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.

Harvard Memorial† #4

† The winner of the competition is unknown.

IN THE INTERNATIONAL COURT OF JUSTICE

ARCADIA v. DRONGOLAND

UNITED STATES OF OCEANIA v. DRONGOLAND

MEMORIAL FOR DRONGOLAND

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STATEMENT OF FACTS

By special agreement the Government of Arcadia and the Government of the Republic of Drongoland have submitted to the International Court of Justice, for determination, differences arising over Drongoland's expropriation of certain property of Windfall, Inc., a company incorporated in Arcadia and doing business in Drongoland.

By special agreement the Government of the Republic of Drongoland and the Government of the United States of Oceania have submitted to the Court, for determination, differences arising over a claim by William Bonassis, a shareholder of Windfall, Inc., for the loss in value of his shares in said company, in consequence of the alleged breach by Drongoland of its Concession Agreement with Windfall, Inc., with respect to moneys claimed to be due to said company.

A joint statement of the facts was submitted to the Court.

Windfall was incorporated in Arcadia in 1950. Drongolese nationals, through majority holdings in companies owning Windfall stock, have always had effective control of Windfall. Although one of the stockholders is also a company incorporated in Arcadia, no individual Arcadian nationals own stock in Windfall. Bonassis owns a large minority interest in the company.

Windfall and Drongoland negotiated an agreement, by which Windfall was given certain mining privileges in Drongoland and in return was to pay royalties and annual fees to that State. Drongoland also agreed to purchase fixed amounts of aluminum

from Windfall. The agreement contained provisions to the effect that Drongoland should neither annul nor alter the terms thereof by legislative or executive action. Also, it contained an arbitration clause to facilitate the clearing up of disputes.

Pursuant to the Concession, Windfall began operations in Drongoland in December, 1950. By 1955, 60 per cent of Windfall's income came from exports of aluminum and other products from Drongoland, the rest came from sales within Drongoland. In September, 1956, the Drongolese legislature passed a law requiring all actions, by any persons, to be brought in the courts of that State. The act was to apply notwithstanding any prior contrary agreement. In January, 1957, Drongoland denied a Windfall claim as to moneys allegedly owed for aluminum supplied to it under the Concession. The Government refused to submit the difference to arbitration on the ground that the legislation of September, 1956, was controlling and that it could not recognize any arbitral award purportedly made pursuant to the Concession Agreement. After Windfall threatened to cut off aluminum supplies, the Drongolese legislature passed an act expropriating part of Windfall's property under the Concession. Drongolese legislatures were appointed to assess compensation. Drongoland having refused to submit the legality of the expropriation and the issue of compensation to arbitration, Windfall appealed to the Government of Arcadia for diplomatic protection.

In May, 1958, at a shareholders meeting, it was resolved

that the company request pressing of the expropriation claim, but not that in regard to moneys owed for aluminum supplied to Drongoland. The latter motion was opposed by Bonassis, but supported by the companies controlled by Drongolese nationals. These companies had presented letters, allegedly received from the Drongolese Minister for National Development, which alluded to possible future economic sanctions on the part of Drongoland in regard to these firms.

In consequence of the waiver, Bonassis requested the Government of Oceania to seek compensation from Drongoland for the value of his shares in Windfall. Bonassis possessed Oceanian nationality, acquired jure soli. His birth had occurred while his parents, both citizens and residents of Corvo, were visiting Oceania in 1904. In 1905 they returned with Bonassis to Corvo, where he remained until he was twenty-two. Bonassis did not opt Corvonian citizenship upon attaining the age of twenty-one. He worked in Oceania from 1927 to 1933. He built a home there, but never voted in any Oceanian elections and never participated in any Oceanian public affairs. In 1933, he married a Thule national and moved to that State. Since 1939, he has spent at least three-quarters of each year outside Thule. He has maintained his house in Oceania, but has visited that State on only four brief business trips in the last ten years.

In contrast, his wife has remained in Thule. His children were educated and still reside there. His private funds are concentrated there. He has played a leading part in Thule civic affairs and has contributed generously to local philanthropic foundations. However, Bonassis has not acquired Thule citizenship.

