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.

Yale Memorial† #5

† The winner of the competition is unknown.

YALE-HARVARD-COLUMBIA
INTERNATIONAL MOOT COURT COMPETITION

In The

INTERNATIONAL COURT OF JUSTICE

MEMORIAL OF THE GOVERNMENT OF THE STATE OF ARCADIA

Submitted by Special Agreement between the Governments of the State of Arcadia, the Republic of Drongoland and the United States of Arcadia.

James Randall
Agent for the Government
of Arcadia

Peter F. Tufo
Agent for the Government
of Arcadia

Kazuomi Ouchi
Of Counsel

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SPECIAL AGREEMENT FOR SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE OF A DIFFERENCE BETWEEN THE GOVERNMENT OF ARCADIA AND THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND AND BETWEEN THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND AND THE GOVERNMENT OF THE UNITED STATES OF OCEANIA WITH RESPECT TO A CONCESSION AGREEMENT BETWEEN WINDFALL, INC., A CORPORATION, AND THE GOVERNMENT OF THE REPUBLIC OF DRONGOLAND.

The Government of Arcadia, the Government of the Republic of Drongoland, and the Government of the United States of Oceania,

Considering that differences have arisen between the Government of Arcadia and the Government of the Republic of Drongoland over the expropriation by the latter Government of certain property of Windfall, Inc., a company incorporated in Arcadia and doing business in Drongoland,

Desiring that these differences should be settled by a decision of the International Court of Justice,

Desiring to define the issues to be submitted to the International Court of Justice by the presentation of a joint statement of the facts of the case,

Have agreed as follows:

Article I

The Court is requested to decide, upon the agreed facts set forth in Annex 1, the following questions:

(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?

Article IV

Upon the entry into force of the present Agreement, it may be notified to the Court under Article 40 of the Statute by any of the Contracting Parties.

Article V

(a) The present Agreement shall be subject to ratification.

(b) The instruments of ratification shall be exchanged as soon as possible in The Hague and the present Agreement shall enter into force immediately upon the exchange of ratifications.

In witness whereof the undersigned, being duly authorized by their respective Governments, have signed the present agreement and have affixed thereto their seals.

Done in triplicate at The Hague, the 17th day of August, 1960, in English.

[Signatures omitted.]

[The instruments of ratification were exchanged on 2 October 1960.]

Annex 1

1. Windfall, Inc. (hereinafter referred to as Windfall)

is a corporation incorporated on March 5, 1950 in Arcadia, with its registered office in that State. From the date of incorporation to the present time, the registered shareholders of Windfall and the proportions of their shareholdings, have remained as follows:

Shareholders	Voting Shares
(i) Antix, Inc., a company incorporated in Arcadia and doing business in Arcadia and Drongoland, with 55% of its stock owned by nationals of the Republic of Drongoland, and the remainder distributed among nationals of states other than Arcadia	25%
(ii) National Ventures Ltd., a company incorporated and doing business in Drongoland, with 60% of its stock owned by nationals of Drongoland and the remainder distributed among nationals of states other than Arcadia and Drongoland	30%
(iii) New Frontiers, Inc., a company incorporated and doing business in the Federation of Corvo, owned and controlled by nationals of Corvo	5%

Shareholders	Voting Shares
(iv) William Randolph Bonassis, a national of the United States of Oceania under the laws of that state	40%

2. As a result of certain negotiations commenced before incorporation, Windfall obtained from the Government of Drongoland on June 19, 1950, a concession, approved by the legislature of that country, granting Windfall "the exclusive right, within the territory of the Concession, to search for and extract bauxite and to use the same for the manufacture of aluminum, aluminum products and any other products" and "the non-exclusive right to transport, refine, or otherwise treat such bauxite and to transport, manufacture or otherwise treat such aluminum, aluminum products and other products, as well as the non-exclusive right to sell the same within Drongoland and to export the same." Windfall in return agreed to pay to the Government of Drongoland certain fixed annual sums as well as annual royalties calculated on the tonnage of aluminum, aluminum ore and products exported by Windfall. The Government also agreed to purchase from Windfall a fixed minimum tonnage of aluminum each year during the first 10 years of the Concession (which was to expire on June 18, 1970) at a price to be calculated with reference to a fixed proportion of the average export price.

3. The Concession Agreement also contained the following provisions:

"Article 15: This 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.

"Article 16: (1) 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, if such difference is not resolved by agreement between the parties.

(2) The party requesting such arbitration shall so notify the other party in writing. Each of the parties shall appoint an arbitrator and the two arbitrators, before proceeding to arbitration, shall appoint an umpire. If the two arbitrators cannot, within two months, agree on the person of the umpire, the latter shall be nominated, at the request of either of the parties, by the President of the International

Court of Justice. If the President of the International Court of Justice belongs to a nationality or a country which, in accordance with clause (3), is not qualified to furnish the umpire, the nomination shall be made by the Vice-President of the said Court.

(3) The umpire shall be of a nationality other than that of Drongoland, Arcadia, or the United States of Oceania, and shall not be closely connected with the said countries by being or having been in the service of any of the said countries or by being resident or having resided in any of the said countries.

