U.S. Foreign Contractors' Standing to Sue in United States Courts

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Recommended Citation

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U.S. Foreign Contractors' Standing to Sue in United States Courts

The question of access of the U.S. foreign contractor to the United States Courts may be considered: (a) as an incident of commercial relations between the U.S. Government and an alien; (b) in relation to the rights and responsibilities of states dealing with aliens; (c) in connection with an international standard for treatment of aliens; (d) as a problem in conflict of laws; and (e) as expressive of one of the universal human rights.

Despite the fact that the United States Governmental preferences to domestic producers are more visible than those in most other countries, the world-wide involvement of the United States makes it compulsory for the U.S. Government to buy goods and services from foreign contractors. One estimate indicates that in fiscal year 1972, the U.S. Department of Defense alone spent $2 billion for supplies and services outside the United States. There are quite a few other departments and agencies of the U.S. Government that are engaged in procurement abroad.

The main purpose of this paper is to explore the issue of the standing of the foreign contractor in U.S. courts. This is the first issue to be resolved before a foreign contractor can seek relief against the United States Government in those courts. The issue of standing of a foreign contractor in the U.S. Court of Claims may arise at contract administration or performance level, in the form of seeking additional compensation or equitable adjustment due to changes, changed conditions, escalation of costs, liquidated damages, etc. The question of the standing of a foreign contractor before the U.S. Federal courts may arise at preperformance level in the form of judicial review of an agency action, e.g., an alien contractor seeking injunctive or declaratory relief against the administrator or officials of the U.S. Government department or agency as

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disappointed bidder to protect his "interests." In this paper the author does not deal with problems arising out of "conflict of laws" in deciding the jurisdiction of courts. In the following pages standing has been dealt with before: [I. United States Court of Claims; II. Other United States Federal Courts.]

The civil law makes the government, in matters of ordinary obligation subject to the suit of the citizen in the ordinary or administrative tribunals of the country; and this liability is not a device of modern civilization, but has been deemed inherent in the system. The Civil Code of the Kingdom of Italy of 1866 recognized this principle, and expressly provided that "in suits pending before the judicial authority, between private persons and the public administration, the proceedings shall always take place formally at the regular session."³

Whereas the undisputed maxim of the common law has been that the sovereign cannot be sued except by his consent, only voluntary submission on the part of the crown could secure a judicial hearing, in favor of private claims against it. And this was granted in England at an early date. "The Petition of Right," the oldest remedy, is said to have originated in the time of Edward I. The concept "The King can do no wrong" is considered repugnant to sound principles today in the United States, but it took almost 100 years after the birth of the nation before that inherited doctrine of common law was modified.⁴

Writings of publicists support the view that a state has no right to refuse, in all instances, to open its courts to foreigners, such action would provide one of grounds for a claim of denial of justice. A more recent tendency is to stress the positive obligations of states to make courts accessible to foreigners. VeDors, for example, regards access as one of the minimal rights which states are obligated to accord by "Droit international general."⁵ Roth submits that one of the "fundamental international obligations incumbent upon the state is to grant the alien free access to court for the protection and enforcement of his right."⁶

Thus the right of citizens to bring their governments to courts has been recognized under civil and common law systems. With the advancement of international trade and commerce there has been tremendous increase of the governmental involvement in activities having their impact beyond national frontiers. Increasing realization by the governments that there can be no commerce without contracts, nor contracts without actions, nor actions without courts, nor courts without persons who have proper standing to sue before the courts, many governments have considered it proper to extend the right of their citizens to bring the governments to the courts, to the non-citizens, aliens-

⁴For a review of its history, see Sherry, The Myth That the King Can Do No Wrong, 22 ADMIN. L. REV. 597 (1970).
natural as well as legal persons—either on the principle of "reciprocity" that is recognized by all civilized nations of the world" or under unilateral arrangements.\(^4\)

I. United States Court of Claims

The Court of Claims was established by an Act of Feb. 24, 1855,\(^6\) but it began as little more than an arm of the Congress, authorized to investigate claims against the government and make reports to Congress for final action. The court continues to discharge this function through its Chief Commissioner, but the inadequacy of its power was soon recognized. President Lincoln, in his 1861 message to the Congress, urged strongly that the court's judgment be made final. The Act of March 3, 1863\(^10\) unsuccessfully attempted to do just that, but it was not until 1966, when Congress removed the requirement of treasury appropriations to pay each claim,\(^11\) that the court's judgment carried with it the freedom from executive revisory authority. This authority was regarded as indispensable by the Supreme Court in its 1864 Gordon Case.\(^12\)

The 1855 Act had established the scope of the Court's jurisdiction as including "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, and all claims which may be referred to it by either House of Congress." The 1863 Act added counter claims and set off against any claimant. It should be pointed out here the broad jurisdiction conferred on the Court of Claims by "all claims," "any contract," "founded on any law of Congress or any regulation" implicitly covers any or all foreign/international claims founded on contract, express or implied, or on any law of Congress, or any regulation of any executive department, against the United States.

