THE PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

1961

Case Concerning the Expropriation of a Mining Company, Arcadia v. Drangoland, United States of Oceania v. Drangoland, 1961.

Columbia Memorial† #6

† The winner of the competition is unknown.

STATEMENT OF FACTS

William Randolph Bonassis is a national of the U nited States of Oceania, owning 40 per cent of the shares in Windfall, Inc., a corporation incorporated in Arcadia on 5 March 1950. Windfall obtained from the Government of the Republic of Drongoland on 19 June 1950 a concession granting to the company the exclusive rights to search for and extract bauxite within the country as well as certain other non-exclusive rights relating to the distribution and sale of aluminum. The concession a greement provides inter alia that

> ...any difference between the parties of any nature whatever and, in particular, any difference arising out of the interpretation of this Agreement and of the rights and obligations therein contained and any difference relating to any of the matters subject to this Agreement or relating to the duration, termination or cancellation in any manner whatever of the rights and obligations contained in this Agreement shall be settled by arbitration...(Art.16)

The Agreement contains specific methods of selecting an impartial tribunal whenever a request is made for arbitration. (Art.16 Sec.2-4). The procedure of arbitration is to be that followed by the International Court of Justice, and the award to be based on the Juridical principles contained in Article 38(1) of the Statute of the Court. (Art.16) The Agreement further provides that the Concession

> shall not be annulled by the government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities. (Art.15)

On 6 September 1956 the Drongolese legislature flagrantly violated the latter provision by enacting an amendment to the Claims Against the Government Act, providing in part, that

> actions against the State, whether by aliens, citizens or corporations wheresoever incorporated, shall be brought only before the courts of the State and the State shall not be bound by any order, award or Judgement not pronounced by such courts. This Act shall apply not-withstanding any agreement or law to the contrary, whether entered into or enacted before or after the date of this Act.

In August 1957 the Republic of Drongoland further violated its obligations by invoking this statute as justification for refusing to arbitrate a dispute with Windfall which had arisen over a sum of $2,500,000 due to the Corporation from the Drongolese Government for materials supplied pursuant to the Concession Agreement. As a result of this breach, Windfall, on 15 September 1957, advised the Government of Drongoland that it would have to consider cutting off supplies of aluminum to the Government until the dispute was settled by arbitration. Exactly one month later the Drongolese legislature retaliated by passing an act expropriating part of Windfall's property comprised in the Concession Agreement. Once again, Drongoland

declined, on the same grounds, to follow the arbitral procedure prescribed in the Agreement, whereupon Windfall appealed to the Government of Arcadia for diplomatic protection.

The Government of Arcadia, unable to reach agreement with the Government of Drongoland, decided to submit the dispute to this Court. However, on 17 May 1958, at an extraordinary meeting of the shareholders of Windfall, Inc., it was resolved that the Company should request the Government of Arcadia to waive its claim for the $2,500,000, and to press only its claims in respect of the expropriation. Voting against this resolution were, of course, Mr. Bonassis and the representative of New Frontiers, Inc., a Corvonian corporation, doing business in Corvo and owning 5 per cent of Windfall's stock. Voting for the resolution were the representatives of Antix Corporation, a company incorporated in Arcadia and doing business in Arcadia and Drongoland and owning 25 per cent of Windfall's stock, and National Ventures, a company incorporated and doing business in Drongoland and owning 30 per cent of Windfall's stock. At this meeting the representatives of Antix and National Ventures submitted letters which each company had allegedly received from the Minister for National Development of the Republic of Drongoland, and which read in part as follows:

In particular, the Government regards

> Company's claim for $2,500,000...as without foundation in fact or law, and if this claim is pursued, against the best interests of the Republic, the Government will have to consider cancelling any contracts it might have with those organizations in Drongoland possessing an interest in Windfall, Inc.

The Government of Drongoland does not deny that these letters were sent.

In consequence of the waiver by Arcadia, at Windfall's request, of the claim for $2,500,000, Mr. Bonassis requested the United States of Oceania to espouse his claim for the loss of value of his shares in Windfall caused by Drongoland's refusal to settle Windfall's claim for this amount, in accordance with the procedures set forth in Article 16 of the Concession Agreement. Between 31 December 1958, before the dispute as to the $2.5 million arose, and 14 October 1957, the day before the expropriation took pla ce, the value of Mr. Bonassis' shares in Windfall had diminished by approximately sixteen per cent. Being unable to reach agreement on this matter, the Government of Drongoland and the United States of Oceania, with the consent of the Government of Arcadia, decided to refer the question of Mr. Bonassis' claim to this court, together with the question of Windfall's claim.