(4) If one of the parties does not appoint its arbitrator, or does not advise the other party of its appointment, within 60 days of having received notification of the request for arbitration, the other party shall have the right to request the President of the International Court of Justice (or the Vice-President in the case provided for in clause (2)) to nominate a sole arbitrator, to be chosen from among persons qualified as above mentioned, and in this case, the difference shall be settled by this sole arbitrator.

(5) The procedure of arbitration shall be that followed, at the time of arbitration, by the International Court of Justice. The place and time of arbitration shall be fixed by the umpire or by the sole arbitrator provided for in clause (4), as the case may be.

(6) The award shall be based on the juridical principles contained in Article 38(1) of the Statute of the International Court of Justice. There shall be no appeal against the award.

(7) The expense of the arbitration shall be borne in the manner determined by the award."

4. Pursuant to the Concession, Windfall established a branch in Drongoland and commenced mining and manufacturing activities in December, 1950. Most of the bauxite mined was used for the production of aluminum; a small proportion was used for the manufacture of various chemicals and abrasives. Branch offices were also opened in Oceania and Corvo in order to obtain access to the markets in these countries. By 1955, 60% of Windfall's income was produced by exports of aluminum and other products from Drongoland negotiated through its Oceania and Corvo branches, the balance of its income arising from sales within Drongoland, including sales to the Government.

5. On September 6, 1956, the Drongolese legislature enacted an amendment to the Claims Against the Government Act. The amendment provided, 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 judgment not pronounced by such courts. This Act shall apply notwithstanding any agreement or law

to the contrary, whether entered into or enacted before or after the date of this Act."

6. In January, 1957, a dispute arose between Windfall and the Government of Drongoland concerning the sum of $2,500,000 claimed by Windfall in respect of aluminum supplied to the Government pursuant to the Concession Agreement. The Government denied indebtedness, disputing both the interpretation of the Agreement and the performance alleged by Windfall. In response to a formal request by Windfall to refer the matter to arbitration pursuant to Article 16 of the Agreement, the Government stated in a letter dated August 15, 1957: "In light of the Amendment of September 6, 1956, to the Claims Against the Government Act, the Government of Drongoland is unable to accede to your request for arbitration. Any claim by the Company should be brought in the appropriate courts of this State. The Government cannot be a party to any arbitration of this dispute and cannot recognize any arbitral award purporting to be made pursuant to the Concession Agreement."

7. On September 15, 1957, Windfall advised the Government of Drongoland that the Company would have to consider cutting off supplies of aluminum to the Government until the dispute was settled by arbitration under the Concession Agreement. On October 15, 1957, the Drongolese legislature passed an Act expropriating part of Windfall's property comprised in the Concession, consisting of one of the Company's mines, a factory, and all the aluminum and

aluminum ore thereon. The Act provided for the appointment of three Drongolese legislators to assess compensation.

8. Windfall protested to the Government, demanding that the question of the legality of the expropriation and the amount of compensation payable, if any, be submitted to arbitration in accordance with the Concession Agreement. The Government declined to follow the arbitral procedure prescribed in the Concession Agreement on the grounds set forth in its letter of August 15, 1957. Windfall thereupon appealed to the Government of Arcadia for diplomatic protection. The Government of Arcadia made representations to the Government of Drongoland, and, being unable to reach agreement, decided to refer the dispute to the International Court of Justice, pursuant to the terms of the foregoing Special Agreement.

9. At an extraordinary meeting of shareholders of Windfall on May 17, 1958, it was resolved that the Company should request the Government of Arcadia to press its claims in respect of the expropriation only and to waive the claim for $2,500,000 referred to in paragraph 6 above. The representatives of Antix, Inc., and National Ventures Ltd. voted for, and Mr. Bonassis and the representative of New Frontiers, Inc., voted against, the resolution. 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. The letters, which were substantially

identical, read in part as follows: "The Government regards with concern and disfavour attempts by Windfall, Inc., of which you are a shareholder, to obtain a settlement of its claim against the Government in a manner inconsistent with the laws and public policy of the Republic. In particular, the Government regards Company's claim for $2,500,000 for aluminum allegedly supplied to the Government 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.

10. In consequence of the waiver by the Government of Arcadia, at the request of Windfall, of the claim for $2,500,000, Mr. Bonassis requested the Government of the United States of Oceania to seek compensation from Drongoland for the loss of value of his shares in Windfall caused by Drongoland's refusal to settle Windfall's claim for this amount. It is agreed that between December 31, 1956, and October 14, 1957, the market value of Bonassis' shares in Windfall had diminished by approximately sixteen per cent and by a further twenty-one per cent between October 15, 1957, and August 17, 1960. 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 the International Court of Justice together with the question of Windfall's claim.

I. WHEREAS WINDFALL CORPORATION IS INCORPORATED UNDER THE LAWS OF THE STATE OF ARCADIA AND HAS REQUESTED THAT ARCADIA ESPOUSE ITS CLAIM AGAINST DRONGOLAND, THIS COURT HAS A DUTY TO RESPECT ARCADIA'S RIGHT TO REPRESENT WINDFALL.