Through the years, many pieces of legislation have added to or limited the Court's jurisdiction in particular areas but the broadest and most significant addition to the Court's initial jurisdictional framework was the Tucker Act of

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\(^1\)The Treaty of Friendship, Commerce and Navigation is one of the most familiar instruments known to diplomatic tradition, that is commonly used to describe a basic accord fixing the ground rules governing day to day intercourse between countries, designates the medium par excellence through which nations have sought in general settlement to secure "reciprocal" respect for their normal interests abroad. On Jan. 1973 such treaties in force between the United States of America and Argentina, Belgium, China (Taiwan), Denmark, Estonia,\(^*\) Greece, Iraq, Israel, Italy, Japan, Korea, Liberia, Nepal, Netherlands, Norway, Pakistan, Paraguay, Switzerland, Turkey, Luxembourg, Austria, Finland, Honduras, Iran, Latvia,\(^*\) Oman, Germany, Federal Republic of, Bolivia, Brunei, Colombia, Thailand, Ethiopia, Tonga, Togo, Philippines, Vietnam.\(^*\) The U.S. has not recognized the incorporation of Estonia and Latvia into the U.S.S.R. The Department of State regards these treaties with them as continuing in force.


\(^11\)12 Stat. 765.

\(^12\)Act of March 17, 1866, 14 Stat. 9.

This Act added to the 1855 grant of jurisdiction, claims founded upon the Constitution, thus providing an explicit remedy for the taking of private property for public use and claims "for damages liquidated or unliquidated, in cases not sounding in tort." At the same time, it provided that District Courts would have concurrent jurisdiction on all such matters as the Court of Claims. The provisions in the Tucker Act for multiple forums for claims against the government could have signaled a fundamental shift in policy, with the government thereafter to be exposed to major litigation in every judicial district throughout the country. The Tucker Act did open the district courts to litigants—including contractors with claims against the government.

The other legislative grafting upon the Court's original grant of jurisdiction has been limited in scope, though some has been of substantial importance to classes of litigants, e.g., patent infringement by government taking or use was covered by legislation in 1910 and 1918. In 1946 Congress, wearied of ad hoc enactments, gave the courts jurisdiction to hear Indian Tribal Claims arising thereafter. There have been a number of other statutory provisions relating to the jurisdiction of the Court of Claims.

The competency of the U.S. Court of Claims to pronounce on the obligations of the U.S. Government arising out of international matters was recognized long ago by the Congress, by expanding the jurisdiction of the Court by Special Acts and a whole line of cases that developed under these acts. The jurisdiction of the Court of Claims in matters involving foreign contractors has been further facilitated and expanded by the Rules of the U.S. Court of Claims under which the Commissioner has the authority to decide the time and the place of the trial with due regard to the places of residence of the claimant and the witnesses and the degree of convenience of all concerned.

Court of Claims Sitting Abroad—"Matter of Right" or "Matter of Grace"

Rule 132(b)(2) of the U.S. Court of Claims reads as follows:


13Act of July 30, 1974, 28 U.S.C. 2402. The jury trial prohibition applies to the district courts with respect to its torts claims jurisdiction.


16Renegotiation Act of 1951. In 1971 jurisdiction of appeals from excess profits determinations of the Renegotiation Board was transferred from the U.S. Tax Court to the U.S. Court of Claims; Pub. L. No. 90-545, 82 Stat. 931 (1968), establishing the Redwood National Park and creating jurisdiction in the court for taking in connection therewith; other examples are Statutes relating to claims of oyster growers arising out of dredging operations (49 Stat. 1040, 28 U.S.C. 1947); and claim arising out of war contracts (41 U.S.C. 101-125).


18For a complete discussion of these cases see J.H. Toelle, The Court of Claims—its Jurisdiction and Principal Decisions Bearing on International Law, 24 Mich. L. Rev. 675 (1925-26).

Time; place; notice; exhibits

(2) The place of trial shall be fixed by the Commissioner with due regard to (i) the places of the residence of the claimant and the witnesses, and (ii) the degree of convenience of all concerned to be served by convening at some central place.

This rule not only authorizes sittings in different states in the United States, but the authority under this section has also been exercised to conduct sittings in different parts of the world. A brief survey of records of the finance office of the U.S. Court of Claims conducted by the author for the purposes of this paper, revealed that between 1959-73 about 14 trips abroad have been taken by the Trial Judges (Commissioners) and Judges of the Court of Claims on official business consisting of trial hearings, taking depositions in conjunction with cases before the Court. Further research revealed that these trips included visits to:

- Australia — in Concrete Industries (Monier) Ltd. v. U.S., Congressional reference case No. 6-70 (pending).
- Italy — in Congressional reference case No. 7-58.
- Sweden — in Congressional reference case No. 2-58.

Regarding the question whether the foreign contractor is entitled to hearing by the Court of Claims in his country, the prevailing view of the Court of Claims\(^2\) is that all the rules of U.S. Court of Claims regarding the conduct of hearings would be applicable; and that the Court of Claims conducts hearings abroad as a matter of grace and not as a matter of right of the alien contractor. This treatment is subject to the statutory requirement of “reciprocity.”

The author tends to agree with the above position only in part. First the requirement of “reciprocity,” 28 U.S.C. 2502, must be met. He agrees that contracts between the U.S. Government and a foreign contractor present unique situations, and special arrangements are required for the court’s sitting outside the U.S. As a matter of policy these arrangements need to be completed through the U.S. Department of State with the foreign governments. In the published Rules of the Court of Claims there is no specific mention of procedure to be followed in conducting “business” of the court in a foreign country. The language of Rule 132(b)(2)\(^3\) is broad and lucid enough to authorize the court’s

\(^1\)In an interview conducted by the author with Commissioner Mastin G. White, of the Court of Claims at his office on May 1, 1973, Commissioner White confirmed the prevailing view of the court in very strong words.

\(^2\)\textit{Supra} note 20.
conducting "business" in a foreign country, and this has been done before in a number of cases as mentioned above establishing precedent.

