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The status of creditors' claims has been one of the most vexing issues in the international law of state responsibility and in the practice of international claims. This is surprising since so many other problems of claimant eligibility have been satisfactorily resolved over the past half-century, including the seemingly intractable issue of dual nationals[1] and the complex matters of partnership[2] and shareholder[3] claims. But creditors' claims remain contentious today, in large measure because they raise issues that transcend claimant eligibility and implicate problems of attribution and causation in the international law of state responsibility.[4] And despite the many opportunities for international tribunals, domestic

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1. *Compare* N. BAR-YAACOV, DUAL NATIONALITY 214–17 (1961); 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW 886 (2d ed. 1947); 1 LASSA OPPENHEIM, INTERNATIONAL LAW 348 (Hersh Lauterpacht ed., 8th ed. 1955) (all contending that dual nationals could not bring a claim against either of their states of nationality), *with* David J. Bederman, *Eligible Claimants Before the Iran-U.S. Tribunal*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 47, 65–86 (Richard B. Lillich et al. eds., 1998) [hereinafter IRAN-UNITED STATES CLAIMS TRIBUNAL]; William L. Griffin, *International Claims of Nationals of Both the Claimant and Respondent States—The Case History of a Myth*, 1 INT'L LAW. 400 (1966); Peter E. Mahoney, Comment, *The Standing of Dual Nationals Before the Iran-United States Claims Tribunal*, 24 VA. J. INT'L L. 695, 700–08 (1984); Note, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 MICH. L. REV. 597, 601–11 (1984) (all writing that dual nationals can bring claims against the State for which they do not possess dominant and effective nationality).

2. *See* Bederman, *supra* note 1, at 86–92; Richard B. Lillich, *Joint Ventures and the Law of International Claims*, 10 MICH. J. INT'L L. 430 (1989); Scribner K. Fauver, Comment, *Partnership Claims Before the Iran-United States Claims Tribunal*, 27 VA. J. INT'L L. 307, 315–21 (1987).

3. *See* RICHARD B. LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 90–94 (1962) [hereinafter ADJUDICATION BY NATIONAL COMMISSIONS]; RICHARD B. LILLICH, INTERNATIONAL CLAIMS: POSTWAR BRITISH PRACTICE 40–52 (1967) [hereinafter POSTWAR BRITISH PRACTICE]; Henry J. Clay, *Recent Developments in the Protection of American Shareholders' Interests in Foreign Corporations*, 45 GEO. L. J. 1 (1956); J. Mervyn Jones, *Claims on Behalf of Nationals Who are Shareholders in Foreign Companies*, 26 BRIT. Y.B. INT'L L. 225 (1949); F.A. Mann, *The Protection of Shareholders Interests in Light of the Barcelona Traction Case*, 67 AM. J. INT'L L. 259, 272–73 (1973).

4. Professor Caron has called these secondary principles of State Responsibility "trans-substantive rules." *See* David D. Caron, *The Basis of Responsibility: Attribution and Other Trans-Substantive Rules*, *in* IRAN-UNITED

claims settlement institutions, and publicists to offer definitive rules and practical insights on the admissibility of creditors' claims,[5] consensus is only now beginning to form on this subject.

As transnational investment and capital flows exponentially expand in the next century, we can expect that the claims of creditors of entities affected by a host government's conduct will remain a significant question. Indeed, situations in which creditors' claims are implicated are all too common, and will become even more routine. Here is a typical scenario. An investor from a capital-exporting nation makes two loans to a company in a developing nation. The company holds a government concession in one of the extractive sectors. One loan is secured by collateral located in the host state. The other loan is unsecured. For a few years, the loans are serviced in accordance with their terms. But then the host government initiates a series of regulatory reforms (equally affecting domestic and foreign interests) that adversely impact the performance of the company, and the company becomes progressively less able to service its debt. Ultimately, the government regulation is transformed into an outright nationalization of all entities (foreign or domestic) operating in that sector. The company then defaults on the loans. The investor then seeks to collect the collateral offered for the one loan, but that action requires many years of litigation under local law, and results in a less-than-satisfactory recovery for the creditor.

This article considers the essential question of whether, under the international law of state responsibility, diplomatic protection and espousal,[6] the creditor can seek recovery of its debts (principal and interest)[7] from the host government. But part and parcel of this inquiry is a host of other difficulties: Is the creditor's remedy solely against the defaulting debtor? Can the creditor recover on both loans or just the secured loan? Does it matter that the government action here was (or was not) discriminatory? Are the answers to these questions provided exclusively by the customary international law of claims, or can bilateral or multilateral engagements of the host government be relevant?

This article attempts to chart the evolution of creditors' claim jurisprudence in international practice over the past century. At the same time, it offers what I trust will be an intelligible approach to analyzing the eligibility of creditors' claims in different legal contexts. I conclude that the claims of both secured and unsecured creditors are substantially protected in international claims practice. Claims for debts secured by mortgages or other

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States Claims Tribunal, *supra* note 1, at 109, 110; *see also* J. Combacau & D. Alland, *"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations*, 16 Neth. Y.B. Int'l L. 81 (1985); Pierre-Marie Dupuy, *The International Law of State Responsibility: Revolution or Evolution*, 11 Mich J. Int'l L. 105 (1989).

5. I had previously written superficially on this subject in David J. Bederman, *Beneficial Ownership of International Claims*, 38 Int'l & Comp. L.Q. 935, 938–40 (1989).

6. The classic definition of espousal was provided by the Permanent Court of International Justice in Panevezys-Saldutiskis Railway (Est. v. Lat.), 1939 P.C.I.J. (ser. A/B) No. 76 (Judgment of Feb. 28). The court said that diplomatic protection is a situation in international law whereby, "in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rule of international law." *Id.* at 16. Diplomatic protection is thus the interposition of a state in the private disputes of nationals. *See* Edwin Borchard, The Diplomatic Protection of Citizens Abroad 3–7 & 30–32 (1915); Guy I.F. Leigh, *Nationality and Diplomatic Protection*, 20 Int'l & Comp. L.Q. 453 (1971).

7. This article will not directly consider the measure of damages for expropriation of debt. Suffice it to say, however, that a full measure of damages for expropriated debt would include three elements: (1) the principal amount owing; (2) any interest accrued; and (3) other expenses incurred in collection of the debt.

similar liens have been accorded wide recognition. As for unsecured debt claims, international law permits (at a bare minimum) recovery by a creditor of debts owed by an entity expropriated by a host government upon proof of certain fault factors. These include outright repudiation, discriminatory treatment, or a denial of justice making collection of the debt impossible. Additionally, a number of investment treaties specifically recognize no-fault claims by unsecured creditors upon proof only that a debt owed by an entity expropriated or otherwise controlled by a host government has gone unsatisfied as a result of the host government's expropriatory act.

I. Jurisprudential History of Creditors' Claims

Any examination of the treatment of creditors' claims in international law needs to look both at treaty provisions and at the decisions of international claims tribunals and domestic settlement institutions. The handling of creditors' claims has changed vastly over time. It is important, therefore, to chart the evolution in this treatment.

A. Pre-World War I Claims Practice

Early claims tribunals were often confronted with cases in which a creditor sought to bring a claim for debts that were owed by entities affected by government actions. Regrettably, no consistent practice was established by arbitrations before World War I. Some tribunals seemed to hold that the injury to a creditor could not be directly traced from damage to, or a taking of, property held by the true owner.[8] As a decision of the U.S.-Spanish Claims Commission made emphatically clear in 1882: "The embargo of an estate which was mortgaged to the claimant, but of which he had neither legal title nor possession, afforded no ground for a claim of damages."[9] These cases seem categorical in their denial of creditors' claims.[10] National claims commissions, in most respects, seemed even less willing in the nineteenth century to accommodate the interests of creditors.[11]

Nevertheless, by the time of the outbreak of World War I, arbitrations seemed to recognize that certain secured debt interests—most notably, mortgages—were deserving of protection in international claims practice.[12] In other cases, tribunals ruled that an individual creditor could not take precedence over a receiver in bankruptcy.[13] But this still suggested

8. *See* Mora & Arango Case (U.S. v. Spain), *excerpted in* 3 John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party 2336 (1898) (award of Feb. 22, 1883).

9. *Id.* M.C. Rodriguez Case (U.S. v. Spain) (award of Mar. 31, 1882).