A. The Fact That Windfall is an Arcadian Corporation is Sufficient Evidence for the Court to Grant Arcadia the Right to Represent Windfall, Thus Decide the Question of Windfall's Claim on the Merits of the Controversy.

Windfall is a corporation chartered under the laws of sovereign nation of Arcadia. On May 17, 1958 the shareholders of Windfall, by majority vote, requested the Government of Arcadia to represent the corporation for the purpose of espousing the corporation's claims against the Government of Drongoland before the International Court of Justice. The Arcadian government, recognizing its duty to protect its nationals in international disputes has agreed to represent Windfall. Arcadia respectfully request the Court to recognize its right to represent Windfall.so that the Court may proceed to judge Arcadia's claim against Drongoland on the merits of the controversy.

The question, when a state is entitled to espouse a claim based upon injury to an individual or corporation in breach of international law, has traditionally been treated as invoking a decision as to the scope of diplomatic protection. The Permanent Court of International Justice expressed the issue in the Mavrommatis Palestine Commission case stating:

> By taking up the case of its subjects and by resorting to diplomatic action or international

> judicial proceedings on its behalf a state is in reality asserting its own rights--its right to ensure, in the person of its subjects respect for the rules of international law. PCIJ Ser. A, No. 2, p. 12

International law might have embraced the notion that a corporation is an artificial person thus possesses no nationality. Consequently, there could be no intervention on behalf of the corporation as such but only on behalf of the individuals who compose it. This, however, is not the view which has obtained international acceptance. Hackworth, Digest of International Law, Vol. III, p. 420, (1942).

Nationality, traditionally, has been a question left to each sovereign state to decide. International law has given each state the competence to regulate the acquisition and loss of their nationality through municipal legislation. A high degree of conclusiveness is to be attributed to the states determination of nationality. Briggs, "Law of Nations" p. 471, (2d ed. 1952), PCIJ. Ser. 13, No. 4, (1923), Harvard Research in International Law 23 AJIL (1929).

Nationality, and the relation between a citizen and the State to which he owes allegiance, are of such a character that they demand certainty.

> "When one considers the occasions for invoking the relationship--immigration and emigration; travel, treason; exercise of political rights and functions; military service and the like-- it becomes evident that certainty is essential. There must be objective tests, readily established, for the existence and recognition of the status.

> That is why the practice of the states has steadfastly rejected vague and subjective tests for the right to confer nationality--sincerity, fidelity, durability, lack of substantial connection--and has clung to the rule of the almost unfettered discretionary power of the State, as embodied in Article I of the Hague Draft Convention of 1931." (1955) I.C.J. Rep. 4. Dissenting Opinion of Judge Read, Nottebohm case p. 46.

In determining and attributing nationality to corporations the traditional test and the test most modern international tribunals have applied is that attributing to a corporation the nationality of its state of incorporation.

> Some measure of State intervention is necessary in every country for the creation of a corporation. The corporation must comply with certain requirements laid down by the local law. Subject to compliance with these requirements, the local law gives beforehand a sanction to its corporate existence without which such corporate existence would be impossible. . .
>
> If this is so, if a corporation can only come into existence by invoking the national law of some country, it is hard to see how it can logically be a national of any country other than that which has made its existence possible. It seems inconceivable that one country should have the right to create a person which is to be a national of another country. Williams, R.E.L. Vaughan, "The Nationality of Corporations" 49 L. Q. R. (1933) 347

Numerous decisions of international tribunals as well as a great many respected commentators support the state of incorporation test. Moore, Digest Vol. VI p. 641, Borchard, Diplomatic Protection of Citizens Abroad, (1914), p. 618, Hackworth Vol. V. p. 839. In the case of the Agency of Canadian Car and Foundry Company, heard by the

U.S.-German Mixed Claims Commission in 1937, Germany challenged the right of the U.S. to present a claim on behalf of a corporation registered in New York whose stocks were all held by a parent Canadian Company. The Commission ruled against Germany's contention stating that regardless of the place of residence or citizenship of the incorporators or shareholders the sovereignty by which a corporation was created determines its national character. Bishop, International Law p. 544.

In a case before the U.S.-Mexican Claims Commission concerning claims by the United States on behalf of a U.S. corporation, all of whose shareholders were British, the Commission stated that "The nationality of the owners is irrelevant to the right of the United States to protect a corporation registered there." Hackworth, Vol. V. p. 837.

In Hamburg-American Co. v. U.S., 277 U.S. 138, the Court of Claims sustained a demurrer to the petition of the Hamburg-American Line Terminal & Navigation Company seeking to recover compensation for its property, which was taken by the United States at the beginning of the war. Claimant was incorporated under New Jersey laws, but its entire capital stock had long been owned by the Hamburg-American Line, a German corporation. In reversing the Court of Claims, Mr. Justice McReynolds said:

> The Court below evidently proceeded upon the view that the property of appellant corporations should be treated as owned by an enemy because their entire capital stock belonged to a German corporation. And as the property was seized during the war with Germany it held there could

> be no recovery. Without doubt Congress might have accepted and acted upon that theory. . . but Congress did not do so; it definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy . . .it is a settled general rule in America that regardless of the place of residence or citizenship of the incorporators or shareholders, the sovereignty by which a corporation was created, or under whose laws it was organized, determines its national character.

