International Lawyer

Volume 13 | Number 1 Article 15

1979

A Trends: A Review of Significant Recent Decisions, Arbitral Awards, Legislative, Executive and Administrative Actions in the United States and Abroad, and of Treaties and International Organizational Developments

Edward Gordon

EDWARD GORDON*

Trends

A Review of Significant Recent Decisions, Arbitral Awards, Legislative, Executive and Administrative Actions in the United States and Abroad, and of Treaties and International Organizational Developments

Sovereign Immunity

International law has long reasoned that since states are independent and equal, no state may exercise jurisdiction over another without the latter's consent. It followed from that principle that the courts of one state could not assert jurisdiction over a foreign state without its consent. However, with the advent of state trading and other commercial initiatives by sovereign governments, the conceptual underpinnings of sovereign immunity were loosened. Whatever deference was due a sovereign state could hardly justify giving it a competitive advantage over private commercial entities when both were engaged in ordinary commercial activities.

On May 9, 1952, Jack B. Tate, then Acting Legal Adviser to the Department of State, advised the Justice Department that customary international law evinced a trend away from the traditional absolute doctrine of sovereign immunity toward a newer, restrictive doctrine which distinguished between governmental acts (acts *iure imperii*) and commercial acts (acts *iure gestionis*) such that, in general, while engaged in the latter a state is not entitled to immunity. The letter became known as the "Tate letter" and has come to symbolize the trend it described.

Until recently, the way the restrictive doctrine worked in practice in the United States put a diplomatically uncomfortable burden on the Executive Branch to determine whenever the question was raised whether a particular

*B.S., University of Pennsylvania; LL.B., Yale Law School. Associate Professor of Law, Albany Law School, Union University.

activity of a foreign state or one of its agencies was governmental or commercial. Congress finally relieved the Executive Branch of the burden by its enactment of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605, which both codifies the restrictive doctrine and establishes a jurisdictional and procedural basis by which private claimants can assert claims and enforce final judgments against foreign governments engaged in commercial activities on something approaching the same basis as the claimants would be able to do if the defendant were not a sovereign government.

Under the Act a plaintiff may bring a foreign state or one of its political subdivisions, agencies or instrumentalities before an American court, obtain a ruling on the defendant's sovereign immunity from the court and, if immunity is found not to exist, secure an adjudication and satisfaction of its claim. The Act virtually eliminates prejudgment attachment of foreign government property, but provides other methods for effecting service of process against the foreign government defendant and establishes a statutory basis for execution against commercially-related foreign government property to satisfy final judgments.

One effect of the foregoing trade-off is to substitute *in personam* jurisdiction for the *quasi-in-rem* jurisdiction which previously obtained whenever, as was often the case, prejudgment attachment was the basis of jurisdiction. The use of jurisdictional attachments had been a cause of friction both because the fortuitous presence of property within the forum did not guarantee a nexus with the litigation and because multiple attachments in various jurisdictions were often resorted to.[1] The difference in jurisdictional bases before and after the effective date of the Act is the subject of discussion in *National American Corp. v. Federal Republic of Nigeria,* 448 F. Supp. 622 (S.D.N.Y. 1978), one of a number of lawsuits instituted in the United States and Europe by various plaintiffs against the Nigerian Government, its Ministry of Defense and/or the Nigerian Central Bank in light of a monumental fiasco involving the suspension of the unloading of cement at the Port of Lagos and the cancellation of a number of cement supply contracts which had been entered into by the Government in 1975. Included among the claims were several for demurrage, the instant suit being, in part, one such claim.

It was brought in June 1976, before the effective date of the Act. Plaintiff obtained jurisdiction by attaching Nigerian Government funds on deposit in New York banks. When the Act did become effective, defendants moved to dismiss on grounds of lack of jurisdiction, sovereign immunity and the related but different Act of State doctrine.[2] Federal district court Judge

---

[1] H.R. REP. No. 94-1487, 94th Cong., 2d Sess., at 26-27, cited at 448 F. Supp. at 638.

[2] Whereas the sovereign immunity doctrine accords a defendant exemption from suit, the Act of State doctrine precludes a suit from going forward when a court determines that to do so will require judicial inquiry into the validity or motives behind the public acts of a foreign government. The equivalent for Act of State purposes of the restrictive doctrine in sovereign immunity would appear to be the commercial exception apparently enunciated by some of the judges in Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682 (1976).

Gerard L. Goettel observed that the attachment would not be permissible under the Act and that if the jurisdictional attachment were dissolved *in personam* jurisdiction under the Act would be the only means of asserting jurisdiction. Acknowledging that the parties had extensively briefed the issue of whether the Act's jurisdictional provisions apply retroactively,[3] Judge Goettel nonetheless appears to have sidestepped the question, noting instead that defendants had raised their jurisdictional challenge somewhat belatedly and, therefore, "because this case has been litigated throughout on the assumption that only *quasi-in-rem* jurisdiction was asserted, and no amendment to the pre-trial order was sought to counter defendant's challenge to *quasi-in-rem* jurisdiction, plaintiff's claim msut be limited to the funds attached." 448 F. Supp. at 639.[4]