10. *See* Jackson H. Ralston, The Law and Procedure of International Tribunals 158 (1926 ed.) (1973 reprint) (quoting *Rodriguez*). *But see* Dickson Car Wheel Co. Claim (U.S. v. Mex.), 4 R.I.A.A. 669, 689 (1931) (opinion of Nielsen, Arb., dissenting) (doubting the precedential weight to be afforded to *Mora & Arango*, which "is very meagerly reported, and it seems to me the soundness of the decision may be questioned."). *See also* Alsop Claims (U.S. v. Peru), 2 Moore, *supra* note 8, at 1627, 1628 (claim of 1863) (creditor claim was never "judicially established").

11. *See* Blagge v. Balch, 162 U.S. 439 (1896) (Fuller, C.J.) (construing French Spoliation Acts, Mar. 3, 1891, ch. 540, 26 Stat. 862, 897, 908 (1891), to exclude assignees and creditors); Labadie v. United States, 32 Ct. Cl. 368 (1896) (same interpretation for 1891 Indian Depredation Act).

12. *See* P.S.R. Hugo Farrington's Case (U.S. v. Salvador), *excerpted in* 2 Marjorie M. Whiteman, Damages in International Law 1371–72 (1937) (exchange of notes of Nov. 15, 1899) (award for an official's refusal to recognize a foreclosure based on mortgage).

13. *See* Bance Case (U.S. v. Venez.), *reprinted in* Jackson H. Ralston, Venezuelan Arbitrations of 1903, at 172 (1903), 9 R.I.A.A. 233, 234 (1903) ("The receiver, representing the creditors, only acts as administrator

that groups of creditors did have standing to bring claims. And, in other contexts, international claims commissions tended to permit claims for debts manifestly secured by mortgages or bonds.[14] In some notable cases, though, tribunals appeared to liberalize that requirement and permit claims for unsecured debts. For example, in the *Heny* claim,[15] decided by the U.S.-Venezuelan arbitration of 1903, an American claimant's usufructuary interest in an estate (akin to a leasehold or remainder interest in American property law)[16] was considered actionable, even if that interest was not recorded as required under local law.[17] In a few claims, awards were granted proportionately to the share of a creditor's interest in a bankruptcy estate.[18] By the eve of World War I, the claims of creditors secured by liens and other similar instruments were recognized in international claims practice.

B. Inter-war Claims Practice

Despite the vast number of claims settlements and arbitrations that occurred in the wake of World War I, little consistent practice was developed on the subject of creditors' claims.

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of the property of the bankrupt party, and it is not possible to consider any individual credits from the total estate as the private property of any one creditor."); *see also* RALSTON, *supra* note 10, at 155–56 (liquidators in bankruptcy as claimants), 159 (creditors as claimants); *Dickson*, 4 R.I.A.A. at 689 (Nielsen, Arb., dissenting) (glossing *Bance* decision). *See also* International Technical Prod. Corp. & Islamic Republic of Iran, Award No. 186–302–3 (Aug. 19, 1985), *reprinted in* 9 Iran-U.S. Cl. Trib. Rep. 10, 15 (1985) (partial award); Greenstreet Case (U.S. v. Mex.), Opinions Gen. Claims Commissioners 199 (1929), 4 R.I.A.A. 462, 463 (Award of Apr. 10, 1929); *but cf.* International Sys. & Controls Corp. & Indus. Dev. & Renovation Org. of Iran, Award No. 256–139–2 (Sept. 26, 1986), *reprinted in* 12 Iran-U.S. Cl. Trib. Rep. 239 (1986) (where claim was rejected because receiver of American corporation was Canadian, an ineligible nationality); *see generally* RICHARD B. LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 24–25 (1962); ABRAHAM HOWARD FELLER, THE MEXICAN CLAIMS COMMISSIONS 1923–1934: A STUDY IN THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 116–17 (1935).

14. *See* Compagnie Générale des Eaux de Caracas (Belg. v. Venez.), 9 R.I.A.A. 329, 330–31, 346 (1903) (Venezuela responsible for the debts of an entity it expropriated). *See also* Diplomatic Correspondence Concerning the Tlahuallio Company in Mexico, *in* 1913 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 993, 1003 (1920) (July 15, 1911, letter from State Dep't to the British government, in which it appeared that the United States and Great Britain were addressing to Mexico a claim for unsecured bond obligations). *But see* later diplomatic correspondence. *Id.* at 957, 972–73 (where the British government, in a letter of July 5, 1928, asserted that the claim in the Tlahuallio Company involved the interests of "mortgage creditors" and rights in "specified assets," secured "in rem"). *See generally* Algot Bagge, *Intervention on the Ground of Damage Caused to Nationals, With Particular Reference to Exhaustion of Local Remedies and Rights of Shareholders*, 34 BRIT. Y.B. INT'L L. 162, 169 (1958).

15. *See* Heny Case (U.S. v. Venez.), 9 R.I.A.A. 125, 133–34 (1903).

16. *See id.* at 134 (noting that the interest was ". . . neither a mortgage nor a sale of the estate and, lacking the characteristic stipulations of an antichresis, can not properly be counted to that species of contracts. . . .").

17. It is important to note, however, that the arbitrators of the U.S.-Venezuela tribunal were, under the terms of the February 17, 1903 protocol establishing the institution, allowed to decide "claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation." *See* Protocol of an Agreement of 17 February 1903 Between the Secretary of State of the United States of America and the Plenipotentiary of the Republic of Venezuela for Submission to Arbitration of All Unsettled Claims of Citizens of the United States of America against the Republic of Venezuela, Feb. 17, 1903, U.S.-Venez., art. I, *reprinted in* 9 R.I.A.A. 115. That provision was interpreted by the umpire in *Heny* as dispensing with the requirement, imposed by Venezuelan law, that the usufructuary interest be recorded in order to be secured. *See id.* at 134; *see also* RALSTON, *supra* note 10, at 159.

18. *See* Turini Case (U.S. v. Venez.), *reprinted in* RALSTON, *supra* note 13, at 51, 62; Rudolf Brach Claim (U.S. v. Mex.), *excerpted in* 3 WHITEMAN, *supra* note 12, at 1724 (award under U.S.-Mex. Convention of July 4, 1868).

Isolated language in decisions from the 1920s was hostile to the notion that unsecured creditors of individuals or companies affected by government action had standing to bring claims for the taking of their debt.[19] Max Huber, arbitrator in the *Ziat, Ben Kiran* claim between Britain and Spain, noted that diplomatic protection must be extended to the party "who has been immediately hit by the damage" and not the person "who is only a creditor of another upon whom the damage has directly fallen in immediate form."[20]

These contradictory authorities were substantially misconstrued in the Mexican-American General Claims Commission's 1931 award in the *Dickson Car Wheel Company* case.[21] The facts of that decision were paradigmatic of unsecured creditors' claims. The claimant sold a number of car wheels to the National Railways of Mexico. Afterwards, that entity was (at least partially) nationalized, and thereafter declined to make payment for the wheels delivered.[22] The commission held that the claimant had no standing to sue because the injury complained of was against a Mexican corporation (the railway) and not an American concern.[23] The American Commissioner, Frederick Nielsen, wrote a vigorous dissent in which he not only disputed the majority's consideration of past authorities[24] but also noted that the claimant had, in fact, suffered from direct damage as a result of acts imputed to the Mexican government.[25]

The primary difficulty with the *Dickson Car Wheel* award is that based on the facts, the sovereign act complained of may have, indeed, been too remotely connected with the claimant's own injuries.[26] The Claims Commission, regrettably, did not stop at making that judgment but, instead, propounded a general rule that unsecured creditors' claims were inadmissible.[27] Adding more confusion, the commission recognized an exception to this

19. *See* Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers Claim (U.S. v. Reparations Comm'n), 2 R.I.A.A. at 785, 787 ("[N]either 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, the distribution of which has been decided by the majority of the shareholders, and, after its winding up, a proportional share of the assets."); *see also id.* at 790 ("[D]ebenture-holders [may] exercise not their own rights but the rights which the company, wrongfully dissolved or despoiled, was unable thenceforth to enforce; [they may not] enforce direct and personal rights, but indirect and substituted rights.").

20. Claim 53, 2 R.I.A.A. 729, 730 (1925).

21. *See Dickson*, 4 R.I.A.A. at 669.