Rule 132 (b)(2) requires an objective test rather than subjective discretion of the trial Commissioner, "the places of residence of the claimant and witnesses" when comprised within "the degree of convenience of all concerned," bring out an inevitable conclusion that a foreign contractor is entitled to "hearings" by the U.S. Court of Claims in his country assuming the required special arrangements having been made and approved by the host government and U.S. Department of State, and the statutory requirement of reciprocity having been satisfied.

It may be pointed out here (subject to a choice-of-laws clause of the contract) that applicability of the Rules of the U.S. Court of Claims in governing the conduct of business of the court in a foreign country, is liable to create additional problems contradictory to various international obligations of the United States. This view is further strengthened by the fact that the United States has ratified the Hague Convention on the Taking of Evidence Abroad, 1968, on June 13, 1972, and thus rules of this Convention must be applied by the Court of Claims in their sittings abroad.

The terms and purposes of the Convention have been well documented in the "Report of the U.S. Delegation to Eleventh Session of the Hague Conference on Private International Law," 8 International Legal Materials 804-20. The Convention makes no major changes in U.S. procedure and requires no changes in U.S. legislation or rules.

Like the Documents Convention now in force, it is consistent with the policy of Public Law 88-619, modernizing the U.S. law of international judicial assistance in a number of respects. Although it does not provide the open system of international judicial assistance that is found in Public Law 88-619, it is meant to provide major help to U.S. courts and litigants, especially the Court of Claims and foreign contractor.

**U.S. Statutory Requirement of "Reciprocity" and Pertinent Decisions of the U.S. Court of Claims**

In the United States, 28 U.S.C. 2502 provides for an alien's privilege to sue the United States in the Court of Claims if: (i) the subject of suit is otherwise

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13 Id. 20.
14 Id. 20.
18 *Supra* note 26.
within the jurisdiction of such court; and (ii) the foreign government (the
government of the alien invoking this privilege to sue) accords to citizens of the
United States the right to prosecute a claim against it (foreign government).

The necessity of showing reciprocity as a prerequisite for the maintenance of a
suit in the Court of Claims by an alien—including a contractor—is beyond
question, and the court has so held in Akiebolaget Imo-Industri v. U.S.,29
except in cases referred to the court by Congressional reference; so held in P. Diacon Zadeh v. U.S.30 in the following words:

... § 2509, U.S.C...directs that report to the Congress include...facts
claimed to excuse the claimant for not having resorted to any established legal
remedy. ...Primary purpose of this section is to provide Congress or either House,
judicially determined facts for its use in determining whether or not certain private
claims warrant legislative relief, including the waiver of certain defenses otherwise
available to the United States.31

The issue of standing to sue the U.S. Government in the Court of Claims by
the foreign contractor has been well settled by Nippon Hodo Company Ltd. v.
U.S.32 hereafter referred to as Japanese case, where actions by Japanese
corporations against the U.S. on contract claims were maintained in the Court
of Claims by Chief Judge Jones. 28 U.S.C. 2502 reads as follows:

Citizens or subjects of any foreign government which accords to citizens of the
United States the right to prosecute claims against the government in its courts may
sue the United States in the Court of Claims if the subject matter is otherwise within
such court's jurisdiction.

This Section was codified in 1948, 62 Stat. 869, 976, but with minor changes
it was simply a reenactment of the Act of March 3, 1911, 36 Stat. 1087, 1139,
which in turn is derived from the Act of July 27, 1868, 15 Stat. 243. It appears
that prior to the Act of 1868, aliens could bring suit in the Court of Claims
without reference to reciprocal rights of United States citizens to sue in courts
of foreign countries, decision in Scharfer v. U.S..33 Wagner v. U.S.34 point out
trends to this effect.

To prove the fact that U.S. citizens are given reciprocal treatment as
contemplated by 28 U.S.C. 2502, the following forms of proof may be taken into
consideration:

i. Deposition by an experienced member of a foreign bar,
ii. Statement(s) of Ministry of Justice or equivalent in the foreign country,
iii. Findings of the U.S. Department of State,
iv. Statement(s) of the Ministry of Foreign Affairs or equivalent in the foreign country,
v. U.S. citizen's right to sue a foreign government in a foreign court to be determined as a whole and not in specie,
vi. Other nation's system of jurisprudence.

Deposition by an experienced member of foreign bar: In the Japanese case, the plaintiffs produced a deposition from a Japanese attorney, an experienced member of the Tokyo Bar Association, stating in unequivocal language that an American shared equally with a Japanese citizen "the right to sue the Japanese State for breach of contract," proof of foreign law by a witness who has practised before the courts of that country, also accepted in Ferdinand F. Brown v. U.S.

STATEMENT(S) OF MINISTRY OF JUSTICE OR EQUIVALENT IN THE FOREIGN COUNTRY

In the Japanese case the Statement of Director of Litigation of the Japanese Ministry of Justice, affirming the deposition of Japanese attorney was accepted by the court.

FINDINGS OF THE U.S. DEPARTMENT OF STATE AND STATEMENT(S) OF MINISTRY OF FOREIGN AFFAIRS OF EQUIVALENT IN THE FOREIGN COUNTRY

The Japanese case also indicates that the U.S. Department of State sought to ascertain the status of American citizens before the courts of Japan, the Court of Claims accepted the following statements—replies—from the Japanese Minister of Foreign Affairs:

"Citizens of the United States are given the right equally with the Japanese subjects to institute actions in Japanese courts against the Japanese Government, in regard to claims arising from such legal relation between the citizens of the United States and the Japanese Government as belong to the domain of private law."