QUESTIONS PRESENTED

I. Does Windfall, Inc., possess the nationality of Arcadia requisite to enable the Government of Arcadia to espouse its claim against the Government of the Republic of Drongoland?

II. Did 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, in respect of the expropriation of property of Windfall, Inc., relieve the Company from the necessity of exhausting its local remedies under the law of Drongoland prior to the presentation of a claim before this Court?

III. Does William Randolph Bonassis 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?

IV. If question III is answered in the affirmative, is the United States of Oceania 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?

V. If questions III and IV are answered in the affirmative, did 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, relieve 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?

ARGUMENT I

THE GOVERNMENT OF ARCADIA SHOULD NOT BE ALLOWED TO ESPOUSE THE CLAIM OF WINDFALL, INC., BECAUSE WINDFALL, INC., DOES NOT POSSESS ARCADIAN NATIONALITY REQUISITE TO THAT STATE'S GRANTING IT DIPLOMATIC PROTECTION FOR PURPOSES OF INTERNATIONAL LAW.

In determining whether a State may validly extend diplomatic protection to an individual claimant, the Court should look to principles of international law, rather than the laws of the moving State. See the Nottebohm Case [1955] I.C.J. Rep. 4.

There are three views in regard to determining the nationality of a corporation.

1. A corporation takes the nationality of the State in which it has been incorporated. This view is the rule of American law.

2. A corporation takes the nationality of the State where it has its principal place of business, i.e., its real seat. This view is generally adhered to in continental Europe.

3. A corporation takes the nationality of the State wherein its "control" is effectively lodged, i.e., of the State whose nationals own a controlling share of the corporation. This view was an outgrowth of the corporate problems activated by the First World War. Williams and Chrussachi, "The Nationality of Corporations," 49 Law Quarterly Rev. 334 (1933), passim. (The authors regard the rule of site of incorporation as the best of the three rules.)

In the present case, the only States that would be able to claim Windfall as a national are Arcadia and Drongoland. Arcadian nationality could be found to exist by virtue of

Windfall's incorporation therein. Drongolese nationality could be established either:

1. By virtue of the fact that Drongoland is the principal State in which Windfall does business; or

2. By virtue of the fact that ultimate control of the corporation rests with Drongolese nationals.

Drongoland contends that, although the rule that a corporation takes the nationality of the State of incorporation is given much weight in municipal law (e.g. United States), for purposes of international law the Court should require that some "genuine link" exist between the corporation and the State before the latter is able to accord diplomatic protection to the former. This contention finds support in a recent case decided by this Court in the area of the right to grant diplomatic protection, Nottebohm Case [1955] I.C.J. Rep. 4. Therein, the Court held that the mere legal relation between Nottebohm (who had required nationality by naturalization) and Liechtenstein was not sufficient, for purposes of international law, for Liechtenstein to seise the Court of his claim. The Court contended that a "genuine link" must exist between the individual and the State. To determine if such a connection, in fact, did exist, the Court reviewed Nottebohm's ties with those States with which he had had material contacts and compared these to his relations with Liechtenstein. The Court considered that, in juxtaposition, his actual connections with Liechtenstein were extremely tenuous. The claim was held to be inadmissible. Although the Nottebohm Case dealt with the right of a State to espouse

the claim of an individual, rather than a corporation, this distinction is not fatal to the analogy. There is a close similarity between the process of nationalization and that of incorporation. Both can be taken as an expression of intent to become a national of the particular State, and hopefully, to be accorded its diplomatic protection. See Williams and Chrussachi, "The Nationality of Corporations," 49 Law Quarterly Rev. 334, 347-348 (1933). Yet, if the mere intention of the individual was not determinative in the Nottebohm Case [1955] I.C.J. Rep. 4, that of a corporation should be given even less weight. The shareholders of a corporation can change. An original intent can all but be lost in the course of later events. Furthermore, if anything, the intent of the person (legal or natural) who seeks the nationality of a State with which, in the future, he will have little or no ties, should be open to suspicion. Such suspicion grows when it is realized that (as is the case with Windfall) the organizers of the corporation are nationals, or are in turn (as is the case with Antix, Inc.) controlled by nationals, of the State with which later conflict is most likely to occur. Therefore, as legal persons, just as natural persons, must have both factual and legal relationships with States, there seems to be no inherent reason why the "genuine link" theory of the Nottebohm Case [1955] I.C.J. Rep. 4 is not applicable to corporations.

