only creates enormous suffering as well as economic and environmental dislocation. ***Query:*** Have the assumptions in this article turned out to be true?

1. "OPERATION JUST CAUSE"— THE PANAMA INVASION

One could place the discussion of the invasion of Panama under the rubric of unilateral self defense, humanitarian intervention, or even under expansion of jurisdiction for the * * * purpose of curtailing drug trafficking. These were all justifications made by the U.S. Government. Consider the following questions as you read: Was the invasion justified by the claim of unilateral self-defense? Was it justified on the basis of regional self-defense and the promotion of regional security? Could it be justified as a "police action" in the basic sense of the term, to "capture a criminal?" Ultimately with some 26,000 U.S. military, the U.S. forces met early resistance and later sniper fire, but within just 3–4 days, all resistance ended. There were at least 400 Panamanian deaths (mainly civilian) and only 23 U.S. fatalities. Judge Hoeveler, in *U.S. v. Noriega,* noted: "[a]lthough the motives behind the military action are open to speculation, the stated goals of the invasion were to protect American lives, support democracy, preserve the Panama Canal Treaties, and bring Noriega to the United States to stand trial for narcotics offenses."

The United States has long had an interest in Panama, since it participated in its creation as it seceded from Colombia in 1903. The U.S. Navy held a presence off-shore, to be sure that Colombia would submit to dismemberment. The U.S. and Panama signed a treaty within a few weeks granting the U.S. expansive rights to the area which is now the Canal Zone. The latter Panama Canal Treaties (effective 1979) allow the gradual return of the Zone and the Canal to the control of Panama, to culminate in 1999.

The Invasion Of Panama:

As East Berliners celebrated their new freedom, the U.S. executive branch was planning an invasion of tiny Panama. Once the invasion was underway, the executive branch justified the surprise attack on various grounds: self-defense, protection of American citizens, defending democracy, protecting implementation of the Panama Canal Treaties, and combatting drug trafficking.

For years Noriega had been coddled by United States officials. The United States long had been aware of Noriega's illicit dealings, but chose to ignore them as long as Noriega remained a "stabilizing" source in the region. According to Panamanian Vice–President Arias, the United States government redefined Noriega as an adversary only after his regime became a "source of instability rather than stability." The executive branch suddenly reversed itself and began to treat Noriega as an enemy. Initially, economic isolation was employed. President Reagan declared a national emergency under the National Emergencies Act and the International Emergency Economic Powers Act [EEPA] on April 8, 1988. Then in May 1989, recently-elected President Bush deployed an additional two thousand combat troops to the canal zone, ostensibly to protect American lives. Predictably, tension and hostilities escalated and President Bush ordered Operation Just Cause, the code name for the Panamanian invasion, on December 20.

Could the invasion of Panama be justified under international and constitutional law? Can any legal definition of self-defense justify or excuse the invasion of Panama? The most fundamental principles of international law call for respect for the territorial integrity and sovereignty of another state. Does the fact that a state is governed by a corrupt tyrant and dictator justify invasion by another state? Did our own actions cause the threats and danger for United States citizens and the Panama Canal? We determined that our national interests would be served best if General Noriega were removed. We then invaded the country—at great cost to Panamanians. Does any principle of international law justify this action?

The invasion falls under the category of acts that are denied to the Executive under the War Clause, so congressional approval is required *before* any military action can occur. President Bush made the decision to invade unilaterally and only notified Congress after initiation of action. At no point prior to or during Operation Just Cause was congressional approval sought by the President.

The War Clause was drafted to demand congressional authorization for acts of war taken by the United States Government except in response to sudden attack on the United States. Therefore, the War Clause must apply to full scale invasions such as Operation Just Cause. First, the United States realistically was not threatened at any time. The Panamanian Assembly's "state of war" proclamation on December 15, 1989, was never more than a mouse that roared. [In fact, it was a domestic statement aimed at triggering domestic authority to Noriega]. Second, there was no "sudden" turn of events that required the President to act immediately without time to consult Congress. Both an attack on the United States and a degree of surprise are necessary prerequisites to an executive military response and neither were present at the beginning of Operation Just Cause. On the contrary, Operation Just Cause was a carefully planned and executed offensive, without congressional approval, against the forces of General Noriega.