Mr. Bonassis was born in the United States of Oceania in 1904, thereby acquiring Oceanian nationality jure soli under Oceanian law. His parents, who were both citizens and residents of Corvo, took him back to

that country in 1905, where he resided until 1927, although he never became a citizen of Corvo under its laws. In 1927 he returned to the United States of Oceania where he worked until 1933 for a large corporation with international interests. During this time he built a home in Oceania, which he still owns and uses when he comes to Oceania on business trips. In 1933 Mr. Bonassis married a national of Thule and decided to make his home in that country. While residing in Oceania he never voted or participated in public affairs. While retaining a share interest in the Oceanian company, Bonassis obtained an executive position with an investment organization in Thule, and subsequently obtained interests in a number of corporations organized in various countries for the purpose of obtaining and exploiting mineral concessions in these countries. Since 1939, when he resigned his position in Thule, he has spent at least nine months of each year outside of Thule, attending to his scattered business interests. Bonassis' wife and children presently reside in Thule, and his children were raised and educated there. Though his assets are distributed among Oceania, Drongoland, Arcadia and other countries, his private funds are concentrated in Thule. During his annual three months vacation in Thule he has played some part in civic affairs and contributed to local philanthropies, though he has never held any elective position and never acquired Thule citizenship.

QUESTION IV

WILLIAM RANDOLPH BONASSIS DOES POSSESS THE NATIONALITY OF THE UNITED STATES OF OCEANIA REQUISITE TO ENABLE THE GOVERNMENT OF THE UNITED STATES OF OCEANIA TO ESPOUSE HIS CLAIM AGAINST THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND.

A- William Randolph Bonassis is a national jure soli of the United States of Oceania.

Under generally recognized principles of international law, determination of the nationality of an individual is exclusively within the competence of municipal law. The principle is accepted by international tribunals and recognized by Articles I and II of the 1930 Hague Convention on Conflict of Nationality Laws. (1) It is stipulated that Bonassis acquired Oceanian nationality jure soli under the laws of that country. (R-12) No facts appear to show that he ever lost Oceanian nationality, and in fact both Bonassis and the Oceanian government have reasserted that Bonassis is a national of Oceania by the very fact that this claim is brought by Oceania on his behalf and upon his request. (R-11) (2) These facts in themselves are sufficient to support the statement that Bonassis has Oceanian nationality. The fact that he may also have nationality elsewhere is not relevant to this point, since international law recognizes that a person may have more than one nationality under the municipal laws of various states. (3) But no question of dual nationality is presented by this case, since it has not been shown that Bonassis has ever acquired nationality in a

state other than Oceania.

B- The connection between a state and its national jure soli is unquestionably sufficient to allow the state to intervene diplomatically on behalf of the national.

In spite of the fact that nationality is a question within the competence of municipal law, the further question of whether or not a state is entitled to exercise diplomatic protection on behalf of a national is one of international law. (4) The issue then becomes whether or not "full international effect ... (can) be attributed to the nationality invoked," (5)

While it is believed by certain writers that some connection must be established between the person and the state if the nationality is to have such effect, (6) others deny the necessity for any such links, however minimal. (7) But a new and novel rule -- that a "genuine" link (as opposed to merely "some" link) must be found between the state and the person to support an assertion of nationality sufficient to give rise to an international claim -- was advanced by the majority in the Nottebohm case. Even if it were conceded that such a rule in fact exists as regards the facts of that case, it must be recognized that the question arose in the context of the requisite connection in cases of naturalization; and since no arguments in that decision can persuasively be construed to extend the doctrine of "genuine connection" beyond the ambit

of the discussion there involved, they ought, therefore, to be contained within that context. This is particularly so in light of the Court's own words:

> The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. (6)

The instant case is factually so far removed from the circumstances of the Nottebohm case that in fact the latter can hardly be considered relevant at all to the present claim and might have been ignored entirely had its impact not been so great as to engender a quantity of general discussion which has tended to obscure the true scope of that case. Two of the factual elements there present, but which are not before the Court in this case, are the acquisition of nationality by naturalization and the "existence of a long-standing and close connection" between the individual claimant and the respondent state; a third set of circumstances, relevant to neither case, but discussed there in order to provide the Court with a fund of principles to be applied by analogy to the factsof that case, is the existence of dual nationality.