This contention is given further support when one realizes that both the rules of situs of business operations and situs of effective control in determining corporate

nationality are, in reality, merely tests to uncover a genuine link between the corporation and the State. Thus, there is ample groundwork upon which to support an "extention" of the Nottebohm Case [1955] I.C.J. Reps. 4, into the area of international corporations.

This position is fortified by the recent codification of the law of the high seas. The Geneva Conference, in regard to the nationality of ships, adopted the following rule:

Article 5

> 1. Each state shall fix the conditions for the grant of its nationality to ships. . . . There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. U. N. Doc A/Conf. 13/L. 53 (Emphasis added).

Two conclusions can be drawn from this article. Firstly, one must look to municipal law to determine the nationality of a ship. Secondly, there must exist a genuine link between the ship and the State for that nationality to be given effect in international law. This latter conclusion is based on the realization that if the mere grant of nationality by a State to a ship were sufficient to give that State the right to grant diplomatic protection to the ship, there would be no reason to require the genuine link. However, the necessity of the genuine link is given vitality when it is construed to mean that a ship's nationality need not be recognized for purposes of international law by other States, unless there is a genuine link between ship and State. This theory is strengthened by the fact that, in adopting the concept of the genuine link, the

Conference used the Nottebohm Case [1955] I.C.J. Reps. 4 as its precedent.

If the Nottebohm Case was considered relevant in establishing the standards by which a State is deemed to possess the right to grant diplomatic protection to a ship, there is no logical reason why it cannot be applied in the case of a corporation. The registration of a ship and the incorporation of a corporation are for all practical purposes the same. Thus, if in the case of a ship the mere site of registration, without more, is not sufficient to establish the State's right to grant diplomatic protection then too, in the case of a corporation the mere site of incorporation, without more, should not be deemed sufficient to establish that right.

In conclusion, as the trend in international law is to look to a genuine link in regard to the right of a State to espouse the claim of a national (whether that national be a natural person or a legal person), and as the law in regard to corporations (at least on the Continent) has long been seeking to apply variations of the link theory in determining corporate nationality, this Court should apply that test to the present situation. In so doing, the Court should find that the sole act of Windfall's incorporation in Arcadia (in contrast to its situs of business and ultimate ownership which are in Drongoland) does not effectively establish a genuine link between Arcadia and Windfall. Therefore, the Court should decide that Drongoland need not recognize the existence of any Arcadian national character on the part of Windfall.

ARGUMENT II

ARCADIA'S CLAIM IN BEHALF OF WINDFALL, INC., IS PREMATURE BECAUSE THE COMPANY FAILED TO EXHAUST ITS LOCAL REMEDIES WITH RESPECT TO ITS CONTRACT RIGHT TO ARBITRATION AND ITS PROPERTY RIGHTS.

It is a well settled rule of international law that before a country can maintain an action in behalf of its national it must be clear that no relief is available from the respondent state's own settlement institutions because of binding decisions or inability to entertain the case. Panevezkys-Saldutiskis R.R. Case, P.C.I.J. ser. A/B, 76 (1939) 4, 18.

The basic policy behind this rule would seem to be fairly explicit, viz.,

> ...the respondent state is entitled, first of all to discharge its responsibility by doing justice in its own way, but alos to the investigation and adjudication of its own tribunals upon the questions of law and fact which the claim involves and then on the basis of this adjudication to appreciate its international responsibility and to meet or reject the claim accordingly. Finnish Vessels Case (Finland v. Great Britain), 3 U.N. Rep. Int'l Arb. Awards 1501 (1934).

