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**THE LEGAL PRACTICE OF THE RECOVERY OF
STATE EXTERNAL DEBTS**

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Sur le préavis de MM. Marcelo KOHEN et Jean-Michel JACQUET, Professeurs à l'Institut, et de M. Petros MAVROIDIS, Professeur, Faculté de droit et des sciences économiques, Division juridique, Université de Neuchâtel, le Directeur de l'Institut universitaire de hautes études internationales, agissant au nom de la Commission mixte de l'Université et de l'Institut, composée des Doyens des Facultés de droit, des lettres, et des sciences économiques et sociales, autorise l'impression de la présente thèse sans entendre par là exprimer d'opinion sur les propositions qui y sont énoncées.

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Professeur Philippe Burrin
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This work is dedicated to

Coralie Amanda Olivares V., and Victoria Marcos Vda. de Olivares

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List of abbreviations and acronyms

Abbreviated titles of selected principal law reports, and of journals containing law reports

AIL Cases	American International Law Cases
AJIL	The American Journal of International Law
BIL Cases	British International Law Cases
<i>Dalloz R.H.</i>	<i>Dalloz, recueil hebdomadaire de jurisprudence</i> (formerly entitled: <i>Dalloz, recueil périodique et critique de jurisprudence, de législation et de doctrine</i>)
<i>Dalloz R.P.</i>	<i>Dalloz, recueil périodique et critique de jurisprudence, de législation et de doctrine</i>
Ency. PIL	Encyclopedia of Public International Law
ICJ Pleadings	International Court of Justice, Pleadings, Oral Arguments, Documents
ICJ Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
<i>JDI (Clunet)</i>	<i>Journal du droit international (Clunet)</i> (formerly entitled: <i>Journal du droit international privé et de la jurisprudence comparée (Clunet)</i>)
<i>Jdip et jc (Clunet)</i>	<i>Journal du droit international privé et de la jurisprudence comparée (Clunet)</i>
<i>Jur. d'Anvers</i>	<i>Jurisprudence du Port d'Anvers et des autres villes commerciales et industrielles de la Belgique</i>
ILM	International Legal Materials
ILR	International Law Reports (formerly entitled: Annual Digest and Reports of Public International Law Cases; sometimes: Annual Digest of Public International Law Cases)
<i>Pasicrisie Belge</i>	<i>Pasicrisie Belge, recueil général de la jurisprudence des cours et tribunaux de Belgique</i>
PCIJ Series A	Permanent Court of International Justice, Collection of Judgments [to 1930]
PCIJ Series B	Permanent Court of International Justice, Collection of Advisory Opinions [to 1930]
PCIJ Series A/B	Permanent Court of International Justice, Judgments, Orders and Advisory Opinions [from 1931]
PCIJ Series C	
Nos. 1-19	Permanent Court of International Justice, Acts and Documents relating to Judgments and Advisory Opinions [to 1930]
Nos. 52-88	Permanent Court of International Justice, Pleadings, Oral Statements and Documents [from 1931]
RIAA	Reports of International Arbitral Awards (United Nations) / <i>Recueil des sentences arbitrales</i>
<i>Sirey</i>	<i>Sirey, recueil des lois et des arrêts</i>

Abbreviated titles of principal journals, reviews, and periodicals

ABA Journal	American Bar Association Journal
<i>AFDI</i>	<i>Annuaire français de droit international</i>
African JI & CL	African Journal of International and Comparative Law
AJIL	The American Journal of International Law
AJCL	The American Journal of Comparative Law
<i>Annuaire IDI</i>	<i>Annuaire de l'Institut de droit international</i>
<i>Annales HEI/Annals GIIS</i>	<i>Annales d'études internationales</i> / Annals of International Studies (<i>HEI</i> / <i>GIIS</i>)
ASIL Proc.	The Proceedings of the American Society of International Law
BNL Q. Rev.	Banca Nazionale del Lavoro Quarterly Review
Boston Col. TWLJ	Boston College Third World Law Journal
Boston Univ. LR	Boston University Law Review
<i>Bull. Inst. Jur. Int.</i>	<i>Bulletin de l'Institut Juridique International</i>
Bus. Lawyer	The Business Lawyer
BYBIL	The British Year Book of International Law
<i>BzöRV</i>	<i>Beiträge zum ausländischen öffentlichen Recht und Völkerrecht</i>
<i>Cah. D. Eur.</i>	<i>Cahiers de droit européen</i>
California LR	California Law Review