With regard to the last, the Court sets out various factors which it considers as relevant to the question of whether or not nationality is "real and effective" but it is to be noted that no attempt was made to claim that evidence

of close ties, such as "habitual residence", "center of interest", "family ties", "participation in public life", etc. has ever been or may ever be invoked, alone and unsupported by nationality, to defeat a claim of nationality unsupported by such ties.(9) Nevertheless, the Court did come dangerously close to espousing such a doctrine by opposing the tenuous character of Nottebohm's connection with Lichtenstein and the intimacy of his ties to Guatemala. (10) In fact the Court states the issue by asking itself

> At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?(11)

Although the statement is made in general terms, it is submitted that the Court was able to address itself to this issue the more freely since the scale was placed between the claimant and respondent states, rather than between either party and a third state. If the Court may properly be thought to have conceived Nottebohm's ties to Guatemala as giving rise to a kind of "quasi-nationality", the situation is analogous to that covered by Article IV of the Hague Convention on Conflict of Nationality Laws:

> Art 4. A state may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses.

The fact that Guatemala was respondent state in this case lends additional credence to this analysis. Thus it does

not appear unreasonable to suggest that if the action had been taken by Liechtenstein against a third state, with which Nottebohm had no close ties; or if Guatemala had brought the claim, either against Liechtenstein or against such a third state, the determination of the issues might well have been quite different.

But the question which offers the most striking distinction between the Nottebohm case and the present case is that of the method of acquisition of nationality. For throughout the judgment, (with the understandable exception of the discussion of dual nationality), no amount of diligent search will disclose mention of any minimum connection necessary to entitle a state to extend diplomatic protection to its national in circumstances unconnected with naturalization.

The distinction is decisive. Thus, it has not been shown in Nottebohm, and indeed has never been shown, that the basis of nationality jure soli — birth within a state — is not recognized as sufficient connection to establish nationality under international law and entitle a state to afford diplomatic protection to its national. (12)

QUESTION V

THE UNITED STATES OF OCEANIA IS ENTITLED TO ESPOUSE A CLAIM BY WILLIAM RANDOLPH BONASSIS AS A SHAREHOLDER FOR LOSS OF VALUE OF HIS SHARES IN WINDFALL, INC., ARISING OUT OF AN ALLEGED VIOLATION BY THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND OF ITS CONCESSION AGREEMENT WITH WINDFALL, INC., WITH RESPECT TO MONEYS CLAIMED TO BE DUE TO WINDFALL, INC., FOR GOODS SUPPLIED BY IT TO THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND.

A general rule of both municipal and international law is that a corporation is a legal entity apart from its shareholders and that therefore an injury to the corporation is not ipso facto an injury to the shareholders. It follows from this that such an injury may normally be redressed only by corporate action, or, on the international level, only by the state of which a corporation is a national. (13) But it has been recognized that the indiscriminate application of this general rule would work considerable hardship on the equitable interests of the individual shareholders, and that under certain circumstances the rule should yield to the superior considerations of justice and equity.

1. In municipal law, the exception was first recognized in the leading English case of Foss v.

Harbottle (2 Hare 461, (1843). On the basis of this case, Halsbury's Laws of England states the English law to be as follows:

> In an action to redress a wrong done to a company...the company is the only plaintiff. Proceedings may be brought, however, by any members in his or their own name or names where the majority will not allow the action to be brought in the name of the company and the act complained of is of a fraudulent character or oppressive...or where...the majority approves the act complained of... (Emphasis added). (15)

Similar exceptions exist in the laws of most other countries (16), and we may, for example, point to the law of France to illustrate the civil law form of the exception. Under French law, an action sociale ut singuli is permitted--

> ...(L)es actionnaires agissant isolement ont la faculte, si la societe demeure dans l'inertie, d'entretenir l'action sociale en leur nom personnel. (17)

Thus the basis of the exception, in municipal law, is that in a particular case, application of the normal rule would work injustice, in that those who ought to press the corporate claim will not or cannot do so, thereby causing injury to individual shareholders.

2. In international law, the exception finds substantial support in diplomatic practice, arbitral jurisprudence, and treaty practice. It is generally conceded that the leading case in the area of state protection of nationals who are shareholders in foreign corporations is the Delagoa Bay case,(18) in which Great Britain and the

United States both officially intervened on behalf of American and British interests in a Portuguese corporation. While both the British and American notes emphasized the fact that the Portuguese company was "almost defunct," the fact which was of ultimate importance was that those individuals whose interests were affected by Portugal's actions had no means available to them for redress of the alleged wrong other than an appeal for protection to their respective governments.