Although on occasions international tribunals have refused to apply the state of incorporation test, the claims have usually involved the enemy character of the corporation during war-time or evidence of fraud or bad faith on the part of the incorporators in obtaining its charter. Neither of these elements is present in the case here in controversy.

B. The State of Incorporation Test Is Best Suited to the International Economic Demands for Predictability and Stability of Enterprise.

The primary advantage of attributing to a corporation the nationality of the country under whose laws it is formed and by whose laws its functions are regulated is the simplicity of operation and ease of application of a test whose criteria are objective and secure. The stability and predictability which such a test guarantees are essential to the growth of international economic interrelations. Modern business demands international cooperative effort through private enterprise in the corporate form. A necessary adjunct to this form is a unity of administration

by means of holding companies and subsidiary corporations. These business forms lend themselves most easily to the state of incorporation test.

By applying this test the Court endangers no national interest. No state need admit a foreign corporation except on its own terms. The taxation and enforcement of police measures over a corporation are matters of domestic determination. Although some corporations take refuge in smaller states less well organized economics to escape the burdensome political and economic regulation of highly organized and controlled economies, they must bear the disadvantages of the inadequate facilities and abilities for international protection these states may provide. The avoidance of taxation is a matter for domestic legislation not international fiat.

To refuse to apply the state of incorporation test would be to restrict the right of international protection normally associated with nationality. The number of countries who might potentially protect the individuals engaged in international commerce would be decreased. Thus, a greater chance of unrecovered loss to the international investor would exist thereby reducing incentive to engage in international economic activity. A decrease in the aggregate flow of exchange in international transactions would serve to defeat the international policy of increasing the distribution of the world's labor and resources. Furthermore, the lack of certainty of protection

would discourage the continuation of enterprises already engaged in international operations by weakening the stability and security of expectations of the participants that accompanies predictable protection.

C. Since Both Arcadia and Windfall Have Acted in Good Faith and Arcadia Is the Only State Which Can Effectively Represent the Interests of All the Shareholders in Windfall, Arcadia Is the State Best Qualified to Espouse Windfall's Claim.

No evidence is presented that Arcadia, in recognizing Windfall, or that the Windfall shareholders, in requesting Arcadia to represent them, have not acted in good faith. Neither party is attempting to avoid the sanctions of another state or tribunal. Neither party is attempting to subvert municipal or international law by entering into their accommodation. To the contrary, Arcadia, by incorporating Windfall, implicitly, contracted to protect the corporation as her citizen. Its claim before this court is brought in the course of meeting that obligation. On the other hand, the fact that the incorporators of Windfall chose to incorporate under the laws of Arcadia furnishes an almost irrebuttable presumption that they wished it to be an Arcadian national.

Arcadia is the only country who can give full representation to all of Windfall's shareholders. The ownerships and assets of Windfall are spread throughout many nations. If Arcadia is denied its claim to representation, the Court is faced with unpalatable alternatives. The Court

then must either deny Windfall's grievances a hearing or allow a claim to be brought by every country which has an interest in the corporation by reason of the nationality of a shareholder or disposition of the corporation's assets. The latter alternative would create a multiplicity of litigation and present the Court with the complexities of determining in whom the ownership and control of the corporation reposes.

D. Drongoland Having Once Recognized Arcadia to Represent Windfall Is Now Estopped from Withdrawing That Recognition.

The Drongolese government, having recognized Arcadia as Windfall's representative in international negotiations (Concession agreement between Drongoland and Windfall, Inc. Article 16(3)) is estopped from now denying Arcadia right to represent Windfall. By stipulating that the umpire in any future arbitration between Drongoland and Windfall should be neither a national of Drongoland or Arcadia, Drongoland implicitly recognized Arcadia's interest in Windfall.

The Court must not allow the Drongolese government to grant recognition to states as diplomatic resresentatives and then to deny the existence of such a relationship when the relationship no longer serves their interests. To sanction such an act would permit the use of this tribunal as an instrument in the Drongolese attempt to evade its international responsibilities.

E. The Subjective Criteria of the Substantial Link Tests Will Result In Uncertainty of Nationality In An International Economy That Demands Stability and Predictability.

It might be contended that the court abandon the traditional state of incorporation test and apply one of the "substantial link" theories of nationality.

> The dangers for the free and ordered use of a great common resource on the basis of equality and certainty of expectations which such an ill conceived innovation as the genuine link requirement creates, can hardly be exaggerated. McDougal, Burke and Vlasic, "The Maintenance of Public Order at Sea dnd the Nationality of Ships." 53 A.J.I.L. No. 1, (1960).

The danger lies in the fact that the link of nationality demands objective and secure criteria, whereas the "substantial link" doctrines substitute purely subjective criteria, shifting from case to case, necessarily leading to a situation of uncertain nationality. Expanding international investment, the mass interchange of peoples from state to state, multilateral corporate relationships and expansions abroad, oft-times in the newer African and Asian states where there is less legal security for foreign persons and assets, demand the stability, dispatch and public notice that the state of incorporation test affords.