The jurisdictional provisions of the Act extend to commercial activities outside the United States which cause "a direct effect" in the United States.[5] In *Carey v. National Oil Corporation,* 453 F. Supp. 1097 (S.D.N.Y. 1978), a complaint brought under the Act was dismissed on the grounds that this provision embodies the due process requirement that there exist "minimum contacts" with the United States in order for United States courts to exercise jurisdiction. The court found insufficient the "contact" described as the foreseeability that oil which was the subject of the contract allegedly breached by defendant was destined for United States markets.[6]

---

[3]Other retroactive aspects of the Act have been addressed by the courts in Yessenin-Volpin v. Novosti Press Agency, TASS, 443 F. Supp. 849 (S.D.N.Y. 1978), discussed *infra*, and Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), 428 F. Supp. 1035 (S.D.N.Y. 1977).

[4]At another point the decision notes: "Much of the trial was devoted to jurisdictional issues. Although never raised by defendants in either a motion to dismiss under FED. R. CIV. P. 12(b) or in their answer, the pre-trial order provided that the pleadings would be deemed amended to include issues raised therein.

"As part of their jurisdictional defense, defendants have raised issues relating to the sufficiency of and non-receipt of process, although these grounds were not explicitly preserved in the pre-trial order. Issues of this type obviously should have been litigated when defendants first entered their 'special appearance' and will not be considered now." 448 F. Supp. 622 at 632n.

[5]"A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . . " [28 U.S.C. § 1605(a)(2)]

[6]The dispute involved the alleged breach of an oil supply contract between the National Oil Corporation, a marketing arm of the Libyan Government, and a Bahamian subsidiary of an American corporation. Neither National nor the Bahamian subsidiary did business in the United States, nor were the contracts involved in the dispute negotiated or performed in the United States. The oil was sold to the Bahamian corporation, refined in the Bahamas or elsewhere outside the United States and then sold to the Bahamian corporation's U.S. parent company, which resold it in the United States. The issue was whether the foreseeability that the oil would end up in United States markets was sufficient to satisfy the "minimum contacts" test. The court thought it was not. But see Gray v. American Radiator Corp., 176 N.E. 2d 761 (111. Sup. Ct. 1961); and Longines-Wittnauer Watch Co. v. Barnes, 15 N.Y.2d 443 (1965) which, in another context, support the view that foreseeability of impact does constitute sufficient contact for due process purposes.

The substantive portions of the Act are not without their own share of ambiguities. For example, when the defendant is a commercial entity from a socialist state, the first step in relying on the Act seems to be that of determining whether the entity is an "agency or instrumentality" of the state. In two of the first cases litigated on this point, that determination involved judicial construction of the Act's inclusion of entities "whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . . ." In the first of these, *Edlow International Co. v. Nuklearna Krsko,* 441 F. Supp. 827 (D.D.C. 1977), the federal district court for the District of Columbia, finding no suggestion in the Act's legislative history that a foreign state's system of ownership, without more, should be regarded as determinative of an entity's status under the law, dismissed for lack of jurisdiction an action brought by a Bermuda corporation (the broker in sales of nuclear fuel) against a Yugoslav workers' organization (the buyer). The precise indices of an entity's status as a state agency, according to the court, include (a) the degree to which the entity discharges a governmental function, and (b) the extent of state control over the entity's operations. The Yugoslav state does exercise ultimate control over the organization's policies, the court said, but neither that nor the degree to which the organization is subject to government regulation aimed at assuring compliance with government goals is necessarily determinative of the entity's status as a state agency or instrumentality.

In the second case, *Yessenin-Volpin v. Novosti Press Agency, TASS,* 443 F. Supp. 849 (S.D.N.Y. 1978), a libel action in which two Communist party newspapers were held to be entitled to claim sovereign immunity under the Act, the status of one of the newspapers (*Novosti*) also turned on the question of the state's "ownership." Plaintiff had contended that *Novosti*'s relation to the Soviet state is defined by its charter, which provides that "[n]o Soviet state organ bears responsibility for the business activities and financial obligations or any other actions of the Agency." But the district court for the southern district of New York felt that the relevant test is simply one of "ownership" — *i.e.,* whether the state "owns" the entity, not whether the entity is, in fact, self-administering.

The issue may be argued again in a case now pending in the southern district. *East Europe Import-Export Inc. v. Federal Republic of Nigeria,* 77 Civ. 2809, 3045 and 2348, is a consolidation of three suits brought by American companies to recover damages for breaches of contract and of letters of credit in connection with the 1975 Nigerian cement contracts, *supra.* Plaintiffs in *East Europe* allege that the Nigerian Government reneged on their contracts and that the Central Bank of Nigeria instructed its correspondent banks not to make further payments under the relevant letters of credit without additional clearance requirements beyond what had been set forth in the original contracts.[7]

[7]The Nigerian Government appears to have invited the cement contractors to Lagos to negotiate a settlement. Some of the suppliers, their shipments already at the port, may have felt

Nigeria moved to dismiss for lack of jurisdiction on the basis of the Act, sovereign immunity and/or the Act of State doctrine. But on September 19, 1978, a United States magistrate reporting to the federal district court judge hearing the case recommended that the motion be denied, finding the acts involved ones of a commercial nature of the sort which the Act excludes from immunity. If the recommendation is followed, the case is expected to go to trial early in 1979.