California W. ILJ	California Western International Law Journal
Canadian B. Rev.	Canadian Bar Review
Canadian YIL	The Canadian Yearbook of International Law
Carib. Aff.	Caribbean Affairs
Carol. JIL & Com. Reg.	Carolina Journal of International Law and Commercial Regulation
Case W. Res. JIL	Case Western Reserve Journal of International Law
Chicago LR	The University of Chicago Law Review
Col. J. Transnat'l L.	Columbia Journal of Transnational Law
Columbia LR	Columbia Law Review
CML Rev.	Common Market Law Review
<i>Com. Levant</i>	<i>Le Commerce du Levant</i>
Cornell JIL	Cornell Journal of International Law
Denver JIL & Pol'y	Denver Journal of International Law and Policy
Dev. & Soc-Ec. Prog.	Development and Socio-Economic Progress
Dev. J. Soc. Int'l Dev.	Development, Journal of the Society for International Development
<i>DF-W</i>	<i>Die Friedends-Warte</i>
Ency. PIL	Encyclopedia of Public International Law
<i>Étud. int.</i>	<i>Études internationales</i>
Food Pol'y	Food Policy
Georgetown LJ	Georgetown Law Journal
Georgia JI & CL	Georgia Journal of International and Comparative Law
German YIL	German Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
Harvard LR	Harvard Law Review
Hastings Int'l & CLR	Hastings International and Comparative Law Review
Houston JIL	Houston Journal of International Law
ICLQ	International and Comparative Law Quarterly
ICSID Rev. / For. Inv. LJ	International Center for the Settlement of Investment Disputes Review / Foreign Investment Law Journal
IDS Bulletin	Institute of Development Studies Bulletin
IFL Rev.	International Financial Law Review
Illinois LR	University of Illinois Law Review
Indian JIL	The Indian Journal of International Law
Indian YBI Aff.	Indian Year Book of International Affairs
Indiana LR	Indiana Law Review
Inst. Dev. Stud.	Institute of Development Studies
Int'l Bus. LJ	International Business Law Journal
Int'l Conc.	International Conciliation
Int'l Lawyer	The International Lawyer
Int'l Stud. Q.	International Studies Quarterly
Italian YIL	Italian Yearbook of International Law
Japanese AIL	Japanese Annual of International Law
<i>JDI (Clunet)</i>	<i>Journal du droit international (Clunet)</i> (formerly entitled: <i>Journal du droit international privé et de la jurisprudence comparée (Clunet)</i>)
<i>Jdip et jc (Clunet)</i>	<i>Journal du droit international privé et de la jurisprudence comparée (Clunet)</i>
J. Dev. Areas	The Journal of Developing Areas
J. Int'l Arb.	Journal of International Arbitration
JIEL	Journal of International Economic Law
JILE	The Journal of International Law and Economics
<i>J. trib.</i>	<i>Journal des tribunaux</i>
<i>Juris-Classeur</i>	<i>Juris-Classeur de droit international</i>
Jur. Rev.	Juridical Review (Edinburgh)
L. & Contemp. Prob.	Law and Contemporary Problems (Duke University)
L. & Pol'y Int'l Bus.	Law and Policy in International Business
Law & St.	Law and State