The variations of the substantial link theory which have gained at least token recognition attribute nationality to:

(1) The country in which the corporation has its administrative center,

(2) The country in which the corporation's principal business establishment is located,

(3) The country of which the shareholders of the corporation are nationals

(1) Administrative center test

The corporation's administrative center may have little actual significance because of the easy mobility of corporate management and records. The center may be arbitrarily chosen thus not indicate any real association between the corporation and the country in which its administrative office is situated. Further, the existence of more than one administrative office complicates the determination as to which is the head office. One must consider the relative functions of officers and directors whose responsibilities and powers may differ under various systems of law. The officers' residence, the place where directors meet or shareholders' vote all would be considerations which might further affect the determination.

(2) Principle establishment test

An attempt to identify the principal place of business is open to similar criticisms. Evidence of wealth may be difficult to obtain. Tax considerations may greatly distort the picture. Multiple establishments and dissimilar economies both will add to the subjectivity of the determination. To attribute to a corporation the nationality of all of the states in which it does business would deprive it of protection under international law altogether for the corporation could then be treated as a national in each of the

States in which it did business.

(3) Nationality of the shareholders test

The test of shareholder nationality demands equally subjective criteria. The beneficial ownership of stock is difficult to determine. The relative weight to be given various interests will always be in controversy. Ownership and control, in the sense of power to direct the affairs of the corporation, must be distinguished. The existence of holding companies, different classes of shares, varying degrees and supervision in fact employed by interest holders all make control impossible to reduce to a precise formula. Borchard argues against the nationality of shareholder test by reasoning that:

> The corporation, the trustee, possesses the entire legal and equitable title to a claim as part of the assets of the corporation, whereas the shareholder possesses only an equitable right to an accounting and to compel proper management. The shareholders, therefore, having no legal title to the property of a solvent corporation, can hardly be recognized by an arbitral tribunal as a proper party claimant. Citing U.S. v. Northwestern Express Company 164 U.S. 686, Borchard, "The Diplomatic Protection of Citizens Abroad" p. 624.

Numerous cases have held that where a Company is still in effective existence the shareholders have no status to claim in respect of damage to the corporate property, and any intervention on their behalf is inadmissible. (Antioquia case, VI Moore's Digest 644; Nitrate establishments of Tarapaca case, ibid. 646; Kunhardt & Co. case, Ralston's Report (1904) 63; Brewer, Moller & Co. case, ibid. 595; Baasch & Romer case, ibid. 906.

F. The Nottebohm Case Reasoning Cannot Be Applied To Corporations Since The Criteria Utilized By The Court To Establish Genuine Link Are Applicable Only To Natural Persons Attempting To Change Their Nationality During War Time From That Of A Belligerent State To That Of A Neutral State.

It might be contended that this Court's decision in the Nottebohm case, 1955 I.C.J. Reports No. 4 should control the question now before the Court. That case is clearly distinguishable, however, in that it dealt with a natural person using devious means to convert his nationality in time of war from that of a belligerent state to that of a neutral.

Nottebohm was a German national living in Guatemala with substantial business interests in that State. Shortly after the outbreak of World War II, Nottebohm went to Liechtenstein and applied for citizenship. Upon obtaining Liechtensteinian citizenship he returned to Guatemala where he was subsequently turned over to the United States' authorities as a German agent and interned for three years in the United States. Guatemala thereupon confiscated his property and refused him re-entry upon his release. Liechtenstein applied to this Court on Nottebohm's behalf but was denied the right to represent Nottebohm on the ground that no substantial link existed between the two parties. The Court's decision was narrowly restricted:

> "What is invoked is not recognition [of Nottebohm's citizenship] for all purposes but merely for the purposes of the admissibility of the application and secondly, what is involved is not recognition by all States but only by Guatemala." Ibid. p. 17

The Court's opinion placed great emphasis on the fact that the real purpose of Nottebohm's change of citizenship was to enable him to substitute his status as a national of a belligerent state, Germany, for that of a neutral State, Liechtenstein. Ibid. p. 26. Thus, the majority injected into the decision the factor of German aggression and war-time conditions, an atmosphere not present in the case at bar.

Three judges registered vigorous dissent to the majority decision, as have many respected commentators. Their primary criticism of the decision is focused upon the limitation the opinion imposes upon the right of international protection. Kunz, "The Nottebohm Judgment" AJIL vol. 54 No. 3, 1960; Mervyn Jones, "The Nottebohm Case" 5 Int. & Comp. L. Q. 230-246 (1956); Glazer, "Affaire Nottebohm--A Critique," 44 Geo. L.J. 313-323 (1955-56).

To read the Nottebohm decision as supporting the effective link doctrine with respect to corporations requires great imagination and a disregard for some important physical and legal factors. The criteria which the Court specifies as creating the effective link are applicable only to human beings: "factors such as his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children." 1955 ICJ Reports, No. 4, p. 22. Since the Nottebohm decision no attempt has been made by international tribunals to extend its application to corporations, nor have the foremost commentators suggested

such an application. See "Convention on the International Responsibility of States for Injuries to Aliens", Harvard Law School, Article 21 (3)(d) (1959).