22. *See id.* at 670. There was substantial controversy as to whether Mexico exercised complete control over the railway. There is language in the award that the National Railways of Mexico continued to exist and that Dickson Car Wheel could have continued to apply to National Railways for payment of its debt and that that entity had sufficient funds to meet its contractual obligations. *See id.* at 670–76. *But see* Oliver Am. Trading Co. v. United States of Mexico, 5 F.2d 659 (2d Cir. 1924) (holding that National Railways was a controlled entity of Mexico and could not be sued in the United States owing to the doctrine of foreign sovereign immunity). *See* Oil Field of Texas, Inc. v. Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 347, 375 n.14 (1981–82) (Mosk, Arb., concurring) (noting that in the *Dickson Car Wheel* case "the Commission denied a claim by a creditor of a railway company against the Government which took over the assets of the railway company because the Commission found the railway company still had assets and income and would have assets returned to it so that it could respond to claims.").

23. *See Dickson*, 4 R.I.A.A. at 677–81.

24. *See id.* at 688–89 (Nielsen, Arb., dissenting). He made the observation, noted above, see *supra* note 13 with text, that the *Bance Case* stood only for the proposition that receivers had priority over individual creditors. Nielsen also questioned the significance of the *Mora & Arango Case*, *supra* note 8.

25. *See id.* at 688 (Nielsen, Arb., dissenting).

26. *See id.* at 675–76, 681 ("The damage that might have been suffered by the claimant company is not definite, but is of a provisional character.").

27. *See id.* at 681 ("A State does not incur international responsibility from the fact that an individual or company of the nationality of another State suffers a pecuniary injury as the corollary or result of an injury

rule, a caveat based on a provision in the convention that established the commission.[28] A claim by a creditor was permissible if the property interest in the debtor was "substantial and bona fide" at the time of the state action that injured the debtor.[29] This language can be taken as a strong statement that the claims of *secured* creditors—that are "substantial and bona fide"—will be admissible.

But apart from its grudging acceptance of secured creditors' claims, the *Dickson Car Wheel* decision has been relied upon as the chief precedent categorically rejecting unsecured creditors' claims in international practice. It is more sensibly interpreted, however, as being merely an international recognition of a rule of causation in claims practice. As Frederick Nielsen pointed out in his dissent: "[T]he issue is whether acts of Mexican authorities in causing directly an injury, namely, the destruction of property rights, impose responsibility on Mexico."[30] Publicists writing contemporaneously with the *Dickson Car Wheel* case tended to side with Commissioner Nielsen's views on the issue of causation in the case.[31] In any event, the distinction embraced by that award—that compensation could only be provided for direct damage to property interests *(dommage)* and not indirect effects *(préjudice)*—was adopted by other arbitrators in the Mexican Claims Commissions of the 1920s[32] and other tribunals.[33]

In the domestic settlement institutions organized under the authority of the United States between the two world wars, however, creditors' claims were routinely allowed. Decisions were rendered awarding damages for unpaid debts[34] and for unsatisfied bond obligations.[35] In the *Hofmann and Steinhardt* case decided by the American-Turkish Claims Commission,

which the defendant State has inflicted upon an individual or company irrespective of nationality when the relations between the former and the latter are of contractual nature."). Ironically, the arbitrator writing for the panel, Commissioner Fernández MacGregor of Mexico, relied chiefly on Edwin Borchard (an American publicist) for his conclusion. *See id.* at 680 (citing 20 AM. J. INT'L L. at 70 (1926) (critical of notion that creditors, partners and insurers can have standing to bring claims)).

28. *See* Convention Establishing a General Claims Commission, Mex.-U.S., Sept. 8, 1923, T.S. No. 678, 43 Stat. 1730 (1923).

29. *Id.* art. 1 (which allows the filing of "All claims for losses or damages . . . in which such citizens have or have had a substantial and bona fide interest").

30. *Dickson*, 4 R.I.A.A. at 688 (Nielsen, Arb., dissenting).

31. *See* JACOBUS GIJSBERTUS DE BEUS, THE JURISPRUDENCE OF THE GENERAL CLAIMS COMMISSION, UNITED STATES AND MEXICO 254–57, 266 (1938); FELLER, *supra* note 13, at 124 ("If the Mexican government had taken over the [railway] lines because it wanted to prevent the fulfillment of this or other contracts, it would be easier to say that the damage was 'direct' and to hold Mexico responsible.").

32. *See, e.g.*, Société civile des Porteurs d'obligations du Crédit Foncier Mexicain (award no. 79, unpublished) (Fr. v. Mex.), *abstracted in* FELLER, *supra* note 13, at 122–23. Other decisions of the Mexican Claims Commissions were hostile even to the claims of secured creditors. *See* Debenture Holders of the San Marcos & Pinos Co. (U.K. v. Mex.), 5 R.I.A.A. 191 (1931) (debentures were secured by mortgage, but claim still disallowed); Greenstreet Claim (U.S. v. Mex.), *abstracted in* FELLER, *supra* note 13, at 123 n.127.

33. *See* Affaires des Forêts du Rhodope Central (Fond) (Gr. v. Bul.), 3 R.I.A.A. 1425, 1426 (1933) (government act must constitute "a step directly aimed at the right of a claimant").

34. *See* Laredo Elec. & Ry. Co. (Decision 2-D), *reprinted in* AMERICAN MEXICAN CLAIMS COMMISSION: REPORT TO THE SECRETARY OF STATE 247–47 (1948) (grant of compensation for "nonpayment by the Mexican authorities of a debt of a Mexican company to the claimant after seizure of that company's assets by those authorities"). This Commission, established by the Act of Dec. 18, 1942, 56 Stat. 1058 (1942), disposed of the claims not decided by the international arbitrations with Mexico of the 1920s.

35. *See* H. Milne McIntosh, *id.* at 364, 367 (Decision 17-C) (citing *Heny* claim, *supra* note 15, holding that bond-owners have right to assert claim); General Finance Co., *id.* at 546, 548 (Decision 125-E) (mortgage bonds).

made under the Treaty of December 24, 1923,[36] the claims concerned bonds held in a private Turkish railway. The arbitrator, none other than Frederick Nielsen, noted that such a claim "must be substantiated by convincing evidence showing an interference by the Turkish Government with property rights resulting, in effect, in confiscation."[37] Nielsen went on in this case to supplement his dissent in *Dickson Car Wheel* and to provide the basic elements of a creditor claim:

> (1) that the claimant has cognizable property interests in another entity, which can include contractual rights or debt obligations; (2) that the government "exercised control" over the entity "and interfered with its operation and took action resulting in the destruction of the claimant's property rights in a manner violative of international law;" and (3) "the claimant has suffered damages that can be estimated with reasonable accuracy."[38]

Hofmann and Steinhardt can rightly be regarded as the origin of the principle that an unsecured creditor's claim is valid upon proof that government action effected a confiscation of an entity along with its contractual and debt obligations. In these circumstances there can be presumed "evidence that [the] damages sustained were the proximate result of the application of such measures."[39]

These decisions thus emphasized that the proper standard for acceptance of unsecured creditors' claims is that there must be a causal link between the government action and the injury sustained. These cases did not, however, articulate precisely what nexus of causation is required. These inter-war authorities certainly did, however, strengthen the rights of secured creditors to make claims.

C. Postwar Practice

1. *U.S. Foreign Claims Settlement Commission Decisions*

In the aftermath of World War II, the United States negotiated a number of lump-sum claims settlements with countries in central and eastern Europe. These agreements typically provided that the European country pay a lump-sum settlement in full satisfaction of a class of claims by U.S. citizens (as defined in the treaty). A domestic claims institution, the U.S. Foreign Claims Settlement Commission (FCSC or Commission), would then distribute the proceeds of the lump sum in accordance with the terms of the agreement, and, more importantly, the provisions of the relevant statutory authority under the International Claims Settlement Act of 1949 (1949 Act).

The ability of the FCSC to award creditors' claims was often sharply limited by the statutory requirements under the 1949 Act.[40] In interpreting the FCSC jurisprudence, it is thus vital to ascertain the precise statutory authority granted by Congress to the Commission in allowing creditors' claims. Where the Commission was free to interpret the then-emerging customary international law of claims, it permitted many varieties of creditors' claims, both secured and unsecured. In many instances, however, Congress chose to conserve the funds distributed from the lump-sum settlements and statutorily disqualified many

36. *See also* Act of March 22, 1935, 49 Stat. 67 (1935).

37. American-Turkish Claims Settlement: Opinions and Report 286, 289 (Fred K. Nielsen ed., 1937) [hereinafter American-Turkish Claims].

38. *Id.* at 291.

39. *Id.* at 293.