> The fact that a corporation is "defunct," as it was in the Delagoa Bay case, is really only relevant in so far as it precludes the possibility of effective remedy by corporate action. (19)

In the El Triunfo claim (20), the American owners of interest in a Salvadorean company appealed to their government for diplomatic protection. Arbitration was finally agreed upon, and in their award of damages the arbitrators stated:

> We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in the El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway arbitration. (21)

In 1925, the United States sought to assert a claim against Great Britain on behalf of the Standard Oil Company of New Jersey, as holder of almost all the shares of Romano-Americana, a company incorporated under the laws of Roumania and having its seat and sphere of oper-

ations entirely within that country. (22) The case involved the destruction of the corporation's properties by Roumania in cooperation with the Allied Powers in 1916, the actual demolition being carried out by a British officer. While the British note denied the right of the United States to intervene on behalf of its national as against Great Britain, it did admit that the precedents indicated a right of intervention in the United States and maintained simply that the claim lay against the Roumanian Government. (23)

In addition to the cases cited, there is a body of treaty law, (24), which further supplements the normal principle of respect for the juridical personality of associations and allows for exceptions to it where its application would cause injustice. These treaty stipulations

> ...testify to the existence of a practice acknowledging the propriety of interposition for cause on behalf of nationals interested through ownership of stock or securities under the laws of the foreign state. (25)

While an examination of the authorities seems to reveal a certain early reliance on some theory of constructive or actual "defunctness" of the corporation, it has been pointed out above (26) that the essential element of the claim is the absence of any effective remedy other than that afforded by diplomatic protection. De Visscher suggests that the raison d'etre of the normal

rule is that members of a corporation have submitted themselves to the law of a particular country for the purpose, inter alia, of ensuring protection for their interests, and when the interest of foreign nationals sustains damage for which there appears to be no effective redress, the raison d'etre for the normal rule disappears, and diplomatic intervention is permissible by the state of which such foreign shareholder is a national.

> Raisonner autrement c'est preter a la personnalite morale des effets qui compromettent le but meme en vue duquel elle a ete constituee; c'est abuser d'une abstraction aux depens des seules realites qui en justifient l'emploi. (27)

To interpret the word "defunct" as meaning "dissolution" would be logically unjustifiable and legally unsound, since when a company is actually dissolved a liquidator normally represents the interests of the company until all its outstanding claims are settled. (28) Thus it can be seen that the use of the word "defunct" in this context must be taken to mean a kind of "paralysis" in that the corporation is unable to take any effective action to redress the injury suffered.

The coercive control which Drongoland possesses over the majority of Windfall's shareholders, by reason of the substantial business done by them with the Government of Drongoland, does in fact paralyze Windfall in respect of any matter in which such coercive control is exercised. If there remained any doubt as to the effectiveness of this control, it was removed when these

shareholders, as a result of the letters received from the Government of Drongoland, and pursuant to special interests alien to their status as shareholders in Windfall, voted, against the rest of the shareholders, to request the Government of Arcadia to waive its claim.

If then Windfall is adjudged a Drongolese national, the reasoning presented thus far is sufficient to establish the right of Oceania to espouse the claim of William Randolph Bonassis. In the event that Windfall is found to be possessed of Arcadian nationality, however, further argument may be adduced in support of this claim.

In the Romano-Americana case mentioned above (29), it was noted that Britain denied the right of the United States to intervene on behalf of its national as against Great Britain. But it is highly significant that Great Britain denied responsibility for the injury to the company's property. Thus, the result can be considered as precedent only for the proposition that no claim will lie against a state of which the company in question is not a national and which is not responsible for the injury giving rise to the claim. It can in no wise be said that, under the precedent of this case, if the Roumanian corporation had been doing business in England, and the British Government had been responsible for injury to its property in that country, the United States would not then have had a right to espouse its claim against Great Britain.

Although the treaties mentioned above (30) do not restrict themselves to cases where injury is caused by the state of which a corporation is a national, it appears that there is no unequivocal precedent either for or against the proposition that in the absence of treaty the state may espouse the claim of its shareholder nationals when the state responsible for the wrong is not the state of which the corporation is a national. From this it has been assumed by some that the authorities cited above cannot be used to support such a proposition. (31) But such an approach is surely overly cautious, since it is based on reasoning which erects an arbitrary dividing line with a foundation in neither logic nor justice, but only in circumstance. It must be clear that the lack of precedent is a result of the fact that where the state responsible for the injury is not the state of which the corporation is a national, the diplomatic protection of the latter will normally suffice to protect the individual shareholder. To use this lack of precedent then to limit the legal rule is to bind the scope of international law to the narrow facts of the controversies which give birth to the rule, even though such restrictive interpretation runs contrary to the very raison d'etre of the rule. Some writers are willing to state clearly:

> When the state of incorporation refuses to give diplomatic protection, then the shareholders may rightly look to their own Governments for diplomatic assistance. (32)

And even those who reason in the narrow fashion described recognize the ambivalence of their position by admitting this to be the direction of the future. So, Al-Shawi states,

> Such shareholders may possibly be left without redress if the state of the nationality of the corporation is not willing to present the corporation's claim. In such a situation, it seems necessary to allow the state of the nationality of these shareholders to present their claims to the limit of their interest in the corporation. (33)

Jones, also, is in agreement--

> It may be that the same consideration will permit the extension of the exception to cases where the corporation is <u>not</u> such a national, and the shareholders cannot reasonably be said to possess any effective remedy other than the intervention of their own Government. (34)

Thus even if Windfall is found to be an Arcadian national, the claim of the United States of Oceania is sanctioned by international law. To maintain otherwise would be truly to exalt the visible effects of the rule over the fundamental cause of those effects and, indeed, to require this Court to follow slavishly individual instances of practice without regard to the underlying basis in justice and reason for the very existence of such practice.

QUESTION VI

THE REFUSAL OF THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND TO SUBMIT TO ARBITRATION PURSUANT TO THE CONCESSION AGREEMENT, IN ORDER TO DETERMINE ITS LIABILITY, IF ANY, TO WILLIAM RANDOLPH BONASSIS IN RESPECT OF SUCH LOSS OF VALUE OF HIS SHARES, RELIEVED WILLIAM RANDOLPH BONASSIS FROM THE NECESSITY OF EXHAUSTING HIS LOCAL REMEDIES UNDER THE LAW OF DRONGOLAND PRIOR TO THE PRESENTATION OF A CLAIM BEFORE THIS COURT.

It is a normal requirement of international law that before a state may intervene diplomatically to espouse a claim of its national against a state responsible for injury to such national, available local remedies must have been satisfied. (35) However, this general rule is subject to certain exceptions and in some circumstances is not applicable at all. (36) Whether this court finds Windfall, Inc. to be a national of the Republic of Drongoland or a national of Arcadia, the facts of this case place it within the admitted exceptions to the local remedies rule and outside the application of that rule.

A - <u>William Randolph Bonassis is relieved of the need to exhaust local remedies because the facts of this case place it within the admitted exceptions to the rule</u>.

In order to show state responsibility in contract cases, one school of thought maintains that a state is liable internationally upon mere breach of its contract with an alien; (37) others, however, hold that some tortious conduct on the part of the state must be shown before a claim may be brought on the international level.

Such tortious acts as abuse of rights, unjust enrichment, arbitrary breaches and abrogations of contracts with aliens, and non-performance of them not justifiable on the grounds of public interest or economic necessity, are suggested by the authorities as sufficient to give rise to responsibility. (38) Nevertheless,

> /I/f one examines these cases carefully, one finds that so far as they can be said to contain any common ground at all it is the feature of the use of the governmental power to defeat the obligations of the contract...an interjection of governmental power to alter the situation envisaged in the contract. (39)

Such tortio us conduct is clearly present in the instant case, as a result of: 1. passage by the Drongolese legislature of the amendment to the Claims Against the Government Act insofar as such amendment affects the concession agreement and, 2. refusal of the Drongolese Government to arbitrate the claim for ₱2,500,000 in reliance upon that amendment. (R-9) The tort is compounded by the threatening and coercive action taken against the shareholders of Windfall doing business in Drongoland, in order to prevent them from pressing their rightful claim. (R-11) Nor have these actions been justified on grounds of public interest or economic necessity. Without a showing of such justification, any contract not "internationalized" in some way could fall prey to the most capricious enactments of the local legislature. (40) These actions of the Drongolese Government constitute a prima facie case of tortious conduct, which is all that need be

shown here, detailed proof of Drongoland's violation of its international obligations being reserved by the stipulation of Article II(c) of the Special Agreement to a further hearing. (R-4)

It is a universally recognized exception to the rule requiring exhaustion of local remedies that remedies which would be futile if pursued need not be exhausted. (41) If the injury cannot be adequately and effectively redressed by local remedies, diplomatic interposition is timely as of the original breach. (42)

Among the circumstances under which it is generally accepted that local remedies need not be exhausted is "when the injury to the alien is the result of the act of the government as such." (43) When the injury is considered to have been

> ...inflicted under orders of the highest authorities of Government.../there is no logical reason/ for the local sovereign to be given an opportunity of examining the facts and law giving rise to the claim...(44)