G. Even If The Court Declines To Apply The State Of Incorporation Test, Arcadia Should Be Permitted To Represent Windfall Because Substantial Interests Link Windfall To Arcadia.

While Arcadia believes the State of Incorporation Test to be the most satisfactory test of nationality yet devised, we do not ask that the Court apply it to the exclusion of the other tests considered. If the Court should determine to exclude the incorporation test as insufficient to support nationality, it can be demonstrated that sufficient interest binds Windfall, Inc. and the State of Arcadia to support Windfall's Arcadian nationality under the effective link theory.

In addition to Windfall's incorporation in Arcadia, it maintains a registered office in that country. At this office it can conduct its business operations and be served with process. All forms of government sanctions may devolve upon the corporation through that office. The stipulated facts of this case implicitly recognize the office in Arcadia as Windfall's main office by referring to Windfall's establishments in Drongoland, Oceania and Corvo as "branches". Windfall's corporate form and functions are subject to Arcadian government regulations. Its income is subject to Arcadian taxes. Furthermore,

25% of the stock in Windfall is owned by an Arcadian national, Antix, Incorporated. Although none of the shareholders in Antix are Arcadian citizens, Antix does business in Arcadia, employs Arcadian labor and is provided with Arcadian public services. Antix is subject to tax by Arcadia and contributes to the flow of the Arcadian economy. Any loss accruing to Windfall will inure to Antix. This resultant loss to Antix will be reflected in its decreased potential contribution to the Arcadian economy by means of tax revenues, labor forces employed, goods bought and sold and products of Antix available to the Arcadian citizens. These enumerated factors add up to a substantial and continuing link between Windfall and the Arcadian economy. Arcadia, therefore, has a substantial interest to protect. It is an interest which was sufficient enough to be recognized in Drongoland in the concession agreement. It should, therefore, be respected by this Court.

H. The Charter Of The International Court Demands That The Court Grant Arcadia The Opportunity To Plead The Merits Of Its Claim, For Only In That Manner Can The Shareholders' Interests In Windfall Be Given Full Representation And A Fair Hearing.

The plea here tendered is relevant only to the preliminary hearing before the court concerning the right of Arcadia to espouse Windfall's claim and the Court's jurisdiction over that claim. The claimant, by demonstrating both the fact that Windfall is incorporated under the laws of Arcadia and that substantial common interest links

Windfall and Arcadia, has provided sufficient evidence of Windfall's nationality to enable the Court to allow Arcadia to espouse Windfall's claim. The fulfillment of the shared expectations of participants in international transactions demands that their claims of injury be given full hearing. To dismiss those claims without a hearing in disregard of the fact of incorporation would be an arbitrary denial to the shareholders of Windfall of their only opportunity for a full hearing of their cause on the merits of the issues in controversy. Only by considering the evidence and counsels' argument can this court fulfill its duty under its Charter and secure the objectives of the World Community.

II. THE ACTS OF THE GOVERNMENT OF DRONGOLAND REPUDIATING THE ARBITRATION PROCEDURES PROVIDED FOR IN THE CONCESSION AGREEMENT WERE IN BREACH OF ITS SOLEMN CONTRACT, DIRECTLY ENGAGING ITS INTERNATIONAL RESPONSIBILITY AND RENDERING INAPPLICABLE THE TRADITIONAL RULE OF EXHAUSTION OF LOCAL REMEDIES.

A. The Concession Agreement Between The Republic of Drongoland and Windfall, Inc., Was a Valid and Mutually Binding Contract, Whose Violation Constituted An International Delinquency.

1. The parties expressly provided that the law of the contract would be international law as applied by an independent arbitral tribunal.

The Concession Agreement of June 19, 1950, made between Windfall, Inc., and the Republic of Drongoland was approved by the legislature of Drongoland. By its terms, it granted to the Company an exclusive mining concession for a limited period (20 years). The Agreement, besides establishing and defining the respective duties and obligations of the parties, provided that it was to be irrevocable and unalterable by the Government during the term of years:

> "Article 15: This 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."

Article 16 of the Concession Agreement provided for the arbitration, upon request of either party, of all differences "of any nature whatever" arising out of or relating to the Agreement. Specific provision was made for the arbitration of differences "relating to the duration,

termination or cancellation in any manner whatever of the rights and obligations" contained in the Agreement. The procedure regulating the arbitration was to be that followed by this Court in such matters and the award was to be based "on the juridical principles contained in Article 38(1) of the Statute of the International Court of Justice."

It thus appears from the words of the Agreement itself (the validity of which is not in question) that the parties made two express provisions of vital importance to the question now before us: (1) that the law of the contract was to be that provided for in the Statute of the I.C.J., and (2) that such law was to be construed and applied to the interpretation of the contract by an international arbitral body subject to international rules of procedure.