40. *See Oil Field*, 1 Iran-U.S. Cl. Trib. Rep. at 375 n.14 (Mosk, Arb., concurring).

sorts of unsecured creditors' claims. Even so, the FCSC still granted debt claims arising from mortgages or similarly strong forms of security.[41]

For example, in drafting the terms of the Yugoslav Claims Program under the 1949 Act and the Agreement with Yugoslavia of July 19, 1948,[42] Congress manifestly intended to exclude most creditors' claims.[43] The FCSC consequently rejected unsecured creditors' claims,[44] while accepting those secured by mortgages.[45] This same result was achieved in the Czechoslovak Claims Program, in claims considered under the nearly identical language of section 404 of Title IV of the 1949 Act.[46] That program did award compensation for debts annulled by the explicit action of the Czechoslovak government.[47]

In the Hungarian, Rumanian and Bulgarian Claims Program under Title III of the 1949 Act, at issue was the interpretation of sections 303(2) & (3) of the statute. These sections allowed claims for "nationalization, compulsory liquidation or other taking of property of nationals of the United States" and "obligations . . . arising out of contractual or other rights acquired by nationals of the United States prior to September 1, 1939, and becoming payable prior to September 15, 1947." The FCSC considered whether this language, as interpreted under the relevant international law of claims,[48] extended

41. The standard used by the FCSC was whether the recorded mortgage interest was proper in form and secure in obligation under the law of the land's situs. *See* Claim of Joseph Singer, 15th Semi-Ann. FCSC Rep. 20, 21 (Dec. 1961) (Czech Claim No. 3,993; Decision No. 2556; Nov. 15, 1961) ("It is well settled that ownership of real property is subject to the laws in effect where such real property is situated."); Claim of Elsa Susman, 1969 FCSC Ann. Rep. 94 (Yugoslav Claim No. 2-1026; Decision No. 2-1734; Apr. 16, 1969) (mortgage interest was an immovable or real property under Yugoslav law); Claim of Ethelee Carlson, 24th Semi-Ann. FCSC Rep. 48 (June 1966) (Polish Claims No. 6168; Decision No. 9001; Oct. 27, 1965) ("security mortgage" only gave priority to future entries and was not a secured debt). The FCSC also gave awards for recorded usufructuary (remainder) interests in property. *See* Claim of Vilma Ferenc, 10th Semi-Ann. FCSC Rep. 52 (June 1959) (Hungarian Claim No. 20,151; Decision No. 966; Mar. 12, 1958).

42. *See* Agreement with Yugoslavia of July 19, 1948, 62 Stat. 2658 (1948).

43. *See* International Claims Settlement Act of 1949, 22 U.S.C. § 643 (2000) (". . . the claims settled do not include creditor interests. They are confined to ownership interests in property, either legal or beneficial, direct or indirect. This is consistent with traditional United States policy in connection with espousals.").

44. *See, e.g.*, Virginia Howard (Docket Y-1282; Decision Y-1259), *reprinted in* FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES: DECISIONS AND ANNOTATIONS 112, 113–14 (1968) (decision of Sept. 15, 1954) [hereinafter FCSC DECISIONS & ANNOTATIONS].

45. *See* Emma Brunner (Docket Y-1281; Decision Y-1130; Aug. 12, 1954); *Id.* at 116; 8 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1001 (1967).

46. *See* Skins Trading Corp. (Claim No. CZ-3978; Decision No. CZ-734; May 23, 1960), *reprinted in* FCSC DECISIONS & ANNOTATIONS, *supra* note 44, at 402, 403–04 ("There is no showing . . . that the debt which forms the res was ever annulled by the Government of Czechoslovakia so as to constitute a taking of the claimant's property; and a mere failure . . . to pay a debt will not give rise to a compensable claim under section 404 of the Act.") (citation omitted); *see also* 8 WHITEMAN, *supra* note 45, at 999–1000 (describing a decision in which compensation was granted by the FCSC where there was an "arbitrary annulment" of a debt obligation). The Czechoslovak Claims Program accepted those creditors' claims that were secured by mortgages. *See* 8 WHITEMAN, *supra* note 45, at 1002 (Benno Pilpel; Claim No. CZ-4242; Decision No. CZ-57; Dec. 23, 1959). Neither of these cases really addressed the question of how an annulment of a debt could be proven. Instead, the claimants had apparently conceded that there was no governmental annulment, and, therefore, the FCSC ruled that the claims were barred by the terms of article 404 of the 1949 Act.

47. FCSC DECISIONS & ANNOTATIONS, *supra* note 44, at 405–06 (annotating Ella Wyman (Claim Nos. CZ-4347 & 4348; Decision No. CZ-3529)).

48. Section 303 of Title III of the International Claims Settlement Act of 1949 required that the "Commission shall determine in accordance with applicable substantive law, including international law, the validity and amount of claims. . . ." *See* 22 U.S.C. § 1643.

to the claims of secured creditors in the *European Mortgage Series B Corp.* decision.[49]

Relying upon the writings of Ralston and Borchard, as well as the *Dickson Car Wheel* case, the FCSC concluded that "the weight of authority is to the effect that such losses as a creditor may suffer as a result of the wrongful act committed against his debtor are too remote or indirect to sustain an award to the creditor."[50] A creditor could only prevail, according to the FCSC, where "the debt forming the basis of [the creditors' claim] would have been paid, *but for* the actions of the Government . . . of which it complains."[51] The Commission consequently rejected the claims of the bondholders secured by mortgages that were valid under Hungarian law. The FCSC cautioned, however, that "[i]t is not intended to find a creditor claimant could under no circumstances show himself entitled to recover, particularly under a statute with different background, history, and language."[52] One commissioner dissented, believing that "[i]t is an anachronism . . . to deny the instant claim on the basis of the traditional reluctance of international tribunals to look with favor upon claims based on secured creditor interests."[53]

The *European Mortgage Series* decision appears to have been wrongly decided on two grounds. First, it is questionable whether international claims practice was, in fact, hostile to the interests of creditors (including bondholders) secured by mortgages. Second, the FCSC appears to have made a very artificial distinction between compensation due for property nationalized or taken (allowed under section 303 of the 1949 Act) and the duty of a government to pay the debts of entities it has nationalized or taken (barred under the same section).[54] The Hungarian, Rumanian and Bulgarian Program thus allowed creditors' claims only for those debts literally covered by section 303(3) of the 1949 Act—those denominated in dollars and undertaken before 1939 and payable before 1947.[55]

A different result was reached with creditors' claims decided under the Soviet Claims Program under the authority of section 305(a)(2) of the 1949 Act.[56] The FCSC thus allowed the claims of "creditors of the nationalized enterprises, secured or unsecured . . ." where there was an "outright repudiation of its own obligation."[57] Awards were likewise granted by the FCSC under the 1960 Claims Agreement with Poland for "debts owed by enterprises which have been nationalized or taken by Poland and debts which were a charge upon

49. *See* Claim No. Hung-22020; Decision No. Hung-1605; Apr. 13, 1959, *reprinted in* FCSC DECISIONS & ANNOTATIONS, *supra* note 44, at 246.

50. *Id.* at 252 (citing EDWIN BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 645 (1927); RALSTON, *supra* note 10, at 158).

51. *Id.* at 254 (original emphasis).

52. *Id.* at 257.

53. *Id.* (dissenting opinion).

54. *See, e.g.*, Universal Oil Products Co. (Claim No. Rum-30531; Decision No. Rum-547), *reprinted in* 10 FCSC Semi-Ann. Rep. 117 (Jan.–June 1959); *abstracted in* FCSC DECISIONS & ANNOTATIONS, *supra* note 44, at 260.

55. Arthur Zentler, *reprinted in* FCSC DECISIONS & ANNOTATIONS, *supra* note 44, at 245.

56. Which provided that "[t]he Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts . . . [of] claims arising prior to November 16, 1933, of nationals of the United States against the Soviet Government." *See* 22 U.S.C. § 1643.

57. First National City Bank of New York (Claim No. SOV-41261; Decision No. SOV-3126; June 20, 1959), *reprinted in* FCSC DECISIONS & ANNOTATIONS, *supra* note 44, at 324, 338. *See also* Panel Opinion No. 40 (Sept. 20, 1956) ("Such action of the Soviet Government amounted to an invalidation and nullification of all claims . . . of creditors against the former private enterprises which subsequently have been nationalized"), *reprinted in* 8 WHITEMAN, *supra* note 45, at 997–98.

property which has been nationalized, appropriated or otherwise taken by Poland." The Polish program granted awards for a broad array of secured and unsecured obligations, so long as the debt had been interfered with by government action.[58]

Thus in claims programs administered in the 1950s and 1960s, the FCSC gave very unequal treatment to creditors' claims. Depending upon the vagaries of legislative language in various titles of the International Claims Settlement Act, the following results were achieved: (1) *all* creditors' claims were rejected; (2) claims for unsecured obligations were rejected, while claims for secured debt, particularly mortgages, were accepted; and (3) *both* secured and unsecured debt claims were allowed, so long as there was an outright repudiation of the debt or direct government interference with the obligation.