As noted earlier, others of Nigeria's cement supply contractors have brought actions against the Government, its Ministry of Defence and the Central Bank in Europe. In many ways the most interesting of these actions is one brought in the United Kingdom, *Trendtex Trading Corporation v. Central Bank of Nigeria,* [1977] 2 WLR 356 (dated January 13, 1977, reprinted in 17 ILM , and found in *The Weekly Law Reports,* March 4, 1977). In *Trendtex* the British Court of Appeal overturned a lower court ruling which had sustained defendant's claim of sovereign immunity. The court held that (1) the bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status, was not an emanation, arm, alter ego or department of the state of Nigeria and was therefore not entitled to immunity from suit, and (2) even if the bank were part of the Government of Nigeria, "since international law now recognize[s] no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature, it [is] not immune from suit on the plaintiff's claim in respect of the letter of credit."[8]

Trendtex was appealed to the House of Lords, but was settled before that body could rule on it.[9] Lords did get to rule on an analogous issue in a case decided July 6, 1978, *C. Czarkinow Ltd. v. Rolimpex* (summarized unofficially in *Halsbury's Laws of England,* July 1978, at p. 12). In *Rolimpex* Lords affirmed a Court of Appeal ruling[10] that a Polish state trading or-

---

constrained to waive their claims on the uncompleted portions of their contracts in order to get paid for cement already shipped and for demurrage. But some of the suppliers which had not yet begun delivery instituted lawsuits, this one being one of those.

[8][1977] 2 W.L.R. 356. Stephenson L.J. felt unable to concur in this aspect of the decision, being troubled by the majority's reasoning that precedent cases incorporating the absolute doctrine did not bind the court because sovereign immunity is based on international law which knows no rule of binding precedent. Lord Denning and Judge Shaw said that in treating a question of customary international law, the courts of the United Kingdom should follow the lead of other countries and replace the doctrine of absolute immunity with a rule of restrictive immunity. Judge Shaw felt, moreover, that in the conditions prevailing at present in international law the principle of restrictive immunity achieves a more just result than that of absolute immunity as it takes into account both sovereign status and the nature of the transaction.

[9]It was subsequently cited in Great Britain in *The I Congreso del Partido*, [1977] 1 Lloyd's Rep. 536 (Queen's Bench Division), a case in which a claim of sovereign immunity was unsuccessfully interposed by the Government of Cuba as a bar to a suit brought by a Chilean company to recover the proceeds of a sale of goods. The proceeds were being held in a Cuban bank pending the emergence in Chile of a regime favored by Cuba.

[10][1977] All E.R. 81.

ganization was not an integral part of the Polish Government and so was entitled to rely on a force majeure clause when its performance of a sugar supply contract was frustrated by the intervention of the Polish Government. The breach occurred following the failure of Poland's domestic sugar harvest, when the Polish Government banned all sugar exports and revoked all export licenses. Plaintiff contended that the trading organization was not only an organ of the Polish Government but was also a co-conspirator with it in a conspiracy to avoid the contract and thus obviate the organization's having to buy expensive sugar to fulfill its contractual obligations. Lords held, Lord Salmon dissenting, that English courts should be reluctant to examine the motives of foreign governments. The seller appeared to be an independent body; the Polish Government's ban on sugar exports had been imposed not to avoid contractual liability but for domestic and social reasons and to preserve foreign exchange; and a contractual undertaking by the seller to obtain the necessary import licenses merely meant that the sellers had to get one, which they had done, not that they were obliged to, nor could they, ensure its continuing validity.

Lords' penchant for Act of State–like deference notwithstanding, Parliament has now codified the restrictive doctrine of sovereign immunity in legislation, entitled "State Immunity Act 1978," which took effect on October 26, 1978. The Act confers a general right of immunity for foreign states, then treats this right as inapplicable if a state has waived it or if the proceedings in which it is involved are of a commercial, industrial, financial, professional or similar nature or relate to a contractual obligation to be performed wholly or partly in the United Kingdom. Immunity is specifically precluded in a variety of circumstances set forth in the statute.[11]

Three other recent rulings confirm the current popularity of the trend described in the Tate letter. Two of these, in Europe, grow out of the Nigerian cement matter. In a German case, *Youssef M. Nada Establishment v. Central Bank of Nigeria* (File No. 3/8 0 14/76 of the District Court of Frankfurt-au-Main, dated August 25, 1976), defendant's claim of sovereign immunity was rejected "because for its civil act, the opening of a [letter of credit] in the framework of the banking business, the defendant does not enjoy immunity in the Federal Republic of Germany" (unofficial English

[11] *E.g.*, proceedings arising out of an employment contract which is made in or is to be wholly or partly performed in Great Britain; proceedings in respect of death, personal injury or damage to or loss of property; and proceedings relating either to immovable property in Great Britain or to a state's interest in any property arising out of succession, gift or *bona vacantia*. British courts, under the Act, may exercise their jurisdiction over any property relating to decedents' estates or estates of persons of unsound mind, to the insolvency or winding up of companies or to the administration of trusts, regardless of any interest or claim of a sovereign state in that property. Likewise, immunity is unavailable to states in proceedings relating to patents, trademarks, designs or plant breeders' rights belonging to them and registered, protected or applied for in Great Britain; in proceedings involving a state's membership in a body corporate, unincorporated body or partnership; and in arbitrations in Great Britain to which it has agreed to submit a dispute.