Similar correspondence from the Italian Ministry of Foreign Affairs was accepted in Fichera v. U.S. and Michele Fischera et al. v. U.S.

From the records of the Japanese case it is not very clear whether the U.S. State Department did make a finding of fact as to the status of American citizens before the courts in Japan. There is no doubt that United States courts would be very much inclined, and rightly so, to accept the findings of the U.S.

35 Supra note 32.
36 Ibid., at 768.
375 Ct. Cl. 571.
38 Supra note 32.
39Id. at p. 768.
40Id.
41See supra note 3. see also 9 Ct. Cl. 254.
Department of State as to the status of U.S. citizens before courts in a foreign country.

In a survey conducted by the U.S. Department of State, where it sent out a circular on July 2, 1959 to all American diplomatic posts requesting that each post ascertain whether (1) citizens of the country enjoy a right to bring suit against the government (2) aliens are accorded national treatment in this respect. Results of this survey indicate that 60 nations meet the test of reciprocity there, by permitting American citizens to sue these governments in their courts, thus entitling citizens including contractors of these countries to sue the U.S. Government in the Court of Claims.

U.S. CITIZEN'S RIGHT TO SUE FOREIGN GOVERNMENT IN FOREIGN COURTS; NATURE OF RIGHT AND OTHER NATION'S SYSTEM OF JURISPRUDENCE

For a proper understanding of the legal right of U.S. citizens to sue a foreign government in local courts like any local citizen, it is desirable to have an understanding of the system of jurisprudence in that country, understanding as to what extent a foreign government has shed the blanket of sovereign immunity even in relation to its own citizens. It is a familiar principle that all governments possess an immunity from suit, and it is only in a spirit of liberty and to promote the ends of justice, that they ever allow themselves to be brought to court.

If it be granted at all, necessarily the regulations concerning it and the mode of proceedings will differ as much as the governments themselves differ. In United States v. O'Keefe the question was whether Great Britain accords to U.S. citizens the right to prosecute claims against that government in its courts, by "petition of right" to meet the test of reciprocity. The U.S. Supreme Court agreed with the opinion of the Court of Claims in findings that:

In Great Britain there is no such right of prosecution, as existing at common law. And the government of England accords to its subjects and aliens the right to prosecute claims against it by petition of right given by the common law of England and regulated by Statutes 23 and 24 Victoria, July 3, 1860.

In relation to the modes and procedures, including payment of legitimate fees, that indicate that granting of "petition of right" is at the will of the crown, the court observed:

18 DIGEST OF INTERNATIONAL LAW, prepared by and under the direction of Majorie Whiteman, Department of State Publication No. 8290 at pp. 411 to 413. These countries are: Argentina, Australia, Austria, Belgium, Brazil, Bolivia, Burma, Canada, Chile, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Federal Republic of Germany, Finland, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Ireland (tort only), Israel, Italy, Jordan, Korea, Lebanon, Liberia, Libya, Malaya, Mexico, Morocco, Netherlands, Norway, New Zealand, Pakistan, Panama, Paraguay, Philippines, Peru, Portugal, Republic of China, Saudi Arabia, Spain, Sudan, Sweden, Switzerland, Thailand, Tunisia, Turkey, Union of South Africa, United Arab Republic, United Kingdom, Uruguay, Venezuela and Vietnam.

11 Wall 178, 20 L. Ed. 131.

Ibid., at p. 132.
U.S. Foreign Contractors' Standing to Sue

It is of no consequence, theoretically speaking, that the permission of the crown is necessary to filing of the petition, because it is the duty of the King to grant it and the right of the subject to demand it... Congress meant to confer on the British subject the right to sue in the Court of Claims under the act... if in the ordinary course of the administration of justice in England the law secures to the American citizen the right to prosecute his claim against the government in its courts, that the petition of right accomplishes this object, cannot admit of question. If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless, a practical and efficient remedy for invasion, by the sovereign power, of individual rights.\textsuperscript{45}

In \textit{Marcos v. United States}\textsuperscript{46} the plaintiff, a Filipino, brought an action against the U.S. Government, for recovery of the alleged value of cattle requisitioned by the United States Army operating in the island of Mindanao in the Philippines. The Court of Claims determined that the provisions of 18 P.L. of Philippines 169 meet the test of reciprocity in the following words:

Admission of American citizens to Philippine courts with all rights of Philippine citizens as against Philippine Government, enabled Filipinos to sue the U.S. in Court of Claims under a statute that citizens or subjects of foreign government which accords to citizens of United States the right to prosecute claims against their government in its courts, may sue United States in Court of Claims, and, the fact that consent of Philippine Government to be sued is more restricted that consent of U.S. Government to be sued is not controlling.\textsuperscript{47}

Proof of reciprocity required is that a right is accorded to citizens of the United States to prosecute claims against alien government in the courts of that nation as a matter of procedure. The Court of Claims has interpreted this requirement of proof very liberally as expressed in the following statement of Judge Jones in the \textit{Japanese case}:

\begin{quote}
Statute providing that the Court of Claims shall be open to any aliens whose government accords to citizens of United States the right to prosecute claims against their governments in its courts, contemplated only that American citizens enjoy an equal standing with the foreigners in actions against a foreign state and does not require that scope of actions for which respective countries render themselves to suit be coextensively identical and \textit{in pari materia}.\textsuperscript{48}
\end{quote}