Operation Just Cause also failed the "fluctuating powers" test governing the delegation of power in foreign relations. Under the test, when Congress has made its intention clear, then it is the will of Congress that controls. Congress has expressed its will regarding unauthorized executive military action on numerous occasions. The War Powers Resolution of 1973, the Hughes–Ryan Amendment to the Foreign Assistance Act of 1974, the Intelligence Authorization Act for Fiscal Year 1981, and the Boland Amendments establish a record of congressional intent; namely, no offensive military activity shall be planned and staged without the knowledge and authorization of the Congress.

The initial deployment of two thousand troops in May 1989 also should have triggered the sixty-day provision under section 5(b) of the War Powers Resolution. Under the Resolution, any introduction of United States troops into "imminent hostilities" *automatically* engages the sixty-day provision. As the House Report on the Resolution stated, the term "hostilities" also "encompasses a state of confrontation in which no shots have been fired but where there is clear and present danger of armed conflict." The House Report further defined imminent hostilities as situations "in which there is a clear potential * * * for actual armed conflict."

Did the act of introducing combat troops into a nation that is being intimidated politically, economically, and militarily create a potential for armed conflict? Can the troop reinforcement of May 1989 be seen as a planned prologue to invasion? Was the "clear and present danger of armed conflict" recognized by the executive branch? Is that precisely what was intended? Did combat troop reinforcement in May 1989 constitute introduction of United States forces into "imminent hostilities," according to both the language and intent of the War Powers Resolution?

Congress should have pressed the War Powers Resolution upon the President in May 1989 for three reasons. First, the situation in Panama had deteriorated to the point where the probability of armed confrontation was clear. Second, by triggering the clock of the War Powers Resolution, Congress would have forced the President to explain his intentions concerning military activity in Panama. This would have allowed Congress to participate in the decision on whether to initiate Operation Just Cause, thus satisfying not only the War Powers Resolution, but also the constitutional war power and foreign relations power. Third, it would have provided valuably needed precedent to increase the functional credibility of the War Powers Resolution. The last reason is vital. Every time Congress allows unauthorized executive action to go unchallenged by the War Powers Resolution—even in situations where Congress agrees with the action taken—the lack of action further weakens this already troubled Resolution.

Report to Congress, President George Bush (December 21, 1989): The White House, Washington, DC, December 21, 1989, to Hon. Thomas S. Foley, *Speaker of the House of Representatives, Washington, DC.*

Dear Mr. Speaker: On December 15, 1989, at the instigation of Manuel Noriega, the illegitimate Panamanian National Assembly declared that a state of war existed between the Republic of Panama and the United States. At the same time, Noriega gave a highly inflammatory anti-American speech. A series of vicious and brutal acts directed at U.S. personnel and dependents followed these events.

On December 16, 1989, a U.S. Marine officer was killed without justification by Panama Defense Forces (PDF) personnel. Other elements of the PDF beat a U.S. Naval officer and unlawfully detained, physically abused, and threatened the officer's wife. These acts of violence are directly attributable to Noriega's dictatorship, which created a climate of aggression that places American lives and interests in peril.

These and other events over the past two years have made it clear that the lives and welfare of American citizens in Panama were increasingly at risk, and that the continued safe operation of the Panama Canal and the integrity of the Canal Treaties would be in serious jeopardy if such lawlessness were allowed to continue.

Under these circumstances, I ordered the deployment of approximately 11,000 additional U.S. forces to Panama. In conjunction with the 13,000 U.S. Forces already present, military operations were initiated on December 20, 1989, to protect American lives, to defend democracy in Panama, to apprehend Noriega and bring him to trial on the drug-related charges for which he was indicted in 1988, and to ensure the integrity of the Panama Canal Treaties.

In the early morning of December 20, 1989, the democratically elected Panamanian leadership announced formation of a government, assumed power in a formal swearing-in ceremony, and welcomed the assistance of U.S. Armed Forces in removing the illegitimate Noriega regime. The deployment of U.S. Forces is an exercise of the right of self-defense recognized in Article 51 of the United Nations charter and was necessary to protect American lives in imminent danger and to fulfill our responsibilities under the Panama Canal Treaties. It was welcomed by the democratically elected government of Panama. The military opera-