These results were complicated by a requirement that the debt in question be actually repudiated by government action. The FCSC consistently denied that "the nationalization of a debtor company . . . constitute[d] a taking of the property of a creditor of the nationalized company, where there has been no annulment or repudiation of the debt."[59] This echoed the language in *Dickson Car Wheel* concerning proximate causation between the taking and the claimant's injury. Yet it seemed the FCSC was primarily concerned with the nature of the expropriation, rather than with the character of the debt.[60] Moreover, the International Claims Settlement Act, in the Czechoslovak, Hungarian, Rumanian, and Yugoslav programs, provided that creditors' claims would not be entertained unless the interests had been confiscated by a special decree, law or administrative decision.[61]

In the recently completed claims program with Iran, under the Claims Settlement of June 22, 1990,[62] and the 1985 Iran Claims Act,[63] the FCSC made a number of awards for unsecured creditors' claims.[64] In the *Rockwell-Collins International Inc.* claim, the Commission ruled that it had jurisdiction in claims where Iran had interfered "with the property rights of such claimants in the amounts owed to them by private Iranian entities."[65] Such interference could be shown by an outright nationalization or taking of the entity owing the debt or other evidence of government control of that entity.[66] The Commission, however, specifically rejected a rule that required that the debt be owed by an entity that was

58. *See* Seiberling Rubber Co. (Claim No. PO-7839; Dec. No. PO-7830), *reprinted in* FCSC DECISIONS & ANNOTATIONS, *supra* note 44, at 523–25.

59. Claim of Skins Trading Corp., 17th Semi-Ann. FCSC Rep. 202 (Dec. 1962) (Claim No. CZ-3978; Decision No. CZ-734; May 23, 1960).

60. *See id.* at 202 n.*. *Cf.* Europa Mortgage Series B Corp., 10th Semi-Ann. FCSC Rep. 72, 76–77 (June 1959) (Claim No. HU-22,020; Decision No. 1,605; Apr. 13, 1959) (claimant must prove "that the debt forming the basis of its claim would have been paid, *but for* the actions of the Government of Hungary . . ." (original emphasis)).

61. *See* RICHARD B. LILLICH & GORDON A. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION 62 n.245 (1962). Creditors' claims against nationalized concerns were, however, specifically allowed in the Polish claims settlement program. *See* Claims Settlement Agreement, July 16, 1960, U.S.-Pol., art. 2, para. c, 11 U.S.T. 1953.

62. Claims of Less than U.S. $250,000, Case No. 86 & Case No. B38, 25 Iran-U.S. Cl. Trib. Rep. 327 (1990-II).

63. Foreign Relations Authorization Act, Pub. L. No. 99–93, tit. V, 99 Stat. 437 (1985) (codified at 50 U.S.C. § 1701 note (1994)) [hereinafter Iran Claims Act].

64. *See generally* Richard B. Lillich & David J. Bederman, *Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims*, 91 AM. J. INT'L L. 436 (1997).

65. Rockwell-Collins Int'l Inc., Dec. No. IR-937, at 11 (1994).

66. *See* Lillich, *supra* note 64, at 450–51 (discussing FCSC decisions examining controlled status of various Iranian entities).

nationalized or otherwise controlled by Iran.[67] Instead, claims were allowed in which Iran had interfered with payments of debts by entities it had not nationalized.[68]

2. *Arbitral & Judicial Decisions*

The FCSC Iran program's liberal handling of creditors' claims reflects a recent trend in national judicial practice, international arbitrations and treaty settlement. For example, in a 1987 decision made by the Second Circuit in *Banco Nacional de Cuba v. Chemical Bank New York Trust Company*,[69] a searching treatment was made of the most recent law concerning creditors' claims. This case was part of the nearly thirty-year-long dispute stemming from Cuban nationalizations in 1960. Banco Nacional attempted to defend some creditors' claims on the theory "that when a state nationalizes an enterprise, the only property 'taken' is that of the enterprise, not that of the enterprise's creditors; thus, international law imposes no obligations upon the state in favor of those creditors."[70]

The Second Circuit rejected this theory, and did so on a number of grounds. First, the court of appeals questioned Cuba's assumption that creditors' claims are not a property right protected in international law. The court concluded otherwise, relying on a wide variety of sources.[71] Second, and more importantly, the Second Circuit noted that "international law recognizes that when the rights of creditors are 'directly affected' by the expropriation of the debtor's assets, the expropriation does constitute a taking of property belonging to the creditors."[72] What constitutes a direct effect sufficient to satisfy *Dickson Car Wheel*'s causation requirement? The Second Circuit held:

> In general, if a state merely expropriated a debtor's assets and treated all of its creditors alike, both foreign and domestic, the state would not be liable under principles of international law to foreign creditors for a taking of their property. This is because, though the expropriation of the assets deprived the debtor of the wherewithal to make repayment, any injury suffered by the creditors would be regarded as a remote and incidental, rather than a proximate, result of the expropriation. . . . The requisite directness may occur, for example, when the state that expropriates the debtor's assets also takes action directly against the creditors, as by annulling their claims or barring suit thereon. . . . The requisite nexus may also exist when the nonpayment of foreign creditors is the product of deliberate national discrimination.[73]

Banco Nacional thus gives content to the causation analysis made in *Dickson Car Wheel.* Claims to debts, the court held, are manifestly a property interest protected under international law. Where there is either (a) an explicit renunciation or repudiation of the debt by the host government or other action tantamount to making the debt unenforceable, or

67. *See* Richard B. Page, Dec. No. IR-1473, at 5 (1993); William Ray Hollyfield, Dec. No. IR-255, at 6–7 (1991).

68. *See, e.g.*, Concrete Detailing Servs. Inc., Dec. No. IR-576 (1992); Andrew Joseph Nemec, Jr., Dec. No. IR-566 (1992); Steel, Inc., Dec. No. IR-22 (1991).

70. *Id.* at 238.

69. Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 822 F.2d 230 (2d Cir. 1987).

71. *See id.* (citing Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 & n.3 (2d Cir. 1985); Louis B. Sohn & Robert R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 567, 574 (1961)).

72. *Banco Nacional*, 822 F.2d at 239 (citing WHITEMAN, *supra* note 45, at 994, 997–98; *Dickson Car Wheel*, 4 R.I.A.A. at 681 (Nielsen, Arb., dissenting); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 192 (1965)). For a criticism of the sources relied upon by the Second Circuit for this point, see Frederic L. Kirgis, Jr., *Understanding the Act of State Doctrine's Effect*, 82 AM. J. INT'L L. 58, 60 (1988).

73. *Banco Nacional*, 822 F.2d at 239 (citations omitted).

(b) deliberate national discrimination in the treatment of various groups of creditors, the government becomes liable for its expropriation of debt.

These principles were, if anything, confirmed and extended in the jurisprudence of the Iran-U.S. Claims Tribunal (Tribunal), established by the Algiers Accords of January 19, 1981, as part of the resolution of the hostage crisis.[74] The Tribunal had jurisdiction not only over claims involving debts but also any "measures affecting property rights."[75] Where the Tribunal found that an Iranian entity had been nationalized, or was otherwise controlled by the government, it followed that Iran was responsible under international law for the payment of debts owed by that entity to American creditors.[76] This was ruled without reference to whether there had been any discriminatory treatment of creditors by Iran or whether there had been an explicit renunciation or repudiation of the debt.[77]

In the *J.I. Case Company* decision, the Tribunal seemed to indicate that it would also be disposed to grant awards where it was proven that Iran had "taken action which had the effect of preventing payment" of debts owed to an American firm by Iranian entities.[78] This suggests that the Tribunal believed that it was consistent with international law to make awards for expropriations of debt in entities that were not ultimately nationalized or controlled by Iran. This holding may have contributed to the decisions of the FCSC[79] permitting creditors' claims even without proof that the debtor entity was controlled by Iran, so long as it was proven that Iran had interfered with the payment of the debt or had otherwise benefitted from its nonpayment.