The scope covered by a petition of right under the common law system of Great Britain, discussed earlier in this chapter once again was scrutinized by the Court of Claims in \textit{John L. Brodie v. U.S.},\textsuperscript{49} in which the plaintiff sued to recover for alleged use by the United States Government, without license or lawful right, of patented invention covered by U.S. Letters Patent No. 1251959, issued to one who at the time of grant of patent and commencement of suit was a British subject. On the jurisdictional issue on the basis of requirement of reciprocity the Court said:

\begin{quote}
\textsuperscript{4}Ibid., at p. 133-34.
\textsuperscript{44}102 F. Supp. 547.
\textsuperscript{4}Ibid., at p. 548.
\textsuperscript{45}Supra note 32 at 766.
\textsuperscript{46}62 Ct. Cl. 29.
\end{quote}
The true test is not whether a citizen of the U.S. may prosecute an action of a particular nature in British courts, but whether the doors of British courts are open to American citizens for prosecution of claims against the crown.\textsuperscript{10}

Dowhey, J., delivering the opinion of the court, further stated:

A citizen of a foreign country which gives American citizens the same right of suit against it as its own citizens have, may maintain the same kind of action in the Court of Claims as is permitted to an American citizen, notwithstanding neither the American citizen nor the said alien could maintain the sort of suit against the foreign government.\textsuperscript{11}

An excellent summary of findings of the U.S. Department of State accepting the reciprocity and showing an understanding of the system of jurisprudence of various nations, permitting the U.S. citizen to sue foreign governments in their courts, is quoted from 8 Digest of International Law,\textsuperscript{52} Department of State Publication No. 8290 pages 411-413:

(1) United States missions overseas have been requested to obtain information from official or qualified unofficial sources as to the right of the alien to bring suit against the state. This data was sought from all countries except the newly independent African States and countries within the Soviet bloc. The requisite information was obtained from all countries to which inquiries were directed except Afghanistan, El Salvador, Luxembourg and Nicaragua.

(2) On the basis of this material it tentatively may be concluded that in a substantial majority of countries: (i) the citizen may bring suit against his government both in contract and in tort; and (ii) the alien is accorded the same rights as the citizen in this respect.

(3) In order to take due account of variations in national legal systems, it is necessary to distinguish between five separate groups of countries, on the basis of the manner in which the right to bring suit is derived. Three of these groups grant national treatment to aliens in the same manner. The fourth consists of countries granting only a conditional right of suit to aliens, and the fifth of countries where only limited rights are extended to either citizens or aliens, or where no clear assurance of any right to sue the state is to be found.

(4) The first group consists of countries having statutes which specifically authorize suits against the state, and extend the right to bring suit to aliens either by statutory language or by necessary implication. (It will be noted that most of these countries have in their legal background the common law principle that the sovereign can do no wrong):

Argentina, Australia, Burma, Canada, India, Iran, Ireland (tort only), Israel, Jordan (contract only), Liberia, Malaya, Morocco, New Zealand, Pakistan, Sudan, Turkey, Union of South Africa, United Kingdom.

(5) The second and largest group consists of countries with a civil-law tradition, where the general tendency of the legal system is to equate the alien with the citizen in matters involving the exercise of civil rights. In these countries the right to sue the state derives: (i) in part from the concept of the state as a juridical person having rights and obligations at private law (which in turn stems from the Roman law concept of the "fisc"); and (ii) in part from the system of administrative courts, which originated in France as a means of holding the state accountable for its actions in most public-law matters without subjecting it to the jurisdiction of the ordinary courts.

\textsuperscript{50}Ibid., at p. 46.
\textsuperscript{51}Ibid., at p. 29.
\textsuperscript{52}Supra note 42.
In most of these countries aliens are held to possess full civil rights including access to the courts on the same basis as citizens. These rights occasionally are specifically provided by statute. More often they are deduced from broadly worded constitutional provisions or from the civil code or, more particularly, from the code of civil procedure. In a number of cases the latter contains detailed provisions on the method of bringing suit, although no substantive grant of a right to sue is to be found anywhere in the codes.

Belgium, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, France, Federal Republic of Germany, Greece, Guatemala, Honduras, Korea, Lebanon, Libya, Mexico, Netherlands, Panama, Paraguay, Peru, Portugal, Spain, Sweden, Switzerland, Thailand, Tunisia, United Arab Republic, Uruguay, Venezuela, Vietnam.

(6) The third group consists of countries where the rights of both citizen and alien to bring suit against the state derive from unwritten or "common law," or from tradition or from an established feature of national jurisprudence.

Denmark (common law), Finland (common law), Haiti (jurisprudence), Iceland (common law), Norway (common law), Philippines (jurisprudence), Saudi Arabia (tradition).

(7) The fourth group consists of countries with a civil law tradition, in the main, which grants citizens a right to bring suit against the state, but makes the enjoyment of a like right by aliens contingent upon the existence of reciprocity or of pertinent treaty provisions.

Austria (reciprocity), Bolivia (treaty), Republic of China (reciprocity), Italy (reciprocity), Japan (reciprocity), Yugoslavia (reciprocity).

(8) The fifth group consists of countries where the right of either citizen or alien to bring suit against the state is severely circumscribed, or where the legal situation is so uncertain and fluid that no definite assurance of adequate rights for either citizen or alien is to be had.

Cambodia (probable right of suit), Ceylon (tort only), Ethiopia (non resident alien rights uncertain), Ghana (petition of right), Indonesia (probable right of suit), Iraq (limited right of suit), Laos (probable right of suit).