Miami Inter-Am. LR	The University of Miami / Inter-American Law Review
Michigan JIL	Michigan Journal of International Law
Michigan LR	Michigan Law Review
NILR	Netherlands International Law Review
Nordisk JIL	Nordisk Journal of International Law, Acta Scandinavica Juris Gentium
North Car. JIL & Com. Reg.	North Carolina Journal of International Law and Commercial Regulation
North W. JIL & Bus.	Northwestern Journal of International Law and Business
North W. Univ. LR	Northwestern University Law Review
NYBIL	Netherlands Yearbook of International Law
NYU JIL & Politics	New York University Journal of International Law and Politics
NYU LR	New York University Law Review
NYU LQ Rev.	New York University Law Quarterly Review
OECD Ec. Stud.	Organisation for Economic Co-Operation and Development Economic Studies
<i>ÖZöRuV</i>	<i>Österreichische Zeitschrift für öffentliches Recht und Völkerrecht</i>
Philippine LJ	The Philippine Law Journal
Polish YIL	The Polish Yearbook of International Law
Proc. Inst. Pub. Aff.	The Proceedings of the Institute of Public Affairs
<i>RBDI</i>	<i>Revue belge de droit international</i>
<i>RCADI</i>	<i>Recueil des cours de l'Académie de droit international</i>
<i>RCdip</i>	<i>Revue critique de droit international privé</i> (formerly entitled: <i>Revue de droit international privé</i>)
<i>RDIDC</i>	<i>Revue de droit international et de droit comparée</i>
<i>RDILC</i>	<i>Revue de droit international et de législation comparée</i>
<i>RDI sci. dipl. pol.</i>	<i>Revue de droit international de sciences diplomatiques et politiques</i>
<i>REDI</i>	<i>Revista Española de Derecho Internacional</i>
<i>Rép. Dalloz de DI</i>	<i>Répertoire de droit international (Dalloz)</i>
<i>Rev. Per. DI</i>	<i>Revista Peruana de Derecho Internacional</i>
<i>RID contemp.</i>	<i>Revue internationale de droit contemporain</i>
<i>RGDIP</i>	<i>Revue générale de droit international public</i>
<i>RpDI</i>	<i>Revue pratique de droit international</i>
<i>RSLF</i>	<i>Revue de science et de législation financières</i>
South African YIL	South African Yearbook of International Law
Stanford LR	Stanford Law Review
Syracuse JIL & Com.	Syracuse Journal of International Law and Commerce
Texas ILJ	Texas International Law Journal
The Annals	The Annals of the American Academy of Political and Social Science
Transnat'l. Ass.	Transnational Associations / <i>Associations transnationales</i>
Trans. Grotius Soc.	Transactions of the Grotius Society
UNCTAD Rev.	United Nations Conference on Trade and Development Review
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Villanova LR	Villanova Law Review
Virginia JIL	Virginia Journal of International Law
World Comp. Rev.	World Competition: Law and Economics Review
Yale LJ	Yale Law Journal
YBILC	Yearbook of the International Law Commission
<i>ZaöRV</i>	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

Other abbreviations

CAD	Consolidated Agreement Debt
<i>CFI</i>	<i>Contrôles financiers internationaux</i>
DM	Deutschmark
FSIA	Foreign Sovereign Immunities Act
LDA	London Debts Agreement
LDC	London Conference on German External Debts

<i>LGDJ</i>	<i>Librairie générale de droit et de jurisprudence</i>
Misc. Pamphlets CIJ	Miscellaneous Pamphlets on the Permanent Court of International Justice
Misc. Publ. LoN & PCIJ	Miscellaneous Publications Chiefly on the League of Nations and the Permanent Court of International Justice
NFA	New Financing Agreement
OFAC	US Treasury Office of Foreign Assets
<i>PUF</i>	<i>Presses universitaires de France</i>
SDDRF	Sovereign Debt Dispute Resolution Forum
SDLM	Sovereign Debtor Liquidation Mechanism
SDRM	Sovereign Debt Restructuring Mechanism
Supp.	Supplement
VCT	Vienna Convention on the Law of Treaties
Vol.	Volumen
§	section (of a statute in New York and U.S. laws)

Acronyms

IBRD	International Bank for Reconstruction and Development
BIS	Bank for International Settlements
GIIS / <i>HEI</i>	Graduate Institute of International Studies / <i>Institut universitaire de hautes études internationales</i>
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ILA	International Law Association
ILC	International Law Commission
ILI	International Law Institute
IMF	International Monetary Fund
LoN / <i>SdN</i>	League of Nations/ <i>Société des Nations</i>
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
<i>SFDI</i>	<i>Société française pour le droit international</i>
UNCTAD	United Nations Conference for Trade and Development
UN	United Nations Organization
WTO	World Trade Organization

THE LEGAL PRACTICE OF THE RECOVERY OF STATE EXTERNAL DEBTS

Introduction

A. Delimiting the scope of, defining and positioning, the subject matter

The subject of the “external debt” is multi-faceted. It attracts different interest in international economic relations, including a wide range of issues for research in comparative private and public international law. However, in this “external debt”-related work, we will focus, primarily, on the practice of recovery, by legal proceedings, of State external debts before different arbitral and judicial jurisdictions, domestically and internationally. This will be done from the standpoint of the general practice of the recovery and settlement of State external debts by the other various compelling means so far implemented in international relations, rather than focusing only on the non-judicial settlement of State external debts, for instance, debt renegotiation, rescheduling, and restructuring, as it has usually been the case in the last decades.