translation). Similarly, in an arbitration in Paris under the auspices of the International Chamber of Commerce's Court of Arbitration, *Ipitrade International c/ Ministry of Defence of Nigeria* (Case RT/DB No. 2949, award dated April 25, 1978, reprinted in 17 ILM), the sole arbitrator, Dr. Max Brunner, applying Swiss law, rejected defendant's contention of sovereign immunity, saying:

> A sovereign country can, like a private person, corporation or company, enter into business transaction[s] with another party. The contract in dispute is such an ordinary business transaction, a sales and purchasing contract between parties of equal reciprocal rights. The Defendant voluntarily agreed thereby that the contract be governed by the laws of Switzerland . . . and voluntarily agreed that all disputes in relation to the contract be submitted to the arbitration of the International Chamber of Commerce in accordance with its rules. According to Swiss law the Defendant is bound by the obligations it voluntarily entered into. The obligation to submit to arbitration in case of a dispute is one of them and sovereign immunity does not dispense from it.[12]

Finally, in a Canadian case, *Zodiak International Products Inc. v. Polish People's Republic* (1977), 81 DLR (3d) 656, an action instituted by a Canadian company for damages growing out of a breach of a commercial contract, the Court of Appeal of Quebec reversed a lower court ruling which had dismissed the suit on the grounds of defendant's sovereign immunity.

Arbitral Awards

Law governing long-term economic development agreements — meaning of "expropriatory action" under investment guaranty — legal effect of sovereign contractual obligations — applicable law of AID guaranty contract

Traditionally, contracts between sovereign states and foreign private parties have been regarded as governed solely by municipal law. A series of international arbitrations, mostly involving the cancellation of oil concession rights and the expropriation of attendant properties, has raised the possibility that customary international law now treats them as being governed by principles of international law as well. That possibility is affirmed by the recent ruling of two of three arbitrators appointed to decide whether a claimant American corporation was entitled to compensation for losses growing out of what it claimed was expropriatory action by a foreign government. The two arbitrators concluded that, at least, an exception to the traditional rule now obtains in respect of long-term economic development agreements between host countries and foreign private entities. The third, dissenting, arbitrator would not have reached the question in the instant case.

---

[12]From the certified copy dated April 26, 1978, signed by Yves Derains, Secretary-General of the Court of Arbitration.

The arbitration[13] involved an investment guaranty contract entered into by Revere Copper and Brass Incorporated ("Revere"), a Maryland corporation, and the United States Agency for International Development ("AID") in 1970. The guaranty insured Revere against the risk of loss from "expropriatory action" with respect to an investment Revere was making in a wholly-owned subsidiary, also an American corporation, pursuant to a long-term contract which the subsidiary had entered into with the Government of Jamaica in 1967. The investment involved the construction and operation in Jamaica of a bauxite mining operation, a plant to convert the bauxite to alumina and related facilities.

The relevant definition of "expropriatory action" in the guaranty contract encompasses

> any action which is taken, authorized, ratified or condoned by the Government of the Project Country, commencing during the Guaranty Period, with or without compensation therefor, and which for a period of one year directly resulting in preventing:
> . . . the Foreign Enterprise from exercising effective control over the use or disposition of a substantial portion of its property or from constructing the Project or operating the same.

The key words, all three arbitrators agreed, were "exercising effective control." The issue dividing them was whether a series of legislative and administrative steps taken by Jamaica had so deprived Revere's subsidiary.

What had happened, in essence, is that in 1972 a newly elected government announced major changes in national economic policy bearing directly upon the important beauxite industry. The government's objectives were to obtain greater revenue from the industry and to eventually take direct control of it through majority ownership of production companies. Putting the first part of this policy into effect, the government initiated and put into effect legislation which (a) led to the revocation of existing mining leases and licenses and their replacement with ones, *inter alia,* of shorter duration and (b) imposed bauxite production taxes tied to new minimum production levels, tied, that is, in the sense that the production levels were deemed for tax purposes to have been achieved whether they actually had been or not. The measures were in direct and explicit contradiction to undertakings contained in the 1967 agreement. Their effect was severe, both in direct financial terms, costing Revere's subsidiary some $19 million in direct tax payments to the government, and in terms of the stability of the contractual relationship the 1967 agreement had established. In the latter sense, the effect was magnified by the political climate created by the new government in announcing and carrying out the new national policies.

---

[13] *In the Matter of Revere Copper and Brass Incorporated and Overseas Private Investment Corporation,* Case No. 16 10 0137 76 dated August 24, 1978 (hereinafter called "Award"). The decision is reprinted in 17 I.L.M. (November 1978).