Thus it is clear that the right of a foreign contractor to sue the U.S. in the Court of Claims is not incumbent upon a system of law or government of his country, but on the showing that the doors in his country are open to American citizens to sue the foreign government.

"Reciprocity" and National Treatment Obligations of Foreign Governments in the U.S. Commercial Offshore Procurement Treaties

Over the period of its national history the United States has concluded many commercial treaties that have provisions relating to civil judicial remedies, but without specific reference to Court of Claims jurisdiction. In most of them there have been broadly stated rights and privileges as to free access to the courts of justice, either on the basis of unilateral policy objective or under the broad spectrum of reciprocity. Of the 40 treaties of Friendship, Commerce and Navigation in force on January 1973, almost all of them provide that:

53Supra note 7.
...nationals of either party shall be accorded national treatment...with respect to access to the courts."  

National treatment is defined in the treaty as follows:

The term national treatment means treatment accorded within the territories of party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals or companies, as the case may be, of such party.  

It is clear from the provisions quoted above that, under the treaty, each government shall give equal treatment to the other with respect to access to the respective courts. This equal treatment is in complete harmony with 28 U.S.C. 2502, to meet the test of reciprocity. "Equal treatment" is the controlling factor both in the statute and in treaties. A similar harmonious construction of statute and treaty "equal reciprocal treatment," was accepted by Laramore, J., in his dissenting opinion as to the burden of proof of reciprocity under the statute in the Japanese case, in the following words:

...it seems to me, that it must mean that each government shall give equal treatment to the other with respect to access to the respective courts. As a matter of fact, this would appear to be in complete harmony with the primary purpose of the statute, which permits a foreign citizen or corporation to sue the United States in cases wherein a foreign government accords to citizens of the United States, the right to prosecute claims against their government in its courts. In other words "equal treatment" would seem to be the controlling factor both in the Treaty and the Statute.  

The U.S. Government also has "Offshore Procurement Bilateral Agreements" in force on January 1973, with: Belgium, Denmark, Federal Republic of Germany, Greece, Israel, France, Italy, Luxembourg, Netherlands, Spain, Sweden, and Turkey. In these treaties there is no direct access-to-courts clause, but through other clauses maximum effort has been made to treat the foreign contractor on the same footing as any domestic contractor in government contracts. Article 12 of the treaty with Belgium

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1 Treaty of Friendship, Commerce and Navigation between U.S. and Japan, 4 U.S.T. 2063, Sec. 1. Article IV.
2 Ibid. Art. XXII.
3 Supra note 32 at p. 770.
provides that "... offshore procurement contracts between the United States Government and either Belgian private contractors or the Belgian Government will contain such clauses as are required by U.S. laws."\(^{69}\)

Termination for convenience clauses in a standard form contract that is a part of most of the treaties, guarantees equitable adjustment without specific reference to the Court of Claims. Changes Clause in the standard form contract of the treaties is another very good example, when it provides for equitable adjustment without referring to the Court of Claims, "... if any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made in contract price delivery schedules or both..."\(^{70}\) These clauses treat the foreign contractor just like any domestic contractor, and entitle him to seek relief against the U.S. Government in the U.S. courts on the same footing as a domestic contractor.

On the question whether citizens of 40 nations,\(^{71}\) whose government under the Treaties of Friendship, Commerce and Navigation guarantee national treatment to American citizens meet the test of reciprocity to entitle them to sue the United States in the Court of Claims; the author's answer is yes, based on the interpretation accepted by the Court of Claims in *Marcos v. U.S.*,\(^{72}\) *United States v. James O'Keefe,*\(^{73}\) *John L. Brodie v. U.S.*,\(^{74}\) and the Japanese case. It has been fairly well settled that countries opening the doors of their courts to the suits of American citizens against their government meet the test of reciprocity.

At this point it should be observed that jurisdiction of the Court of Claims, in cases arising upon treaties, is withheld from the Court of Claims. According to the recognized practice of nations, such claims are usually adjusted by special process, since they partake of a political character which renders it proper that they should be under the immediate supervision of Congress.\(^{75}\) But we are dealing with claims arising out of contracts with foreign contractors, to which treaty obligations apply only as a broad umbrella.

II. Other United States Federal Courts

In the United States from the beginning, the question of access by aliens, contractors to U.S. courts, was related to assignment of jurisdiction to Federal courts. Alexander Hamilton, wrote in *The Federalist*:

> As the denial or perverseness of justice by the sentence of courts is with reason closed...
among just causes of war, it will follow, that the federal judiciary ought to have
cognizance of all causes in which the citizens of other countries are concerned. 76

Article III, Section 2 of the U.S. Constitution looked at this principle. The Judicial Act of 1789 laid down in broad outline the competence of Federal courts with respect to suits involving aliens. 77 The act gave these courts jurisdiction over suits by aliens, including contractors, among others "over suits of a civil nature at common law or in equity involving $500 or more to which an alien was a party." 78

By the current version of 28 U.S.C. 1332, the amount in controversy must exceed $10,000. In addition to cases involving federal questions under the Constitution, Federal law or treaties, an alien, including a contractor, may gain access on appeal, to the highest Federal court. 79 National legislation subsequent to the original Judiciary Act, has widened the alien contractor's right of access to courts against the U.S, specially under the Tucker Act, presently codified under 28 U.S.C. §1346(a) (1964):

The district courts shall have original jurisdiction, concurrent with the Court of Claims of: (2) Any other civil action or claim against the U.S. not exceeding $10,000 in amount, founded either upon the Constitution, or upon any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the U.S. or for liquidated or unliquidated damages in cases not sounding in tort.