Furthermore, it might be noted that insofar as the individual involved has voluntarily established a genuine link with the allegedly delinquent state this rule would not seem to work any basic injustice. Meron, "The Incidence of The Rule of Exhaustion of Local Remedies," 35 Brit. Yo. Int'l L. 94-100 (1959).

Turning now to the specific case at hand, a consideration will first be given to the contract rights and then to the property rights.

The Company's alleged right to compulsory arbitration is an individual contract right which no state may espouse until both its existence and denial have been shown. A local suit for specific performance or damages is clearly provided for by the Drongolese Claims Against the Government Act.

The Claims Against the Government Act as amended in 1956 would not necessarily appear to preclude the success of an action inasmuch as it might be interpreted to merely require a court order that the arbitration take place, thus giving judicial control. Furthermore,

> In nearly every jurisdiction it is recognized that, even in countries where courts are bound to apply municipal law, even if contrary to international law, a rule of construction obliges them to try to interpret laws wherever possible so as not to conflict with international law. Zander, "Act of State Doctrine," 53 A.J.I.L. 841 (1959).

Judge Lauterpacht recently emphasized this same point in a discussion of the local remedies rule, and went on to say that, despite an apparently contrary statute, an attempt to obtain local relief should be made, however contingent and theoretical it may seem. Norwegian Loans Case [1957] I.C.J. Rep. 39 (dissent) (decided on other grounds).

Thus, it appears possible to bring a claim for breach of the arbitration agreement and there is no indication that it would be doomed to failure.

As to the alleged unlawful expropriation, it would seem that relief is possible and should have been sought first. To be sure, under the Concessions Agreement as it was originally negotiated, this question would have been subject

to arbitration, but it does not follow that if such arbitration is now impossible (which can not be finally determined until Drongoland's Courts rule) that judicial relief is not feasible and that this change of remedy would be prejudicial. There is no indication that the Company would not be received in court under the Drongolese Claims Against The Government Act. There being no question of the possibility of a local suit the policy of allowing the state involved to clean its own house would seem most applicable.

In summary, international law in accordance with sound policy requires that international tribunals refuse to entertain a case unless application for local remedy has been made.

ARGUMENT III

ALTHOUGH BONASSIS IS AN OCEANIAN NATIONAL JURE SOLI AND ALTHOUGH HE HAS NO TIES WITH DRONGOLAND, THE RULE EXPOUNDED IN THE NOTTEBOHM CASE IS APPLICABLE TO THE PRESENT SITUATION BECAUSE (a) THE RULE LOOKS TO THE FACTUAL CONNECTION BETWEEN THE STATE AND THE INDIVIDUAL WHICH ENSUES FROM NATIONALITY, RATHER THAN THE MERE LEGAL METHOD BY WHICH NATIONALITY IS ACQUIRED; AND (b) THE RULE LOOKS TO THE GENUINE LINK BETWEEN THE INDIVIDUAL AND THE ESPOUSING STATE, RATHER THAN TO ANY CONNECTIONS BETWEEN THE INDIVIDUAL AND THE DEFENDING STATE. APPLYING THE RULE THE COURT SHOULD FIND THE BONASSIS DOES NOT POSSESS A SUFFICIENT NEXUS WITH OCEANIA, REQUISITE TO THAT STATE'S ESPOUSING HIS CLAIM.

Assuming that Bonassis validly possesses Oceanian nationality, the issue is whether the rule established in the Nottebohm Case, [1955] I.C.J. Rep. 4, can be invoked by this Court to determine whether there is a sufficient factual tie between Bonassis and Oceania so as to permit that State to espouse his claim. The answer lies in the nature of the rule itself: does its validity rest upon the factual situation presented in the Nottebohm Case, or does it have independent significance? If the mode by which Nottebohm obtained Liechtenstein nationality, to wit, by naturalization, and the nature of his relationship to Guatemala motivated the formulation of the rule, then clearly it is inapplicable in this case. However, if it was the absence of a genuine link between Nottebohm and Liechtenstein that prompted the Court to establish the rule, then this Court may apply it to determine whether there is a sufficient nexus between Bonassis and Oceania.