It was clear to all three arbitrators[14] that the mere breach of the 1967 agreement by Jamaica would not by itself have automatically triggered the guaranty's compensation clause, since the language of the guaranty explicitly says otherwise, *viz:*

> The abrogation, impairment, repudiation or breach by the Government of the Project Country of any undertaking, agreement or contract relating to the Project shall be considered an Expropriatory Action only if it constitutes Expropriatory Action in accordance with the criteria set forth in this section.

But that did not dispose of the question of whether the actions resulted in preventing Revere's subsidiary from exercising effective control over the use or disposition of a substantial portion of its property or from operating it. The majority view, in fact, was that the question of the breach or repudiation of the 1967 contract and that of effective control were inextricably intertwined, because if the Jamaican Government had in fact repudiated the contract the effect of that repudiation would be to so destabilize the decision making process which control of a large industrial enterprise entails as to render effective managerial control impossible.

> Rational decisions require some continuity of the enterprise. In a large enterprise like the present one, with the contract gone decisions simply become gambles. Risks are inherent in all such decision making, but without the contract the odds cannot be calculated. There is no way in which rational decisions can be made. What the Government did yesterday it can do tomorrow or next week or next month. If it did one thing yesterday, it can do something else tomorrow or next week or next month.
>
> This is the antithesis of the rational decision making that lies at the heart of control. Here "effective control" not only of the contract but of the entire operation has been lost, due directly to the action of the Government.[15]

The dissenting arbitrator, finding the question completely resolved by the words of the guaranty contract itself, disagreed:

> The uncertainty and doubt faced by business management in such a situation are, in my view, plainly not the direct prevention of control within OPIC's[16] undertaking of guaranty. There is no resemblance whatever to the actual situation in Jamaica of [Revere's subsidiary] which not only remained fully in control of its business, but asserted and exercised its legal right to decide and carry out its decision to close down its Jamaica plant for economic reasons.[17]

The majority countered that the test had to be one of practical and not merely theoretical or formal control and added:

> If this analysis is not valid, if physical impact on a substantial portion or all of the property or on the operation of the enterprise is needed to trigger [the guaranty contract's compensation provision], one must ask at what point, if ever, in a

---

[14]These were G. W. Haight and Carroll R. Wetzel of the New York and Pennsylvania Bars, respectively, constituting the majority, and Hon. Francis Bergan, retired member of New York's Court of Appeals, dissenting.

[15]Award, pp. 58-59.

[16]The U.S. Government-owned Overseas Private Investment Corporation ("OPIC") succeeded to AID's rights and obligations under the guaranty contract.

[17]Award, pp. 122-123.

> complex industrial operation such as we have here, involving large investments, will the cumulative impact of the inability to make rational decisions in fact trigger this [provision]?
>
> Must one wait until there has occurred something akin to the troops coming in, little by little or all at once, in a nineteenth century sense? Must there be some physical impact? In our view such narrow interpretation of the contract of insurance does not fit the realities of today and was not intended by the framers of [the provision].[18]

It was thus logically essential that the majority find that the 1967 agreement had indeed been repudiated, not because breach or repudiation as such triggered the compensation but because, as explained, outright repudiation would have deprived Revere's subsidiary of the stability of expectations essential to continued rational business decision making. As to this, the majority was confronted by the fact that in January 1976, after it had closed its Jamaican plant, Revere had instituted an action against the Jamaican Government in the Supreme Court of Jamaica, claiming breach of contract and seeking an injunction against the imposition of the bauxite production tax. That court, applying Jamaican law, had held that no breach had occurred because the 1967 contractual commitment not to impose additional taxes had been *ultra vires*, void *ab initio*, because Ministers could not fetter the sovereign power of Parliament to legislate with respect to taxation. Therefore, "no valid contractual right" had ever obtained.[19]

If the court's ruling was dispositive on the question of breach or repudiation, then that also settled the matter of Revere's claim, the majority said. But while accepting the court's view as dispositive as to Jamaican law, the majority concluded that because of the nature of the contract and the reciprocal undertakings it put into effect the 1967 agreement was governed by principles of international law as well.[20]

That is, the invalidity of the contractual provision under Jamaican law did not establish its invalidity under principles of international law. Applying such principles, they found the Jamaican Government's action had amounted to an abrogation and repudiation of the agreement.

From the perspective of international law, in the majority's view, the question of Jamaica's *power* to impose taxes, far from being fettered by the agreement, is in no way affected by it. Governments routinely enter into treaties which commit them to refrain from some future exercise of sovereign power. Hardly denying the prerogative in question, the treaty has the

---

[18]Award, p. 60.

[19]The court, however, did hold that the bauxite levy could not be imposed when the company was not actually producing bauxite. *See* Award, p. 16.

[20]In an opinion dated just one day prior to the Award, a Texas state court applying Texas conflicts rules held that Libyan national law governs the nature of rights conferred by an oil concession agreement between Libya and a foreign private entity. Nelson Bunker Hunt v. Coastal States Gas Producing Company, No. 1809 (Fourteenth Court of Civil Appeals, Houston) (slip opinion dated August 23, 1978).

effect of confirming it, in the sense that the waiver of some prerogative necessarily implies the right to the prerogative in the first place. But once having undertaken this international commitment, the state is under an obligation to fulfill it. It may reassert its sovereign prerogative at some future time, but in doing so incurs liability under international law if that assertion involves breaking the treaty or, in this instance, the international agreement. Thus, the agreement was valid under international law and a breach of it was a violation of international law.