> /T/he scope of the local remedy rule is limited to the reasonable opportunity which may be afforded the local sovereign to make good the injury and thus make unnecessary an international claim. (45)

A further circumstance in which a defense based on non-exhaustion of local remedies cannot succeed is when the unavailability of such remedies is shown by the terms of an "unambiguous municipal enactment." (46)
Both of these exceptions are clearly applicable to the instant case, for the acts complained of have indeed

been those of the "highest authorities of Government," and the amendment to the Claims Against the Government Act "unambiguously" prevents the local courts from providing adequate redress. It must be remembered that the controversy before this Court arises from injury to William Randolph Bonassis "caused by Drongoland's refusal to settle Windfall's claim" (R-11) for $2,500,000, i.e., Drongoland's refusal to arbitrate the claim. It is not based solely on Drongoland's refusal to pay the amount due to Windfall for goods supplied. Thus this cannot be considered as a mere breach of contract by the Government of Drongoland, such as might be adequately redressed in the local courts, but rather as a deliberate and blatant abrogation by the Government of Drongoland of the express terms of the concession agreement, on the ground of municipal legislation inconsistent with the agreement.

The very essence of the concession agreement has been vitiated by the passage of legislation and by executive actions altering its terms, in violation of Article 15; and by the refusal of the Drongolese Government to arbitrate, in violation of Article 16(1). How can it be maintained under these circumstances that the corporation must, each time a dispute arises, look to the local courts for redress, when the very necessity of looking to the local courts is the basis of the violation complained of? How can it be maintained that Bonassis must demand diplomatic protection only if no adequate remedy can be obtained in the local courts

when resort to the local courts in the first instance is sufficient to establish the inadequacy of any remedy which might be obtained therein?

This is hardly a frivolous claim, considering the dissimilarity between proceedings in local courts and the arbitration provided by Article 16 of the concession agreement. The latter avoids the display of disputes before the public which normally attends local court proceedings, thus maintaining a reserve of good will and facilitating a return to mutual confidence and harmonious business relations between the parties. Secondly, the arbitration clause furnishes a method of insulating the dispute from Drongolese law, Drongolese courts, and all Drongolese influence; a method of ensuring the greatest impartiality in the settlement of disputes. Third, the finality of the arbitral award tends to expedite claims in an efficient and business-like manner, without the potentially lengthy appeals and legal maneuvers characteristic of court procedure. Fourth, highly technical issues which may arise can normally be handled more competently by trained arbitrators than by the courts. The list could be extended, (47) but the point is already amply demonstrated: The arbitral procedure envisaged by the concession agreement possesses features which cannot be duplicated in the courts, therefore the substitution of the one for the other can never result in the adequate remedy which alone can suspend

diplomatic intervention.

B - William Randolph Bonassis is relieved of the need to exhaust local remedies because the facts of the case place it outside the scope of application of the rule.

The concession agreement between Windfall and Drongoland by its very terms, cannot be characterized as a simple contract governed by the law of the contracting state. (48) As was p ointed out above, there is every reason to believe that the fundamental purpose of the parties was to insulate the execution of the agreement from Drongolese law and the Drongolese courts, to withdraw disputes arising under the agreement from the competence of the local system of justice. To this end, the parties expressly provided that the law to be applied was international law as "contained in Article 38(1) of the Statute of the International Court of Justice;" and that the procedure of arbitration would be "that followed... by the International Court of Justice." In addition, they stipulated that a series of specific steps be followed in the selection of those who would settle their differences, (R-7,8), thereby showing their desire to bring differences before the most impartial tribunal possible.

If it is found that Windfall is an Arcadian national, the concession agreement is between a state and an alien. The generally accepted view is that such an agreement, since it is governed by international law, is in many ways equivalent to a treaty between states, and, therefore,

that the principle of pacta sunt servanda applies to the obligations imposed by such an instrument. (49) In at least two situations, this principle has been recognized by virtually all authorities: a) where it is stipula ted in the instrument that it shall be governed by international law or the equivalent; and b) where the instrument contemplates settlement by international arbitration. (50)

Although the authority is somewhat less explicit on this point, it nevertheless can be said that modern international law recognizes that even where a concession is granted by a state to its own national corporation, if a substantial part of the capital and the shareholders are drawn from other countries, and the contract takes the form of an "economic devel opment" concession, an arbitration clause referring disputes to international arbitration under international law, succeeds in taking the concession agreement out of the competence of the local courts. (51) Thus the rule regarding exhaustion of local remedies is not applicable to the claims arising from the concession agreement in the instant case, whether Windfall is a Drongolese or non-Drongolese corporation.