Firstly, is the rule applicable in a case where the individual acquired his nationality jure soli?

In international law, nationality is attained jure sanguinis, jure soli or by naturalization. However, once nationality is validly secured the legal means by which it has been acquired offers the individual no greater benefits. The quantum of nationality is absolute. Nationality is not measured by degrees. To hold that the rule is applicable only in cases involving nationality acquired by naturalization will create an artificial distinction (recognized neither in municipal nor in international law) between the legal modes of attaining nationality. Degrees of nationality will result: with nationality jure sanguinis or jure soli affording the individual greater rights than those of the naturalized national.

Furthermore, such a holding would not be in accord with the basic premise of the rule. The Court in the Nottebohm Case did not even deal with the bare legal connection between the individual and the State. It went beyond the issue of nationality and considered the factual relationship between the State and its national. Certainly, if a case arose presenting a factual situation similar to that of the Nottebohm Case, but with the individual acquiring his nationality jure soli, having no further contact with the State, and then returning years later to seek diplomatic protection, it would be hard to see how a non-application of the Nottebohm Rule could be justified. Moreover, it would seem that the Court in the Nottebohm Case had answered this question when it said that:

> A State cannot claim that the rules it has . . . laid down relating to nationality are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States." Nottebohm Case, [1955] I.C.J. Rep. 4, 23. (Emphasis added.)

Therefore, the Court can properly apply the Nottebohm Case here because there is no legal justification for differentiating between the methods of acquiring nationality; and because it is the factual relationship that flows from the legal conclusion of nationality, not the conclusion itself, that is the basis of the rule.

Secondly, is the rule applicable in a case where the individual has little or no ties with the defending State?

1. The mere fact that the Court held that the scope of the question was "whether the nationality conferred on Nottebohm can be relied upon as against Guatemala" and that Liechtenstein "is not entitled to extend its protection to Nottebohm vis-a-vis Guatemala" is not conclusive. Nottebohm Case, [1955] I.C.J. Rep. 4, 20, 24. The Court could only decide the issue vis-a-vis Guatemala. It was the only defending State. Therefore, the Court was not faced with the question of Liechtenstein's right of espousal in regard to other States. In fact, had the Court entertained this "broader" question, the competency of its decision would be doubtful because it would have entailed a ruling as to States which were not represented before the Court.

2. The reasons invoked by the Court to deny Liechtenstein's claim to exercise diplomatic protection were

necessarily based on the manner in which Nottebohm had acquired Liechtenstein nationality and his overall relations with that State, and not on any special reasons which Guatemala may have had for refusing to recognize that nationality. Nottebohm Case, [1955] I.C.J. Rep. 4, 60 (dissenting opinion per M. Guggenheim, Judge ad hoc). This conclusion is bolstered by the fact that, regardless of how overwhelming the closeness of the connection between Nottebohm and Guatemala, the Court would have allowed Liechtenstein to espouse this claim had he had the nexus with Liechtenstein requisite to establishing a genuine link for the purposes of international law.

3. Any theory of a close "bond" between Nottebohm and Guatemala which would make inequitable a suit by Liechtenstein on his behalf is dispelled by the following facts: in 1943 Nottebohm was arrested by Guatemalan authorities and deported as an enemy alien; in 1946 Nottebohm was denied reentry to Guatemala; and in 1949 Nottebohm's property in Guatemala was expropriated without compensation.

4. The above contention is further borne out by the Court's evaluation of the "essential facts." The Court did not confine itself to Nottebohm's relations with Guatemala, but gave equal consideration to his prior ties with Germany. The Court then concluded that, in contrast, Nottebohm's actual connections with Liechtenstein were extremely tenuous. Nottebohm Case, [1955] I.C.J. Rep. 4, 25. Certainly, if the Court had been concerned with Nottebohm's "bond" with Guatemala it would not have gone into his relationship with Germany, which (concerning this issue) would have been immaterial.