In this respect, the majority quoted with approval from United Nations General Assembly Resolution 1803 (XVII) ("Permanent Sovereignty Over Natural Resources") and from several prominent international arbitrations for support for the proposition that as a matter of customary international law agreements between aliens and host governments which are governed by international law must be carried out in good faith even if they conflict with the constitution or other national law of the host country.[21]

However, it is Revere, not OPIC, which is challenging the Award, since Revere's victory in principle turns out to be nearly pyrrhic in dollars and cents. If fully vindicated Revere's claim would have approached one hundred million dollars. Under the Award it receives just over one million dollars. The difference lies in a series of downward "adjustments" claimed by OPIC with which the majority arbitrators, for the most part, agreed.

The largest single adjustment involved a write down of over forty million dollars in respect of the recoverability of balance sheet values. The issue, in essence, was whether the value of the assets of its subsidiary carried on Revere's books as of the date of expropriation complied with generally accepted accounting principles. It did not, the arbitrators concluded, because it failed to reflect the uncertainty as of that time of the recoverability of the subsidiary's assets.[22]

---

[21]They had little to say, however, with respect to more recent General Assembly resolutions (such as the so-called "Charter of Economic Rights and Duties of States") which accord the redistribution of the world's wealth a higher priority than the doctrine of *pacta sunt servanda*. As to these, the majority referred only to another arbitrator's dictum which denied legal value to recent General Assembly resolutions on this point. It is not unlikely that this aspect of the decision, at least, will be challenged as too little reflective of the real state of customary international law.

[22]"Recoverability," the majority arbitrators said, is a fundamental accounting concept which essentially relates to the ability to convert into cash an investment in fixed plant through the generation of earnings (or an investment in inventory through the sale of the inventory). Recoverability becomes a matter of concern where, as in this case, there are continuing losses in connection with the fixed plant and significant uncertainty as to whether the fixed plant can recover its investment. If the uncertainty is created solely by the expropriatory actions which give rise to a claim for compensation, then requiring the claimant to write down the value of its assets to reflect the uncertainty is a little like allowing the child who has murdered his parents to beg the court's mercy because he is an orphan. That is, the ultimate defendant would be profiting from the very actions which are the basis of its culpability. In the present case, however, the majority arbitrators found that the continuing uncertainty of recoverability of stated asset values had set in prior to the government's expropriatory actions. Cost overruns appeared to have been fundamental to the plant's production operations; costs, even before

The majority arbitrators also directed a substantial (approximately twelve million dollar) downward adjustment in the value of the subsidiary's assets to remove the effect of a tax credit allocated in Revere's consolidated tax return to the subsidiary in respect of its losses. The effect of the allocation was to increase the subsidiary's book value, but in the arbitrators' view that increase should not be allowed for the purpose of computing Revere's "net investment" as that term is defined in the guaranty contract. Moreover, they (a) directed a substantial adjustment downward of the value ascribed by Revere to its subsidiary's assets to reflect the adjustment called for under applicable accounting principles for the fact that Revere had failed to charge its subsidiary interest on loans it extended to it; (b) rejected as not called for by the guaranty contract Revere's claim to be reimbursed for the nineteen million dollars in taxes invoiced by the Jamaican Government in contradiction to the terms of the 1967 agreement; and (c) rejected on similar grounds the cost of litigating the breach of contract question in Jamaica, the cost of plant maintenance borne by Revere which Revere said would inure to OPIC's benefit and Revere's claim to interest on the amount of the Award from the date of expropriation.

They did agree with Revere's claim to recover the value of certain capitalized development and exploration costs, depletion charges and the amount of premiums paid to OPIC for its guaranty subsequent to the date of expropriation, and did award Revere the cost of arbitration.

United States Legislation

Multiple Currency Clauses

For the purpose of discharging legal obligations, American law presumes that the value of money remains constant. As Justice Holmes wrote in *Deutsch Bank v. Humphrey*, 272 U.S. 517, 519 (1926): "Obviously in fact a dollar or a mark may have different values at different times, but to the law that establishes it, it is always the same." Chronic inflation has rendered this assumption expensively obsolete, and despite the adoption of the doctrine of commercial impracticability by both the *Uniform Commercial Code* (§ 2-615) and *The Restatement (Second) of Contracts* (§ 281, Tent. Draft No. 9, April 1974), American courts have been reluctant to utilize this doctrine to counteract inflation-induced contractual distortions.