It should be pointed out here that "all claims," "any contract," founded on "any law of Congress," or "any regulation" implicitly cover any or all foreign/international claims founded on any law of Congress, regulation of executive department, against the United States.

Applicability of Rules of Civil Procedure;
Administrative Law and Implications of U.S. Immigration Laws as Related Actions by Alien Contractors

Rule 17(a), Federal Rules of Civil Procedure, provides that a suit must be brought by a real party in interest and Administrative Procedure Act Sec. 10(a), 5 U.S.C. 1009(a) recognizes a right of judicial review by any person "suffering legal wrong because of an agency action or aggrieved by such action within the meaning of any relevant statute." Yet despite the breadth of language in the latter statute, the federal courts usually have adhered to somewhat restrictive rules in recognizing an alien's standing to sue. In immigration disputes, non-resident aliens have generally been denied standing to sue on the ground that the immigration statutes evidenced such an intent. Section 10 of the Administrative Procedure Act provides in part:

76 Federalist, No. 80.
77 1 Stat. 73.
78 Id. Sec. 11.
79 Dodge v. Cunnard S.S. Co., 19 F.2d. 500.
§1009, Judicial review of agency action: except so far as (1) statute precludes agency review or (2) agency action is by law committed to agency discretion.

Legal wrong or adversely affected is a pre-requisite for standing to seek judicial review. Allegations of less serious economic injury have been held insufficient to support standing to sue in a number of cases. In Perkins v. Lukens Steel, the complainant's lack of standing to sue was based upon principles implicit in the Constitutional division of authority in the U.S. System of Government, and the impropriety of judicial interpretations of law at the instance of those who show no more than a possible injury to the public.

A more difficult question arises if the aggrieved party is outside the United States, since under the Federal Rule 17(a) a person is not deemed to have standing to challenge an administrative determination or action unless he himself is a party to a proceeding in which the determination is made, or unless he is directly affected by the result. However Prof. Charles Gordon makes a point in his treatise, Sec. 3, that this preclusion may be modified in the light of appalling situations. Because of the U.S. policy of selective immigration control and the differential national origins quota feature of U.S. Immigration Laws the United States is not in a position to agree to a most favored nation treatment clause.

Therefore, the approach devised takes the form of a non-contingent rule that positively assures the reciprocal admission, and indefinite sojourn, of individuals who function in an international commerce or investment capacity. Because it is positive, this commitment is subject to the reserved rights of the U.S. immigration laws.

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81310 U.S. 113 (1940).
82See Davis, Adm. Law Treatise, Ch. 22, in which the restrictiveness of the Federal rules is criticized. See also GELTHORN AND BYSE, ADMINISTRATIVE LAW, p. 256.
83Young Americans for Freedom Inc. v. Rusk, 205 F. Supp. 603. The court had no authority to intrude into the political field of government and could not compel secretary of state to grant visa. . . . Plaintiff, invoking the right to declaratory judgment must have standing to sue. See precautionary note in Brownell v. Tom We Shung, 352 U.S. at 184, "we do not suggest of course that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." Also see note of Supreme Court in DeCatur v. Paulding (14 Pet. 947), quoted in Perkins v. Lukens Steel Co. at p. 131, 132: "The interference of the courts with the performance of the ordinary duties of the executive departments of Government would be productive of nothing but mischief and we are quite satisfied that such a power was never intended to be given to them."
84GORDON & ROSENFIELD: 2 IMMIGRATION LAW AND PROCEDURE Sec. 8.3 (Rev. ed. 1971).
85Present statutory authority for these "treaty trader" and "treaty investor" clauses is contained in International Lawyer, Vol. 8, No. 3
right of each country to exclude or expel particular individuals who are deemed undesirable, for health, morality or security reasons.

The contract claim dilemma is in large measure a question of appropriate relationship between administrative and judicial remedies available for the resolution of government contract disputes. This proposition stands true for the claims of U.S. foreign contractors also. The value of administrative procedure is attested by the fact that, over the years, a large proportion of disputes processed administratively has been resolved without resort to the courts. It is feared that a foreign contractor may reluctantly accept an unsatisfactory administrative settlement rather than pursue the long and uncertain course of judicial review.

Foreign Contractor's Standing in Judicial Review in District Courts on the Basis of "Wrongful Injury and Protection of Interest Theory"

In Constructores Civiles de Cen. TroAmerica, S.A. (CONCICA) v. John Hannah et al., U.S., 86 the Court of Appeals for the District of Columbia was faced with the question of standing, sovereign immunity and preclusion of judicial review in relation to government contracts. The case involved a Honduras Corporation which sought an injunctive and declaratory judgment against the administrator and several subordinate officials of the Agency for International Development (AID), in connection with disqualification of the foreign corporation (prospective contractor) as bidder on road construction contracts in Honduras.

The United States District Court for the District of Columbia, Matthew F. McGuire, J., dismissed the complaint for insufficiency and plaintiff appealed. The Court of Appeals, Tamm, J., held that for purposes of standing, challenge to Agency action (AID decision), disqualifying the plaintiff Central American Corporation from bidding on projects (future construction projects) was arguably within the "zone of interest" to be protected or regulated by the statutes involved. The court also held that even though plaintiff was a non-resident alien, it had standing to challenge the agency's decision.