But, Nottebohm's ties with Germany are material if the Court had been weighing his connections in regard to Liechtenstein with those he had with all States, throughout his lifetime, to determine whether he had established a genuine link with Liechtenstein.

Therefore, the Court can properly apply the Nottebohm Case here because its essence is in determining whether the individual has a genuine connection with the State seeking to grant diplomatic protection; and not whether any equities resting in the defending State render it immune from such suit.

The facts in the present case warrant a finding against the right of Oceania to espouse the claim of Bonassis:

Bonassis acquired Oceanian nationality because of a fortuitous event, to wit, his birth while his parents were merely passing through that State. It is material to note that the Court in the Nottebohm Case,,[1955] I.C.J. Rep. 4, 25, alluded to the "transient character" of Nottebohm's naturalization. Bonassis' other contacts with Oceania were predicated solely on his business needs. He never voted in an Oceanian election; nor did he ever participate in Oceanian public affairs.

In contrast, he had established traditions, interests, activities and family ties with Corvo (where his parents live and where he was raised) and with Thule (where his wife lives; where his children were raised and educated; where his private funds are located; and where he is active in civic affairs).

Therefore, except for seeking Oceanian protection, based on his "birth right," Bonassis has shown no desire "of becoming wedded to its traditions, its interests, its way of life

or of assuming the obligations . . . and exercising the rights pertaining to the status thus acquired." Nottebohm Case, [1955] I.C.J. Rep. 4, 26.

Consequently, the Court should find that Oceania is not entitled to extend its protection to Bonassis vis-a-vis Drongoland and should hold its claim to be inadmissible.

ARGUMENT IV

THE UNITED STATES OF OCEANIA IS NOT ENTITLED TO ESPOUSE A CLAIM BY WILLIAM RANDOLPH BONASSIS BECAUSE INJURIES TO A CORPORATION GIVE A RIGHT OF ACTION TO THE CORPORATION ALONE SO LONG AS IT REMAINS VIABLE.

In a long line of arbitral decisions and diplomatic disputes a general rule of international law has evolved, viz., a state can not espouse a claim for injury to a shareholder national if the corporation involved still functions effectively.

Firstly, a consideration of the cases where the shareholder nation was not permitted to maintain a claim.

In 1903 a Netherlands-Venezuelan Commission ruled in regard to a claim put forth by a Dutch shareholder in a Venezuelan corporation,

> It is a Venezuelan corporation created and existing under, and by virtue of, Venezuelan law, and has its domicile in Venezuela.... It is the corporation whose property was injured. It may have a rightful claim before the Venezuelan Courts but it has no standing here. The shareholders being Dutch does not affect the question. The nationality of the Corporation is the sole matter to be considered. Baasch and Romer v. Venezuela, Ralston, Venezuelan Arbitrations of 1903, 909-10.

Commenting on this case Dr. J. M. Jones said,

> It will be noticed that there was no evidence that the Venezuelan corporation was incapable of asserting its rights in the courts, or that it had attempted to do so, or that there was any obstacle or conspiracy among the directors which prevented it from doing so. Jones, "Claims in Behalf of Nationals Who Are Shareholders in Foreign Companies," 25 Brit. Yo. Int'l L. 246 (1949) (emphasis added).

Another case from a Venezuelan Commission of 1903 also lends support to the general rule. In the Kunhardt Claim a suit by an American shareholder was rejected. Kunhardt v.

Venezuela, Ralston, Venezuelan Arbitrations of 1903, 63. The Venezuelan commissioner stated that the corporation involved was still existing and consequently should be the source of any claim. Ibid., 71-72. The American commissioner recognized the general rule although he contended that the corporation was not in existence. Ibid., 67.

In the Tlahualilo Case the United States of America and the United Kingdom intervened diplomatically for nationals who were shareholders and bondholders of a Mexican corporation allegedly injured because of a violation of a concessions agreement. Tlahualilo Case, Foreign Rel. U.S. 1913, 993. Mexico rejected the claims of the two states on the grounds that the corporation was Mexican, and later it concluded a settlement with the still functioning corporation. Ibid., 996, 1008.