Draftsmen of contracts whose performance is deferred over a period of years have themselves used a variety of verbal formulae to maintain the real economic value of contractual obligations. The most notable of these have been commodity (especially gold and silver), foreign currency and price

---

the election of Jamaica's new government in 1972, appeared to be such that operating results were becoming critical. Thus, had it been a separate company (*i.e.*, had Revere not been able to absorb its losses) the subsidiary's assets would have had to be written down in any case. The same conclusion seemed to be called for in light of the inadequacy of the plant, the recognized necessity of its expansion and related factors.

index clauses. For international lawyers, the drafting problem was complicated in 1975 by the decision of the Supreme Court of Tennessee in *Aztec Prop. v. Union Planters National Bank*, 530 S.W. 2d 756 (1975), cert. den. 425 U.S. 975, to the effect that index clauses are in conflict with the so-called "gold clause" resolution passed by Congress in 1933 (Joint Resolution of 1933, 48 Stat. 112 (1933), 31 U.S.C. § 463 (1970), which says: "Every obligation . . . shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."[23] The same clause has been interpreted since 1939 as rendering multiple foreign currency clauses invalid in the United States, if the United States dollar is included as one of the possible currencies of payment.[24]

In October 1977, however, Congress included among other "technical amendments" tacked on to Public Law 95-147 (91 Stat. 227, approved October 28, 1977) a section which provides:

> The ["gold clause"] joint resolution . . . shall not apply to obligations issued on or after the date of enactment of this section.

Its legislative history suggests that this section was intended by Congress to permit gold clauses in loan agreements,[25] and most subsequent discussion of the provision has focused on this aspect of it. But its more profound impact for practicing lawyers may actually lie in the likelihood that it also removes any statutory bar to including dollars among several alternative media of payment in multiple currency bonds and other contracts, especially, one would think, international commercial contracts.

Treaties

Succession to Treaties

The second session of the United Nations Conference on Succession of States in Respect of Treaties, held in Vienna from July 31 to August 23, 1978, adopted a proposed convention on succession to treaties (U.N. Doc. A/CONF. 80/31 dated August 22, 1978). As to newly independent states ("NIS"), the proposed treaty establishes a "clean slate" rule, that is, a presumption that such states are not bound by treaties made in their behalf by former colonial or other administering powers, but have the option, in the case of multilateral agreements, to agree to be bound, and as to bilateral treaties, to agree to be bound subject to the consent of the other contracting party.

---

[23]The ruling is criticized in a recent article by Professor Keith S. Rosenn of Ohio State University College of Law entitled "Protecting Contracts from Inflation," 33 BUS. LAW. 729 (January, 1978), in which Professor Rosenn suggests several alternative index clause techniques.

[24]*See* Guaranty Trust Co. v. Henwood, 307 U.S. 247 (1939), and Bethlehem Steel Co. v. Zurich Insurance Co., 307 U.S. 265 (1939).

[25]*See* 123 CONG. REC. S.16918-16919 (October 11, 1977).

There are two exceptions to the foregoing presumptions. Existing boundary treaties and so-called "dispositive" treaties are both treated as binding on NIS. The latter category is in the nature of what in American law might be thought of as covenants running with the land. With both boundary and dispositive treaties, the interest of the world community in maintaining the stability of existing expectations is treated in the proposed convention as overcoming the presumption which otherwise obtains.

For non-NIS (*e.g.*, states formed by the merger of two existing independent states), the proposed convention establishes a presumption in favor of continuity, that is, that such new states continue to be bound by existing treaties.

The conference was working from a draft proposed by the International Law Commission (see U.N. Doc. A/CONF. 80/4 dated March 1, 1977) but substantially recast the ILC's version.

International Courts

Election of I.C.J. Judges

On October 31, 1978, the United Nations Security Council and General Assembly elected Roberto Ago (Italy), Richard R. Baxter (United States), Abdullah Ali El-Erian (United Arab Republic), Platon D. Morozov (Soviet Union) and Jose Sette Camara (Brazil) to nine-year terms as members (judges) of the International Court of Justice beginning February 6, 1979. Judge Morozov will be serving a second term, having served as a judge since 1969. The others will be new to the Court and will replace Eduardo Jimenez de Arechaga (Uruguay), Hardy C. Dillard (United States), Louis Ignacio-Pinto (Benin) and Federico de Castro (Spain), whose terms will expire February 5.[26]

Professor Baxter, who is Manley Hudson Professor at Harvard Law School and an Honorary Fellow of Jesus College, Cambridge University, is well known in the international law community, having served as President of the American Society of International Law, Vice President of the American Branch, International Law Association, Editor in Chief of *The American Journal of International Law* and, most recently, Chief Reporter for the American Law Institute's new *Restatement of the Foreign Relations Law of the United States.* He has been a consultant to the United Nations Secretariat, the Departments of Defense and State and the Naval War College, Counselor on International Law at the State Department and a member of the United States Delegation to the Diplomatic Conference on In-

[26]The remaining I.C.J. judges are Nagendra Singh (India), Isaac Forster (Senegal), Andre Gros (France), Sir Humphrey Waldock (United Kingdom) and Jose Maria Ruda (Argentina), whose terms expire in 1982; and Manfred Lachs (Poland), Hermann Mosler (Federal Republic of Germany), Tashlim Olawale Elias (Nigeria), Salah El Dine Tarazi (Syria) and Shigeru Oda (Japan), whose terms expire in 1985.

ternational Humanitarian Law. In 1977 he was elected an Associate of the Institut du Droit International in Paris.