The result is justifiable on strict international legal grounds alone, but the law itself is founded upon considerations of economic and political policy. One such consideration is that in practice, the presence of arbitration clauses requiring resort to international

law are often used as an inducement for the formation of the corporation or for the conclusion of the concession agreement (52), or both, as seems likely in the present case. But the most compelling policy reason for this Court to uphold the validity of the arbitration clause in this case (and, by implication, all such arbitration clauses), is that an adverse decision would henceforth render all but meaningless a valuable device for the peaceful settlement of disputes which promises to grow even more important—particularly in the developing nations of the world—in the decades ahead.

NOTES

1) 179 League of Nations Treaty Series 89; 5 Hudson, International Legislation 359. (Principle approved by League of Nations Codification Conference, Bases of Discussion (1929), v. 1, pp. 13-20; cf. Minutes of the First Committee (1930), v. 15, pp. 19-36, 205-210.) See also 3 Moore, Digest of International Law 302-311, 513-516 (1906); Jones, J. Mervyn, British Nationality Law and Practice (1947), p. 15; Kunz, Joseph L., The Nottebohm Judgment, 54 American Journal of International Law, no. 3 (July 1960), pp. 545-546; Nottebohm Case (second phase), I.C.J. Reports 1955, p. 20.

2) See 2 Hyde, International Law 1064 (2d ed. 1945).

3) See, e.g., the Canevaro Case, Scott, Hague Court Reports (1916), p. 284; 6 A.J.I.L. 746 (1912); and discussion in 5 Hackworth, Digest of International Law 819-822.

4) Nottebohm Case, pp. 20-21.

5) Id., p. 22.

6) E.g., Jessup, Philip C., A Modern Law of Nations (1948), p. 72; and Kunz, Joseph L., The Nottebohm Judgment, 54 A.J.I.L., no. 3 (July 1960), p. 546.

7) For discussion see the various dissenting opinions in the Nottebohm Case.

8) Nottebohm Case, p. 17.

9) Id., p. 22.

10) Id., pp. 24-26.

11) Id., p. 24.

12) Kunz, op. cit., pp. 553-554; Jessup, loc.cit.

13) Jones, J. Mervyn, Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies, 26 British Year Book of International Law 225, 227, 232 (1949); Al-Shawi, Khalid A., The Role of the Corporate Entity in International Law (1957), p. 44.

14) Jones, Claims on Behalf of Nationals, pp. 227 et seq.; Al-Shawi, op.cit., pp. 44 et seq.

15) (2d ed. 1932), v. 5, p. 318, sec. 522.

16) Jones, Claims on Behalf of Nationals, pp. 233-234, and authorities cited.

17) Houpin et de Bosvieux, Traite general theorique et pratique des societes civiles et commerciales (7th ed. 1935), v. 2, p. 620, no. 1368.

18) (1883); 2 Moore, International Arbitrations 1865 (1898); U.S. Foreign Relations (1902), p. 848.

19) Jones, Claims on Behalf of Nationals, p. 257.

20) U.S. For. Rel. (1902), p. 838.

21) Id., p. 873.

22) U.S. For. Rel. II (1928), p. 957; 5 Hackworth, Digest 840.

23) See also the Tlahualilo Case, U.S. For. Rel. (1913), p. 993; and the Ziat Ben Kiran Case, British claims in Morocco under the Anglo-Spanish Agreement of 1923: Annual Digest (1923-1924), Case no. 102; Reclamations britanniques dans la Zone espagnole du Maroc: Rapports (1925), p. 185. Also, Suez Canal Company dispute--for details Pinto, Annuaire francaise de droit international (1957), v. 2, p. 23; and details of subsequent settlement, Revue Egyptienne de Droit International (1958), v. 3, Appendix I.

24) See Jones, Claims on Behalf of Nationals, pp. 251-254.

25) 2 Hyde, Int'l Law 908 (rev'd ed. 1945).

26) See the quotation from Jones on p. 13.

27) De Visscher, Charles, Revue de droit international et de legislation comparee (3d series), 15 (1934), p. 642; see also the comment of Mr. W. A. Bewes, in Beckett, W.E., Diplomatic Claims in Respect of Injuries to Companies, 17 Transactions of the Grotius Society 194 (1932).

28) Beckett, op. cit., pp. 190-191.

29) Pp. 13-14.

30) See footnote 24.

31) See Al-Shawi, op. cit., pp. 51, 55-56; Jones, Claims on Behalf of Nationals, pp. 257-258.