3. *Treaty Law on Creditors' Claims*

Explicit protection of unsecured creditors' claims against expropriation by host governments has only been extended in treaties concluded after World War II.[80] In a series of claims conventions negotiated with countries in central and eastern Europe after the war, language was incorporated that specifically allowed claims for debts. For example, the treaty between the United Kingdom and Hungary of June 27, 1956, covered "all property, rights or interests (including debts) affected by the various Hungarian measures. . . ."[81] Virtually identical language was included in the protocol of February 26, 1953, signed by Denmark and Poland.[82]

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74. *See* 1 Iran-U.S. Cl. Trib. Rep. 3, 9 (1981–82).

75. Claims Settlement Declaration, art. II, para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9–10.

76. *See, e.g.*, Sedco, Inc. & Iran Marine Industrial Co., 21 Iran-U.S. Cl. Trib. Rep. 31, 35 (1989-I).

77. The Algiers Accords specifically provided that Iran was under an obligation "to pay all its debts and those of its controlled institutions. . . ." General Declaration, ¶ 2, 1 Iran-U.S. Cl. Trib. Rep. at 1–2.

78. J.I. Case Co. v. Iran, 3 Iran-U.S. Cl. Trib. Rep. 62, 65 (1983-II).

79. Which was obliged to follow Tribunal precedent, as well as "applicable principles of international law, justice and equity." *See* Iran Claims Act, *supra* note 63, at § 501(a).

80. *See generally* LUCIUS CAFLISCH, LA PROTECTION DES SOCIÉTÉS COMMERCIALES ET DES INTÉRÊTS INDIRECTS EN DROIT INTERNATIONAL PUBLIC 253–54 & nn.3–4 (1969) (collecting references to at least a dozen such agreements).

81. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic Relating to the Settlement of Financial Matters, June 27, 1956, U.K.-Hung., 249 U.N.T.S. 24, art. 4(1).

82. Protocol No. 2 Between Denmark & Poland on Danish Assets and Interests in Poland, Feb. 26, 1953, Den.-Pol., 186 U.N.T.S. 303, art. I(A)(3) (covering "claims, including claims incorporated in securities, against debtors in Poland whose property has been affected by Polish legislation or by measures taken thereunder."). *See also* Claims Agreement, U.S.-Yugo., July 19, 1948, art. 2(c), 89 U.N.T.S. 43, 46 (reference to "indirect interests" was later interpreted to cover some sorts of creditor claims). *See supra* notes 42–45 and accompanying text (regarding the U.S. Foreign Claims Settlement Commission's handling of claims under this treaty).

The most explicit provisions on creditors' claims in these postwar agreements can be found in Section IV of the United Kingdom-Poland Exchange of Notes of October 31, 1947.[83] Point 16(a) of this instrument made clear that

> [w]here the financial claims of British creditors lie against the owners of undertakings nationalized [by Polish action, Poland] will grant compensation to British creditors whose claims—(i) Are or, immediately prior to nationalisation, were secured on, whether by debenture, bond, mortgage or otherwise, or legally enforceable against such undertakings. . . .[84]

This indicates a strongly held intention to protect creditors' claims. Point 16(a) does require that the debt be secured, but is otherwise quite liberal in its requirement of how that security is manifested (whether "by debenture, bond, mortgage or otherwise"). Indeed, the additional language that the debt need only be "legally enforceable against such undertakings" may reflect a repudiation of a formal security requirement.

The overall thrust of these postwar claims agreements was to permit large classes of creditors' claims affected by nationalization decrees or other expropriatory action. The key element in definition in each of these treaties is precisely that a debt interest in an entity is adversely affected by a particular government action.

More recent Bilateral Investment Treaties (BITs), concluded by capital-exporting countries with investment host governments, reflect a similar trend in defining creditors' claims as being subsumed within the term "investment." The standard language employed in treaties made by many developed countries (a sampling includes Austria, Denmark, Germany, The Netherlands, Switzerland, United Kingdom, and the United States) provides that "the term 'investments' comprises every kind of asset. . . ."[85] The French formulation includes the phrase *"les biens, droits et interêts de toute nature."*[86] In addition to this broad general language, many BITs include a standard reference to "claims to money and titles to performance."[87]

In addition, other BITs include more specific references to creditors' claims as an "investment" protected by the agreement. Many national model BITs refer to species of secured debt as an "investment."[88] The current language used by the United States in its model BIT clearly provides that:

> "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, *debt*, and service and investment contracts and includes:

83. *See* United Kingdom-Poland Exchange Notes, Oct. 31, 1947, U.K.-Pol., 87 U.N.T.S. 1, 8 [hereinafter U.K.-Pol. Exchange].

84. *Id.* at 8–9.

85. Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 27 (1995) (quoting Germany-Sri Lanka treaty of 1963 and 27 § I(a) of British model BIT, which noted that "[a] change in the form in which assets are invested does not affect their character as investments.").

86. *Id.* at 27 (quoting France-Nigeria treaty of 1990).

87. *Id.* at 28. *See also id.* at 167 (§ I(1)(c) of Austria model BIT), 188 (§ I(1)(c) of German model), 210 (§ I(a)(iii) of Dutch model), 219 (§ I(c)(cc) of Swiss model: ". . . money claims and any entitlements of economic value . . ."), 229 (§ I(a)(iii) of British model), 241 (§ I(1)(a)(iii) of United States model).

88. *See id.* at 167 (§ I(1)(a) of Austrian model, referring to "mortgages, liens, pledges, usufructs"), 177 (§ I(1)(iii) of Danish model mentioning "mortgages, privileges, guarantees"), 188 (§ I(1)(a) of German model mentioning "rights in rem"), 210 (§ I(a)(i) of Dutch model also mentioning "rights in rem," while § I(a)(ii) listed "bonds"), 219 (§ I(c)(aa) of Swiss model and "rights in rem"), 229 (§§ I(a)(i) & (ii) of British model referring to "mortgages, liens or pledges" and "debentures of a company").

(i) tangible and intangible property, *including rights, such as mortgages, liens and pledges*;
(ii) a company or shares of stock or other interests in a company *or interests in the assets thereof*;
(iii) *a claim to money or a claim to performance having economic value, and associated with an investment*; . . . .
(v) *any right conferred by law or contract*. . . .[89]

The italicized portions of this standard provision can all support the notion that creditors' claims are covered by the protections under the Bilateral Investment Treaty. Nor is it just secured debt that is protected, although the references to "mortgages, liens and pledges" and "interests in the assets [of a company]" are clearly intended for that purpose. Unsecured creditors' claims appear to be covered in the simple formulation of "debt" in the chapeau of the clause, as well as in the standard language of "a claim to money or a claim to performance having economic value, and associated with an investment," as well as the catch-all "any right conferred by law or contract." Additionally, when the U.S. BIT defines return as "an amount derived from or associated with an investment," interest is specifically detailed.[90]

Finally, the February 14, 1998, draft of the Multilateral Agreement on Investment (MAI), then being negotiated under the auspices of the Organization for Economic Cooperation and Development (OECD), but later aborted, clearly indicates a trend in favor of protecting creditors' claims. Article II of the MAI defined investment to include "[e]very kind of asset owned or controlled, directly or indirectly, by an investor, including. . . . (iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom. . . ."[91] The drafters have indicated, though, "an interpretive note will be required to indicate that, in order to qualify as an investment under the MAI, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[92] In any event, this draft stands as explicit evidence that the international community regards all creditors' claims (and not just those secured by mortgages or forms of debenture) as being cognizable.

Moreover, the standard language of BITs and the proposed formulation in the MAI suggest that an investment in debt is taken whenever a government expropriation of the debtor entity has the effect of preventing repayment of the debt or otherwise materially prejudicing the performance of the loan.[93] The MAI provides that "[a] Contracting Party shall not expropriate or nationalise directly or indirectly an investment . . . or take any measure or measures having equivalent effect. . . ."[94] This language tracks the most recent BITs negotiated by the United States[95] and has been construed as having broad scope.[96]

89. *Id.* at 241 (art. I(1)(a) of standard United States BIT as in force in 1995) (emphasis added).

90. *Id.* at 241–42 (§ I(1)(d) of the U.S. model BIT).

91. Multilateral Agreement on Investment, The MAI Negotiating Text (as of Apr. 24, 1998), art. II(2)(iii), (visited Jan. 3, 2000) <http://www.citizen.org/pctrade/maitext2.htm> [hereinafter MAI].

92. *Id.* at n.2.