The triennial election of five of the Court's fifteen judges takes place simultaneously but separately in the United Nations Security Council and General Assembly pursuant to a provision in Article 8 of the Court's constitutive instrument, the "Statute," which provides that the two bodies "shall proceed independently of one another to elect the members of the Court." This divided responsibility has roots which go back to the deadlock which prevented the 1907 Hague Peace Conference from establishing a permanent court; a deadlock ultimately broken, in 1921, by the adoption of a compromise not unlike the "Connecticut compromise" in American constitutional history.

In practice, the outcomes of the simultaneous but separate votes usually contain few surprises with respect to the places on the Court which have traditionally been filled by nationals of those countries which are permanent members of the Security Council.[27] But the voting in October did not follow traditional patterns; while the two candidates who were nationals of permanent members of the Security Council, Messrs. Baxter and Morozov,[28] were elected on the first ballot along with two other candidates, Messrs. Sette Camara and El-Erian,[29] the margin of victory was not the customary one. More significant, perhaps, was the seat eventually won by Mr. Ago. This is one of several seats which customarily go to a national of a Western European country, but it was won by Mr. Ago only after four ballots in the General Assembly and fourteen in the Security Council.[30]

---

[27]France, the Soviet Union, the United Kingdom, the United States and China. China has not always had one of its nationals on the Court and, in fact, does not currently have one on the bench.

[28]Another United States national, Myres S. McDougal, Sterling Professor Emeritus at Yale Law School, was nominated by the Republic of Panama and received eight votes on the first ballot in the General Assembly and one vote on the first ballot in the Security Council. See United Nations Press Releases GA/5868 and SC/3999, each dated October 31, 1978 (hereinafter "U.N. Press Releases").

[29]In the General Assembly, with 150 votes being cast on the first ballot and an absolute majority required for election, Sette Camara received 125 votes, Baxter 103, Morozov 92 and El-Erian 83. Roberto Ago received the necessary majority only on the fourth ballot. In the Security Council, where there are fifteen votes, Sette Camara received fourteen on the first ballot, El-Erian twelve and Baxter and Morozov nine each. Mr. Ago's election, described *infra* n. 5, took fourteen ballots. *See* U.N. Press Releases.

[30]On the Security Council's first ballot, Mr. Ago and H.W. Jayawardene (Sri Lanka) each received seven votes and Edilbert Razafindralambo (Madagascar) six, with Eero J. Manner (Finland) five, Leon Boissier Palun (Benin) three and Prof. McDougal one. Mr. Ago's total remained at seven for the next three ballots, while Mr. Jayawardene's fell to four on the second ballot before rising to five for the third and six for the fourth. With the fifth ballot, votes appear to have switched from Mr. Ago to Mr. Manner, apparently reflecting an attempt to maintain the seat currently held by Judge de Castro as a "European seat," Mr. Manner, like Mr. Ago, being a national of a Western European country. By the ninth ballot, however, it became clear that Mr. Manner could not muster more than six votes, with Mr. Jayawardene frozen at five. On the tenth and eleventh ballots, Mr. Ago got seven votes, Mr. Manner dropping to three. Mr. Jayawardene was able to attract six votes on the twelfth ballot, apparently gaining one at Mr. Ago's expense. But on the thirteenth ballot, the seven-five-three

The pertinent provisions of the Statute have little to say about the nationality of the judges, other than to bar more than one national of any country from serving on the Court at the same time[31] and providing that "in the body as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured."[32] Although no country is entitled to have one of its nationals elected to the Court, the geographical distribution of seats on that bench has, for some time, paralleled that of the Security Council. The recent elections, their final results notwithstanding, suggest that that pattern may no longer be secure.

Revision of I.C.J. Rules of Procedure

The International Court of Justice on April 14, 1978, adopted a revised set of "Rules of Court," effective July 1, 1978, except as to matters then pending (U.N. Press Release ICJ/374, dated July 3, 1978). The new rules modify and rearrange but also substantially add to and delete from the rules adopted May 6, 1946, as amended May 10, 1972.[33]

Containing some 109 articles, the new rules were adopted by the judges following their own thorough review of those aspects of the Court's procedures which had been criticized as impediments and deterrents to greater use of the Court by states and international organizations. Their purpose is thus to (a) simplify the Court's procedures in both contentious and advisory proceedings with a view to making them flexible and expeditious, (b) reduce the expenses for litigants, and (c) facilitate recourse to chambers (*i.e.*, three- and five-man panels provided for in the Court's Statute which have remained virtually unused) and the use of advisory proceedings.

It remains to be seen whether the judges' efforts will bear fruit. A number of observers contend that the technical reasons advanced for not using the Court to resolve disputes and questions of international law are for the most part rationalizations of decisions made for political reasons unrelated to the Court's procedures. Still, the judges have now done what they feel they can do to ease recourse to the Court should this alternative be at all attractive to national and international decision makers.

---

pattern reappeared, with Mr. Ago finally able to gain the necessary eighth vote on the fourteenth ballot as Mr. Jayawardene's total fell to four. *See* U.N. Press Releases.

[31]Article 3(1).

[32]Article 9.

[33]The old rules are set forth in *I.C.J. Acts and Documents, No.* 3, pp. 92-149. A summary of the new ones is available in "Background Note by the Registry on the Revised Rules of Court," published in 1978, with the complete text to appear as *I.C.J. Acts and Documents, No.* 4, pp. 92-161.