32) Wortley, B.A., Expropriation in Public International Law (1959), p. 144.

33) Op. cit., p. 55.

34) Claims on Behalf of Nationals, pp. 257-258.

35) Panevezys-Saldutiskis Railway, (Estonia v. Lithuania), (1939), P.C.I.J., Series A/B, no. 76, p. 18; 4 Hudson, World Court Reports 341.

36) See, e.g., 5 Hackworth, Digest 511-516.

37) Schwarzenberger, The Protection of British Property Abroad, 5 Current Legal Problems 315 (1952); Wadmond, L., Sanctity of Contract between a Sovereign and a Foreign National, A.B.A. London Conference Proceedings (July 26, 1957), p. 6; Brandon, M., Legal Aspects of Private Foreign Investments, 18 Federal Bar Journal 338-339 (1958). See also American Branch Reply to the 48th I.L.A. Conference, N.Y., Questionnaire (1958) : "...The contractual obligations freely

assumed by a state towards aliens are no less binding than its treaty obligations."

38) Mann, op. cit., pp. 572-591; Borchard, E.M., The Diplomatic Protection of Citizens Abroad, p. 284; Dunn, F.S., The Protection of Nationals (1932), p. 167; Whiteman, Damages in International Law, v. 3, p. 1558. For a summary of this view, see Amador, Garcia, 4th Report to the International Law Commission on State Responsibility (Feb. 1959), U.N. Documents, A/CN.4/119.

39) Dunn, op. cit., p. 167.

40) See Amador, 3d Report to the International Law Commission on State Responsibility, A/CN.4/116.

41) See, e.g., the Finnish Ships Case (1934), 3 R.I.A.A. 1479.

42) Freeman, Alwyn, The International Responsibility of States for Denial of Justice (1938), especially p. 406.

43) Lauterpacht, Hersch, Oppenheim, v. 1, p. 362; see also authorities there cited; Dunn, op. cit., p. 167; Amador, 4th Report, A/CN.4/119, paragraphs 111-138; and Fawcett, 31 B.Y.B.I.L. 458 (1954).

44) Freeman, op. cit., pp. 433-434.

45) Borchard, 28 A.J.I.L. 732 (1934), as quoted by Freeman, op. cit., p. 434. See also Waldock, 31 B.Y.B.I.L. 101

(1954); 5 Hackworth, Digest 504; 6 Moore, Digest, sec. 987.

46) Lauterpacht, op. cit., pp. 362-363; Wortley, op. cit., p. 142.

47) See, e.g., Carabiber, Charles, L'Arbitrage en droit international prive (1960), pp. 17 et seq.

48) Cf. the following intruments:

A-The Judicial Settlement clause of the 5% 1932 and 1935 Bonds of the Czechoslovak Republic guaranteed by France; see Mann, Law Governing State Contracts, B.Y.B.I.L. (1944), p. 21;

B-Anglo-Iranian Concession Agreement, 29 April, 1933, Art. 21;

C-The Lena Goldfields, Ltd. Concession Agreement with the U.S.S.R. (1925);

D-The Concession Agreement between the Sheik of Abu Dhabi and Petroleum Developments (Trucial Coast) Ltd.;

E-The Iranian Consortium Agreement (1954), Art. 45;

F-The Concession Agreement of the Gulf Oil Co. and the Government of the United Kingdom of Libya (Official Gazette (June 19, 1955), p. 73.

49) Carabiber, Les Arbitrages entre gouvernements et particuliers, Hague Recueil des Cours (1950); Wadmond,

op. cit.; Jessup, Transnational Law (1956), pp. 2, 102; Schwarzenberger, op. cit., p. 315; Farmanfarma, The Oil Agreement between Iran and the International Oil Consortium: the Law Controlling, 34 Texas L. Rev. 289 (1955); McNair, The General Principles of Law Recognized by Civilized Nations, B.Y.B.I.L. (1957), p. 3; Carlston, K.C., International Role of Concession Agreements, 52 Northwestern L. Rev. 620-622; Huang, Some International and Legal Aspects of the Suez Canal Question, 51 A.J.I.L. 296 (1957). For a summary, see Amador, 4th Report, A/CN.4/119.

50) See Amador, 4th Report, A/CN.4/119.

51) See Lauterpacht, op. cit., v. 1, p. 219; Verdross, A., Volkerrecht (1951), p. 326; Rubin, Private Foreign Investments (1956), ch. 2; Schwebel, The International Protection of Contractual Arrangements, A.S.I.L. Proceedings (1959).

52) See footnotes 49 and 51.