93. *See, e.g.*, DOLZER, *supra* note 85, at 245 (§ III(1) of the standard U.S. BIT provides "[i]nvestments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization. . . .").

94. MAI, *supra* note 91, art. IV(2.1).

95. *See, e.g.*, Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, July 2, 1997, U.S.-Jordan, art. III(1), 36 I.L.M. 1498, 1501 (1997).

96. *See* DOLZER, *supra* note 85, at 27–28.

II. The Current Status of Unsecured Creditors' Claims

Current international claims practice rejects a categorical rule denying unsecured creditors' claims. Precedents supporting such unconditional disapproval exist from the last century, and certainly the often-cited *Dickson Car Wheel* decision from 1931 may appear to support such a conclusion. As discussed above, however, the modern view seems to be that it would be a mistake to regard *Dickson Car Wheel*, and similar awards, as outright denials that a claim for unsecured debt taken by government action was ever admissible.[97] The question, therefore, is whether the obligation to pay an expropriated debt arises only when the host government expressly renounces the debt, discriminatorily treats different groups of creditors, or otherwise denies justice to the creditors (fault conditions), or automatically when the host government takes action against a domestic entity and, as a result, its debt obligations are not paid (no-fault conditions).

A. Fault Conditions

The essential insight of the *Dickson Car Wheel* case, as noted by later authorities and publicists,[98] is that there must be a causal connection between a host government's action, however characterized, and the loss suffered by the foreign creditor. Such a causal link is an essential element in any international claim or exercise of diplomatic protection under the law of state responsibility, except where an international agreement alters the requirement of such a causal link (as, for example, in the Algiers Accords and the U.K.-Poland 1947 Exchange of Notes).[99]

There are easy ways to prove a causal connection between a government's action directed toward a domestic debtor and a loss suffered by a foreign creditor. One way involves secured debts, where the host government interferes with the creditor's attempts to enforce its security interests in the encumbered property after default. Another way would be to show that the host government repudiated or renounced an unsecured debt or otherwise affirmatively prevented its repayment. Many authorities focus on precisely such explicit abrogation or repudiation.[100]

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97. *See* Caflisch, *supra* note 80, at 263; Eric Wyler, La règle dite de la continuité de la nationalité dans le contentieux international 203–11 (1990). *But see* Ulrich Hess, *The Banco Ambrosiano Collapse and the Luxury of National Lenders of Last Resort with International Responsibilities*, 22 N.Y.U. J. Int'l L. & Pol. 181, 207–08 (1990) ("What are the creditors' remedies according to the parallel expropriation standards? Unfortunately, no remedy exists at the present time.").

98. *See, e.g.*, de Beus, *supra* note 31, at 254–58, 266; *Banco Nacional*, 822 F.2d at 238–39.

99. *See generally* Admin. Decision No. II (U.S. v. Ger.), Reports of the Mixed Claims Commission, U.S. and Germany 5 (Nov. 1, 1923), 7 R.I.A.A. 23, 28–30 (upholding "familiar rule of proximate cause"); Sohn, *supra* note 71, at 548, 575 (art. 1(1) of a Draft Convention on State Responsibility provided "A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes an injury to an alien."); Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 241–53 (1953); Michael Straus, *Causation as an Element of State Responsibility*, 16 Law & Pol'y Int'l Bus. 893 (1984); Norbert Wuhler, *Causation and Directness of Loss as Elements of Compensability Before the United Nations Compensation Commission*, *in* The United Nations Compensation Commission 207 (Richard B. Lillich ed., 1995) (all collecting sources evaluating a rule of causation).

100. *See, e.g.*, Rhodope Central Forests Case, 3 R.I.A.A. at 1426; American-Turkish Claims, *supra* note 37, at 291; FCSC Decisions & Annotations, *supra* note 44, at 403 & 254; Feller, *supra* note 13, at 124; Jiminez de Arechega, *Diplomatic Protection of Shareholders in International Law*, 4 Phil. Int'l L. J. 71, 72–75 (Jan.–June 1965).

And, of course, the Restatement (Third) of the Foreign Relations Law of the United States appears to endorse such an explicit standard when it provides that

> A state is responsible under international law for injury resulting from . . .
>
> (2) a repudiation or breach by the state of a contract with a national of another state
>
> (a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by noncommercial considerations, and compensatory damages are not paid; or
>
> (b) where the foreign national is not given an adequate forum to determine his claim of repudiation or breach, or is not compensated for any repudiation or breach determined to have occurred.[101]

It is vital to note, however, that this section involves only repudiation or breach of a contract made directly by the host government. It does not expressly cover the case where the host state expropriates, nationalizes or takes other action having the effect of taking a property interest in a domestic entity that is indebted to a foreign creditor. The problem considered in this article may be more accurately described as consequences flowing from expropriation, not contractual breach.

"Repudiation," as used in section 712(2) of the Restatement (Third) was meant as "an outright disclaimer by the state of any liability under the contract."[102] If applied in the context of obligations flowing from debts, the host government would have to renounce any obligation to pay whatsoever, in order to be covered by section 712. Of course, host governments may simply decline to make any explicit disclaimer of the debt, in order to avoid triggering a duty to compensate.

Fortunately, though, the Restatement section provides that "where the foreign national is not given an adequate forum to determine his claim of repudiation or breach," there is a violation of international law and a duty to compensate arises.[103] When applied to a creditor's claim, if a domestic entity owing debts to a foreign creditor is nationalized, that creditor would have the right to proceed in domestic courts for the determination of the debt. If that forum is denied—probably on the ground that the original debtor does not exist and the claim is, in fact, against the government and is thus barred by sovereign immunity—then the expropriation of debt is compensable under international law. Such an interpretation of Restatement secton 712(2)(b) would impose a substantial exhaustion of local remedies rule for creditors' claims. Adequately exhausting such remedies might take years and could only be initiated on the first default of the debt obligation.

The last important provision of the Restatement section 712 is that if the repudiation or breach of a debt obligation is discriminatory then it violates international law and compensation must be forthcoming. This bar against a host government's discriminatory treatment of creditors' claims has a long pedigree in international claims practice.[104] If a host govern-

101. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(2) (1986) [hereinafter RESTATEMENT (THIRD)].

102. *Id.* § 712, at 212, reporters' note 8 (citing *Matter of Revere Copper & Brass Co.* and *OPIC*, 14 I.L.M. 1321, 1345 (Arb. 1978) (interpreting OPIC insurance policy) and [1979] DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 1217 (interpreting Second Hickenlooper Amendment)). *See also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 192 (1965) ("Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property. . . .").

103. *See* RESTATEMENT (THIRD) § 712(2)(b).

104. *See, e.g.*, *Banco Nacional*, 822 F.2d at 238–39; Sohn, *supra* note 71, at 567, 574 (art. 12(4) of their Draft on State Responsibility, referring to a breach of contract as wrongful if it is a "clear and discriminatory departure from the proper law of the contract or concession"); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 315–20 (1991).

ment nationalizes or otherwise exercises effective control over an entity and allows payment of that entity's obligations to its own citizens, but not to foreigners, or to only select nationalities, then it is discriminatory. Such discriminatory conduct results in state responsibility to pay the debt.

B. No-Fault Conditions

Obviously, if fault conditions are applied in situations involving expropriation of entities owing debts to foreign creditors, there is a substantial risk that the obligations will go unsatisfied. A host government may make no express renunciation of debt, nor need it do so. Furthermore, the host government may not treat different classes of claimants discriminatorily. It may choose not to repay, or simply reschedule, debt obligations for all creditors of the nationalized entity, both domestic and foreign. Lastly, a host government may extend local remedies through domestic tribunals to adjudicate debts, but such proceedings may take years, may prove procedurally cumbersome and may not produce binding judgments that will result in prompt, adequate and effective compensation for the expropriated debt. For secured creditors, this government interference may take the form of local tribunals refusing to permit the creditor to enforce its security interests in the encumbered property, in accordance with its rights under local law. Nevertheless, it may be hard for a creditor to argue, after initiating such domestic proceedings, that they were inadequate, at least in the sense that the recovery was less than expected.

The most recent trend in creditors' claims practice is to compensate for expropriation of debt upon proof that the host government undertook action that had the effect of preventing repayment of the obligation to a foreign creditor. This new, strict-liability trend is derived from two treaty sources: claims settlement instruments, especially those concluded after World War II, and bilateral or multilateral treaties for the protection of investment (BITs or the MAI).[105] This new, no-fault standard seems to require compensation simply upon proof of a government action that materially affects the performance of a debt.