That a contract of this type could thus be put beyond the jurisdiction of the municipal courts and legal doctrines of either party should be beyond dispute. That "the contract is the law of the parties" is a principle so well established that citation of authority, if necessary at all, must of necessity be selective. Thus, Pound begins with Ulpian in the third century and traces the axiom through codes and commentaries to the present, An Introduction to the Philosophy of Law (1954) 161. Similarly, Sauser-Hall draws upon Garsonnett and Cesar-Bru for the statement that the contract constitutes the law of the parties and carries with it a renunciation of customary jurisdiction. ("Le compromis fait la loi des parties et il entraîne une

renonciation à law juridiction ordinaire".) Pleadings, PCIJ, Ser. C, No. 78, p. 269. Finally, Maurice Bourquin has pointed out the relevance of the principle to the specific type of contract we are considering here, 15 The Business Lawyer 860, 864 (1960).

The law which the parties thus establish for the regulation of their contractual relationship can, and often must, act to displace the jurisdiction of municipal courts and to substitute other doctrines of law for those obtaining within any particular state. The peculiar nature of long-term concessions or "economic development agreements" as they are commonly called in modern writings, may make it mandatory that conflicts be resolved by doctrines that cut across national boundaries. Lord Atkin considered it beyond dispute that a government could submit to be bound even by the law of a foreign state, Rex v. International Trustee for the Protection of Bond Holders Aktiengesellschaft, (1937) A.C. 500, 531, while Fawcett and Mann have urged that the mere fact that the contract is between a state and foreign individual or corporation tends to "internationalize" the contract and make it possible for the parties to submit it to international law, e.g. the pronouncements of this Court and the principles contained in Article 38 of the Statute of the Court, Fawcett, 25 British Yearbook of International Law 34, 44 (1948); Mann, 21 BYIL 19 (1944). Furthermore, where the contract provides that there shall be no appeal from the

arbitral award, it has been held that there was an express intent to oust municipal courts of jurisdiction and vest exclusive jurisdiction in the arbitral tribunal provided for in the contract, North and South American Construction Company v. Chile, No. 7, U.S. and Chilean Claims Commission, 3 Moore, International Arbitration 2318; Pleadings, PCIJ, Ser. C, no. 78, p. 160.

The International Law Commission of the United Nations, in its Fourth Report on International Responsibility, Doc. A/CN.4/119(1959), reviewed some of the authorities in this field and gathered from them the following comment:

> "The parties may submit their contract to international law, i.e. 'internationalize' it, or even refer it to rules of strict public international law...The principal factor in determining the legal system to which the contractual relationship should be subject is the intention of the parties. The State granting the concession must be presumed authorized to submit the contract to a foreign municipal law or to international law. In such cases, it is clear that it was the intention of the parties that the concession should not be affected by any subsequent change in the grantor's municipal law nor be subject to any other form of interference by the grantor's State organs...Consequently, if a Government and a corporation conclude a contract containing an arbitration clause, the corporation has removed itself from the realm of national law and jurisdiction and has subjected itself to a legalsystem half-way between public international and private law." (p. 74).

Carlston has said that there is "an international economic activity escaping the sovereignty of individual legislative bodies and cloaked by its own juridical regulation, incapable of being reduced to the simple confines of internal laws in conflict," adding that a state can in no case

manipulate its internal laws with a view of evading its international obligations, 52 American Journal of International Law 260, 269, 275 (1958). On this latter point see also Pleadings, PCIJ, Ser. C, No. 78, p. 160.

It is clear that the parties to the agreement now in question exercised their respective powers to contract in a manner so as to put their relationship beyond the application of municipal law. To insure an equitable and unbiased regulation of that relationship, they made specific provision for an independent decision-making body to be free not only of local pressures but of local doctrines as well. The authorities clearly show that the parties were free to make these choices and, once made, to be bound by them. Should the mechanism fail through unilateral violation of the Agreement, no local remedy could be adequate to restore it. The remedy contemplated by the parties was exclusive and its denial resulted in direct international responsibility.

2. The principle of pacta sunt servanda is an undoubted part of international law recognized by civilized peoples.

When the parties specified that their contract would be governed by the juridical principles contained in Article 38(1) of the Statute of this Court, they incorporated by reference "one of the most basic of human expectation, namely, the expectation that a solemn promise of another, upon which future action...is to be based, will be kept.

This is an expectation which any system of law must protect. Its protection is indeed a general principle of law universally recognized by civilized states." Carlston, 52 AJIL 260, 261 (1958).

At its Seventh Conference at Cologne, the International Bar Association stated that the principle of pacta sunt servanda is "an undoubted part of the rule of international law" as accepted by civilized countries, and that "it applies to the specific engagements of States towards other States or the Nationals of other States and that in consequence a taking of private property in violation of a specific state contract is contrary to international law." I.B.A., 7th Conference Report, Cologne, July 1958, p. 485. Wehberg has said that to deny the principle would amount to denying the existence of international law in general because "international law would be deprived of a decisive foundation and a society of states would not longer be possible." 53 AJIL 775, 782 (1959). Fachiri, discussing diplomatic interposition, recognizes that states are not in general entitled to intervene even if the measures taken against their subjects are prejudicial to their interests, but proposes this test:

> "Does the measure in dispute substantially violate a legal principle accepted by the society of civilized states as a whole, so that the detriment caused to the individuals concerned can be regarded as a breach... of international law?" 6 BYIL 159, 170 (1925).