The standing of a foreign contractor to sue in district courts is distinguishable from the standing of non-resident aliens in immigration cases. As mentioned earlier in immigration disputes non-resident aliens have generally been denied standing on the ground that statutes evidenced such an intent. In the matters involving foreign contractors there is no indication that Congress intended to

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*459 F.2d. 1183 (1972).
limit review, or to entrust the matter to the finality of the administration process.87

In Brownell v. Tom We Shung,88 the Court observed "... exemptions from the ... Administrative Procedure Act are not lightly to be presumed ... and unless made by clear language or supersede the expanded mode of review granted by the Act cannot be modified." A person may be just as "affected or aggrieved" by agency action within the terms of the Administrative Procedure Act, if he is a non-resident alien contractor as if he was an alien or a domestic contractor.

Furthermore, the Administrative Procedure Act uses the words "any person"6 not "any citizen," and persons include natural as well as legal entities. Congressional intent that a particular plaintiff has the right of review may be found either in express statutory language granting it to the plaintiff's class, or, in the absence of such express language, in statutory indicia from which a right to review may be inferred. Reviewability may ordinarily be inferred from evidence that Congress intended the class to be a beneficiary of the statute under which the plaintiff raises his claim.

In the CONCICA case the court followed the Scanwell-Ballerina PenBlackhawk trilogy,89 in deciding the question of judicial reviewability of the agency action: (i) injury in fact; (ii) allegation of arbitrary, capricious or illegal agency action; (iii) arguably within the zone of interests. Any foreign contractor's standing to sue the United States in the Federal District Courts must meet the above three requirements. The law of standing as developed by the U.S. Supreme Court has become an area of incredible complexity.90

The extent of judicial review of decisions of the Appeals Boards or the contracting officer is governed by the language-of-disputes clause in the contract and the relevant statutory provisions. The function of reviewing and administrative decision can be and frequently is performed by a court of original jurisdiction, as well as by an appellate tribunal. From the CONCICA case, it seems to be well settled that the foreign contractor has the right to have his day in the Federal courts of the United States.

Recommendations

One procedural recommendation is for the Court of Claims to adopt rules to

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87Almost all U.S. foreign procurement is done by negotiations under the authority 10 U.S.C. 2304(a)(6), from the decision in Wheelabrator Corp. v. John Chafee, Secy. of the Navy, 147 U.S. App. D.C. 238, 455 F.2d. 1306, it seems that determination to make negotiations as permitted by 10 U.S.C. 2304 (a)(14) or strictly a failure to take action is "committed to agency discretion by law," within the meaning of the Administrative Procedure Act 5 U.S.C. 701(a)(2) (1970).
88352 U.S. 180; S. Ct. 252, 256.
90The Court has itself characterized its law of standing as a "complicated speciality of federal jurisdiction," United States ex rel Chapman v. FPC, 345 U.S. 153, 156 (1953).
the effect that in the conduct of "business abroad," the Court of Claims should not only look at the U.S. domestic laws, but also give proper regard to international law, treaty law, international agreements and domestic law of the contractor's country.

The subject of responsibility of states in relation to their contractors has certain aspects that are dependent upon or co-existent with each other. Thus, there exists under international law, an international standard of justice, actually a collectivity of standards the denial of any one of which is denominated "denial of justice," entailing the responsibility of the state. Co-existing with such standard, is the general rule of exhaustion of remedies available in the local state.

"There is no principle of international law which makes it the duty of one nation to assume the collection of claims of its citizens against another nation, if the citizens themselves have ample means of redress without intervention of their governments." A private person armed with no power of enforcing his rights, cannot speak in sufficiently impressive tones to insure his being heard by a foreign nation. At the same time, when a citizen applies to his government to press his claim against a foreign power, he does so subject to the wise and judicious discretion which a nation has a right to exercise in determining its duty to itself, the citizen and the foreign power.

The U.S. Department of State's position on exhaustion of local remedies is in conformity with the position taken by British, French and other Governments, which requires that states do not interfere with the regular course of the administration of justice in which an alien is a party, until he shall have taken his case to the court of last resort. This rule is subject to certain exceptions. Before taking up the claims, a state must be satisfied that its citizens have exhausted the means of legal redress offered by tribunals of the country that gave rise to the claim.

It is recommended that other countries, whose citizens do business with the U.S. Government (foreign contractors), and who have the right to sue the U.S. Government for their claims or interests—money claims—in the U.S. Court of Claims under the reciprocity theory or—injunctive, accounting or declaratory relief—in U.S. Federal courts under the wrongful-injury and protection-of-interest theory, must insist that these contractors first seek the relief from the courts of the United States of America.

A large portion of claims of federal contractors may thus be dealt with in the simple and justifiable routine of the U.S. Court of Claims and other Federal

11For detailed discussion, see Exhaustion of Local Remedies. DIGEST OF INTERNATIONAL LAW, Dept. of State Publication No. 8290 at p. 769 to 783.
13Ibid., note 93 at p. 779.
courts. Forcing the maximum number of cases involving foreign contractors into municipal courts, and their disposition under the watchful eyes of "international justice" standards, should lead a wider incorporation of international standards into municipal standards and vice versa. This will bring consequent beneficial effects for legal protection of alien contractors.

This will also reduce international adjudication to the minimum that otherwise might be a costly, burdensome, time consuming task, and there are obvious advantages in keeping as much litigation as possible out of international channels.

It is necessary to make certain that international character of the claim of an alien contractor against the U.S. Government is not destroyed, and that possibility of recovery at an international level is retained. This purpose is very well served by making the claim of the contractor itself independent of the exhaustion of local remedies, and by considering this requirement of resort to municipal courts of the United States, as a procedural or jurisdictional rather than as a substantive one.