The Romano-Americana Case involved three countries, the United States of America, the United Kingdom, and Roumania. Romano-Americana Case, 2 Foreign Rel. U.S. 1926, 308. The United States intervened diplomatically for Standard Oil of New Jersey the parent of Romano-Americana, a Roumanian corporation. However, it was rebuffed by the United Kingdom which contended that since the corporation was still in operation the corporation alone could press the claim in its state, Roumania; and this is how the matter was settled when the Roumanian government decided to compensate Romano-Americana. Ibid., 324-25.

Finally, mention might be made of another dispute involving Standard Oil of New Jersey, Deutsche Amerikanische

Petroleum Gesellschaft Oil Tankers (United States v. Reparations Comm.), 2 U.N. Rep. Int'l Arb. Awards 779 (1926). In this case the United States of America objected to a decision by the Reparations Commission that certain ships belonging to a German corporation a subsidiary of Standard Oil should be turned over to it. The Commission said in rejecting the claim,

> ...the decisions of principle of the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets, other than to receive, during the existence of the company, a share of the profits.... Ibid., 787.

There is one decision which seems to be contrary to the cases discussed above, Ziat Ben Kiran (Great Britain v. Spain) Ann. Dig. 1923-24, 190. This was a decision by the Commission established by the Anglo-Spanish Agreement of 1923. While the claim of the United Kingdom arising from alleged injury to its national, a partner in the company (a juridical person under the municipal law), was rejected on the merits, the Commission in its opinion gave approval to the right of the United Kingdom to espouse the claim. This despite the fact that it appears that the firm involved was still operational. Inasmuch as it doesn't seem to be distinguishable, it must be taken as against the weight of authority.

Except for several decisions which turn on the peculiarities of the arbitration agreement (e.g., see Alsop Claim, Foreign Rel. U.S. 1910, 138, and 1911, 38; Orinoco Steamship v. Venezuela, Ralston, Venezuelan Arbitrations of 1903, 72.), the following two cases permitted claims by a state asserting

shareholder injury: Delago Bay Case, Foreign Rel. U.S. 1902, 848; El Triunfo Case, Foreign Rel. U.S. 1902, 838. In both of these cases the corporation was rendered defunct. As was said by the United Kingdom in the Delago Bay Case,

> The Portuguese company being without remedy, and having now practically ceased to exist, the only recourse of those whose property has been confiscated is the intervention of their respective governments. Ibid., 849.

Thus in summary of the law, before the shareholder's nation can successfully advance a claim, the corporation must be defunct and thus precluding action by it or its state.

This position of public international law would seem sound. It means that a minimum of conflict is produced between nations representing different shareholders and between the state which claims the corporation as a national and the states claiming shareholders as nationals.

It is within this framework of international law that we must consider the present case and the significant question would seem to be: Is the corporation still operational and able to seek redress for its injuries?

This question clearly must be answered in the affirmative. While one of the operations of Windfall, Inc., was expropriated it still functions and if successful in litigation it might be restored to full operation.

It is true that a majority of its shareholders have voted not to press the claim which the United States of Oceania now seeks to assert. But such a voluntary decision is to be distinguished from the situation where because of the defunct nature of the corporation it can not bring a claim.

In summary, Windfall, Inc., is a going concern and public international law backed by sound policy requires that it alone should be the source of redress for any injuries.

ARGUMENT V

THE UNITED STATES OF OCEANIA'S CLAIM IN BEHALF OF W. R. BONASSIS IS PREMATURE BECAUSE W. R. BONASSIS FAILED TO EXHAUST HIS LOCAL REMEDIES WITH RESPECT TO HIS CONTRACT RIGHTS AND PROPERTY RIGHTS.

Inasmuch as W. R. Bonassis is seeking to "stand in the shoes" of Windfall, Inc., with regard to the claim for debt; the arguments advanced under Argument II are fully applicable and will not be reiterated.