Assume that a U.S. creditor has a debt obligation with an entity incorporated in a state with which the United States has a BIT that provides that investments include "debt[s]" and "claim[s] to money or . . . performance having economic value." If that entity is expropriated by the host government (and that expropriation is followed by nonpayment of the creditor's debt) that would effect a taking of the creditor's investment, requiring compensation under the treaty, unless the expropriating government can rebut the natural presumption of a causal connection between the expropriation and the subsequent nonpayment of the debt.[106] Most BITs concluded by capital-exporting countries would cover creditors' claims by such, or similar, language. Nor do they appear to require that an expropriation of the domestic entity or the treatment of its creditors be necessarily discriminatory in order to trigger the duty to compensate. The draft of the MAI contains similar language, although some ambiguity remains in the standard of compensation to be followed in cases of expropriation in that instrument.[107]

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105. *See supra* section I.C.3 for a discussion of these instruments.

106. *See* note 111 *infra* and accompanying text.

107. *See* MAI, *supra* note 91, at 49, art. IV, para. 2.1 ("A Contracting Party shall not expropriate or nationalise directly or indirectly an investment . . . except: a) for a purpose that is in the public interest, b) on a non-discriminatory basis, c) in accordance with due process of law, and d) accompanied by payment of prompt, adequate and effective compensation. . . .").

1. *Causation and No-Fault Claims*

It must be emphasized that the causation requirement is not waived under no-fault takings of debt interests: there must still be a causal nexus between the government action and the lender's damages. For example, it is entirely possible to imagine that a debt was nonperforming before any government action changing the legal status or responsibilities of the debtor. In short, the loan was bad even before any confiscatory act. In this situation, it cannot be said that government action resulted in nonpayment of the loan.

The Iran-U.S. Claims Tribunal has recently indicated that the full amounts of principal debt owing by an entity controlled by Iran are payable. It is not a defense, as Iran suggested, "that a recovery of the [promissory] notes should not be awarded because IMICO [the debtor] would not have been financially able to pay such amounts, except possibly upon liquidation of the company."[108] Instead, as the Tribunal held, "Iran undertook in the Algiers Accords to pay the debts of its controlled entities" and "[m]oreover, the ability of an entity to pay clearly could not affect the Tribunal's findings on the extent of the Respondents' legal liability, or serve as a substantive defense to the claim."[109]

This last caveat seems to suggest that if Iran had not been under an obligation by the Algiers Accords to pay the debts of its controlled entities, the inability of a debtor to repay its loans prior to expropriation could be relevant. As noted by the Tribunal in the *CBS* claim,[110] whether, at the time of expropriation, an entity was capable of paying its debts does bear on the valuation of the equity claim for expropriation of a going concern. By analogy, if an entity was not performing on its loans prior to nationalization (and such default was not, itself, owing to government interference) it might be doubted whether the host government should satisfy those debts. Alternatively, one might argue that so long as a loan was not a sham, or characterized as a contribution to capital, it should not matter whether the debtor entity later became unable to service its loan or was in default. Under the Algiers Accords and similar agreements, an expropriating government is under an obligation to pay those debts, regardless of any causal connection between the government's action and nonpayment of the debt.

By contrast, in a no-fault claim for expropriation of debt, the essential inquiry is whether, because of host government action, the debtor entity was unable to repay its debts. If the debtor was performing on its obligations prior to nationalization, and thereafter defaulted, that is *prima facie* evidence of government action causing interference with the debt obligation.[111] If the debtor was already in default of its obligations prior to government action leading to expropriation, the government does not necessarily assume the obligations. It is, however, under an obligation to respect the debt and the collateral and security pledged by the debtor to the benefit of creditors. Failing this, government action has interfered with the debt obligation.

Although lenders could argue that an expropriation has the effect of changing the legal identity of a debtor enterprise and thus likely triggering a default condition in the loan instrument, I do not believe that this factor, standing alone, constitutes conduct that caused

108. *Sedco*, 21 Iran-U.S. Cl. Trib. Rep. at 45.

109. *Id.* The Tribunal did note that "[t]he assets of a controlled entity could be relevant in determining the extent of the Respondent's liability only where the claim is based on an expropriation and the Tribunal was required to determine the value of the controlled and expropriated company." *See id.* n.12.

110. CBS Inc. & Islamic Republic of Iran, 25 Iran-U.S. Cl. Trib. Rep. 131 (1990-II).

111. *See Hofmann and Steinhardt Claim*, discussed *supra* notes 37–39 and accompanying text.

a loss. Absent an explicit undertaking by a host government to assume the debts and liabilities of the entities it was expropriating, as Iran did in the Algiers Accords, it would not be liable for the payment of debts that were already nonperforming.

2. *The Customary Status of No-Fault Expropriations of Debt*

The question, then, is whether this new, no-fault standard of compensation for expropriation of creditors' claims can apply when there is no explicit treaty provision in force between the host government and the capital-exporting state. To put it another way, have the new provisions of BITs and claims settlement instruments effected a change in the background principles of the customary international law of claims and diplomatic protection? It is true that the creditor protection clauses in BITs now appear in virtually all agreements offered by capital-exporting nations and have been broadly accepted by capital-importing countries from all over the world. To that extent, this may be evidence of an emerging customary international law rule.

The best evidence that there has emerged a no-fault rule regarding the admissibility of creditors' claims would be a respected international arbitration holding that such a rule has acquired the status of custom, independent of a provision in a claims settlement instrument. To date this has not occurred, other than in the case of *Hofmann and Steinhardt.*[112] As noted above, there are decisions of a domestic claims settlement institution (the U.S. FCSC) that have held in favor of such a rule, but only when the underlying claims settlement agreement allowed it, as with the Polish Claims Program.[113] Otherwise, the FCSC appeared hostile to the claims of unsecured creditors.

Likewise, the decisions of the Iran–United States Claims Tribunal, as well as those of the FCSC's Iran Claims Program, which followed Tribunal jurisprudence, may be a *lex specialis.* They may not be confidently cited as evidence of customary claims practice. After all, the Algiers Accords explicitly allowed claims for debts and losses arising from "other measures affecting property rights" to be brought before the Tribunal.[114] Moreover, the Claims Settlement Declaration specifically attributed to Iran the conduct of entities that it "controlled,"[115] and Iran specifically affirmed "its intention to pay all its debts and those of its controlled institutions. . . ."[116] That meant that if Iran nationalized an entity that owed obligations to American creditors, Iran was obliged to satisfy those debts. In such circumstances, the only required proof was that the domestic debtor was controlled by Iran, either through outright nationalization or measures equivalent to that, and that the debt was owing and unpaid.

So unless there is a government guaranty for a particular loan, a BIT or global regime (such as the MAI) allowing a claim for expropriation of debt on proof that governmental action had the effect of preventing repayment, it is uncertain whether a claim would be admissible, except with a showing of fault—renunciation, discrimination, or denial of jus-

112. *See supra* text accompanying notes 37–39.

113. *See Seiberling Rubber Co., supra* note 58 and accompanying text.

114. Claims Settlement Declaration, art. II(1), 1 Iran-U.S. Cl. Trib. Rep. at 9–10.

115. *Id.* art. VII(3).

116. General Declaration, ¶ 2, 1 Iran-U.S. Cl. Trib. Rep. at 1–2. *But see* Claims Settlement Declaration, art. V, 1 Iran-U.S. Cl. Trib. Rep. at 10 ("The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable. . . ."), suggesting that its decisions are not really a *lex specialis.*

tice. While, as discussed above, proof of these fault factors is difficult, it is by no means impossible. Many expropriations of debt will be shown to be, in some way, discriminatory. Moreover, failures in the subsequent performance of the loan will often be irremediable in the tribunals of the host state, and, therefore, constitute a denial of justice for the creditor.

III. Conclusion

I maintain that the claims of both secured and unsecured creditors are substantially protected in international claims practice today. Some trifling issues of detail may remain, but I think it is beyond cavil that claims may be properly brought against host governments for expropriations of debt. There is, I suppose, a risk that an unwary publicist or tribunal may unwittingly cite to now-discredited rulings or opinions that categorically rejected such claims. That would be unfortunate, since the clear weight of more recent authorities has been to admit most, if not all, species of creditors' claims. In view of the growing liberalization of global finance and investment, it becomes especially imperative to grant creditors the same extensive protections afforded to other forms of investment under the international law of state responsibility. Anything less will create serious distortions in global capital markets and will impede much needed capital flows to those parts of the world that need them the most.