Carlston distinguishes between state acts in the exercise of a contractual right and those founded upon

sovereignty itself, reasoning as follows:

> "If the act of termination be in the bona fide exercise of a claimed contractual right, it is to be deemed an act jure gestionis and the rule of exhaustion of local remedies and the requirement of a denial of justice therein applies. On the other hand, if the act of termination be in the exercise of sovereign power independently of contractual right, it is an act jure imperii of which international law may directly take cognizance and which may be held to be a violation of a right of the state of the concessionaire." 52 AJIL 260, 267 (1958).

He finds an "unusual amount of authority" forbidding the unilateral termination based solely on sovereign right.[4] (p. 269).

Friedmann, who acknowledges a broad freedom in states to affect private property and contractual rights nevertheless recognizes an important limitation, viz. where by contract it has created expectations which the proposed measure would nullify:

> "A national parliament may have power to amend legislation that has incorporated promises in regard to the sanctity of foreign property. The enactment of such amending legislation nevertheless constitutes an international delinquency." 50 AJIL 475, 505 (1956).

Wehberg, in the careful study cited above, has found that no arbitral tribunal has ever rejected or weakened the principle of pacta sunt servanda, and reviews numerous cases emphasizing the rule (p. 784).

In the case of North and South American Construction Co. v. Chile, No. 7, U.S. and Chilean Claims Comm., 3 Moore, International Arbitration, 2320, it was held that a refusal by the state to arbitrate as provided for in

the contract gave rise to direct international responsibility and made recourse to local courts unnecessary, and de Visscher states that such responsibility is directly engaged where arbitration is refused, Theories et Realites en Droit International Public, Paris, 1955, p. 244. Similarly, Fawcett has pointed out that where the act complained of is a breach of customary international law, "the rule of exhaustion of local remedies is not applicable and cannot support a preliminary defence or objection to a claim." 31 BYIL 452 (1954).

3. The violation of contractual obligations directly engaged the international responsibility of the offending state and rendered the rule of exhaustion of local remedies inapplicable.

In the case at hand, the Government solemnly contracted (1) that the Agreement would not be changed unilaterally and, (2) that all disputes would be submitted to arbitration. It then passed general legislation providing that no claim against the state could be brought otherwise than through court proceedings. This was a clear breach of the Agreement by the same body which had approved it earlier. There followed shortly two further violations, one by the executive when it refused to arbitrate the dispute concerning $2,500,000 and another by the legislature when it expropriated the property of the Company.

These violations, singly or in the aggregate, constituted a flagrant repudiation of binding contractual

obligations, a rupture so obviously contrary to the legal expectations of civilized peoples as to engage directly the international liability of the offending state, In the face of them, no local remedy could be considered a vehicle for adequate redress, and such remedies were certainly not in the contemplation of the parties.

If any doubt were left in this regard, the expropriating legislature has banished it by its provision for a board composed of its members to assess compensation for the taking. The principle that the rule of exhaustion of local remedies does not apply where the remedies are in effect non-existent, illusory or patently incapable of serving justice is as old as the rule it qualifies. See Borchard, Diplomatic Protection of Citizens Abroad, 330-332; Schwarzenberger, International Law, (3rd ed.) 608; Sauser-Hall, Pleadings, PCIJ, Ser. C, No. 78, p. 309; Ibid, pp. 157-159.

The Concession Agreement between the Government and the Company was of the type that has come to be called "quasi-public". Another appellation focuses on certain of its outstanding characteristics and results in "international economic development agreement." Whatever the name, the contract looks to the establishment of a long-term, controlled relationship between a people and its government on the one hand and the private investor on the other, in which the futures of all parties are intimately joined. In essence, it is a sharing of economic values for the purpose of furthering the industrial development of

one while insuring a fair return on capital to the other. In a world where many countries have yet to enter the industrial phase, the importance of such contracts cannot be exaggerated. See generally Carlston, The International Role of Concession Agreements, 52 Northwestern University Law Review 618 (1957); McNair, 33 BYIL 1 (1957).

No less clear is the fact that the success of such projects depends on a degree of collaboration which can only rest on the firmest foundations of good faith and mutual guaranties. It has been accurately pointed out that the contract becomes a "constitution" for the parties, the "organic instrument for an organization of international economic relations embracing many states having diverse interests as well as the nationals of such states and their property...The principle of arbitration embodies a recognition by the state that it shall not sit in judgment of disputes involving its own acts but rather shall join with the corporation in the establishment of an independent judicial body, to wit, an arbitration tribunal, to which such disputes shall be referred for final and binding decision. Herein the state implicitly waives any requirement of the exhaustion of local remedies. This waiver is...consistent with the principle that a state should not sit in judgment on its own acts in matters involving contracts with aliens." Carlston, 52 NWULR 618, 637, 640 (1957).

The basic guarantee, upon which all else rests, is that the solemn obligations of the parties shall be kept. It is that guarantee that has been violated here. The violation is one against the interests of the world community, and it is one which can be redressed only in its tribunals.