Through the study of the arbitral and judicial practice, this work seeks to identify the law of recovery of State external debts as it originated from the initial status of lack of judicial remedies, and legal and practical impossibility to sue and execute sovereign debtors in foreign municipal courts, until the present period, in which the existing legal remedies, in these municipal courts, tend to overprotect creditors at the expense of both the public interests of debtor States and the development of this area of law.

The law of recovery of State external debts is a neglected topic of international law. It has existed since the first State defaults, notwithstanding the lack of international

conventional law on the matter. It has emerged from the practice of the courts and tribunals, their legal decisions and statements, and the legal positions assumed by the interested parties (*i.e.*, both creditors, and debtor States, including their agencies and instrumentalities) before these jurisdictions. This law has a comprehensive coverage: it includes the rights of action and counterclaim, the defences, the proceedings before and after judgment, and the execution in foreign courts of justice or law tribunals. In other words, it operates from the commencement of the suit for remedy, until the receipt of the money or a final debt settlement.

The origins of this discipline can be traced as early as the end of the 18th century, having evolved in a fragmented way through the 19th and 20th centuries, principally under different domestic rather than international jurisdictions, until the present period. However, as it is presently emanating largely from one domestic jurisdiction only (namely, New York), it cannot be viewed as a neutral source of general principles, doctrines, rules and disciplines of international law, insofar as many of these have not yet been recognized by, and incorporated into, evolving public international law. This law, as any other subject of international law, aims at evolving in a balanced and rational direction and at being applied before a proper fora: an international permanent and neutral judicial jurisdiction for the resolution of all State external debts.

Under general international law, and the law of recovery of State external debts, States are the unique constant element in a creditor/debtor State relationship. Thus, for the purpose of delimiting the coverage of this study: Firstly, it will be immaterial whether the monetary debt was contracted by the State with a private foreign individual, a foreign bank, another State, or an international financial or monetary organization—what counts in this creditor/debtor State relationship is that the debtor is a State, or an agency or an instrumentality of it (its *ratione personae* coverage); secondly, it will make no difference whether the contentious issues in question, decided by a jurisdiction, concerned the partial or total recovery of a State external debt, or, if related to another procedure, considered issues applicable to our subject matter in a subsidiary manner—in fact, what matters here is that the contentious issues in question relate to a State external debt (its coverage *ratione materiae*); and, thirdly, it will be of no importance whether the case was brought in the 18th or the 19th century, or before World War I, or between

the two World Wars, or after World War II, insofar as it involves a State, or an agency or an instrumentality of it, as a debtor (its coverage *ratione temporis*).

As regards the substance of a non-executed or non-performed monetary obligation it will also be irrelevant whether the monetary debt was (a) contracted directly by the State under a loan contract entered into with private or public foreign creditors, or if it resulted from (b) the use by the State of international credits and banking facilities, or from (c) the State's participation, as a guarantor, or as a third party, in a transboundary financial relationship, or whether it resulted from (d) the State's voluntary assumption, by virtue of the exercise of its sovereign monetary power, of an external monetary obligation undertaken by one or several of its nationals *vis-à-vis* foreign creditors, or from (e) the State's assumption of a monetary arrangement or settlement of another type, such as those resulting from war indemnities and torts, undertaken in the exercise of its sovereign powers.

B. Importance of the present subject matter

The present subject matter is crucial especially in the field of international economic relations because of the following main legal and systemic reasons:

(i) The "external debt problem" is one of the most controversial and enduring challenges for the international community and the globally-integrated world economy of the 21st century. It has been a major problem in international relations since the first State defaults following the first modern State loans in the beginning of the 19th century; it remains unresolved, and has no prospects of solution so far despite the devastating effects that it continuously produces on the economic, legal, political, and social life of, mainly, developing countries, and the systemic disarray that it recurrently causes to the globally-integrated world economy as a source, a manifestation, or as a result of financial and monetary crisis.

Here, the basis of a new approach, based upon the practice of the courts and tribunals, is proposed to tackle this major problem, at the level of international law and international

organization, for the instauration of a more balanced and stable globally-integrated economic system.

(ii) The “external debt” has not been sufficiently examined as a legal subject or a subject with legal issues, because it is considered, by many, as not ascertainable in law (it is suggested that it is ascertainable only in monetary economics), and rather suitable for a political solution at a global level (debt reduction, debt relief, and debt forgiveness), or for non-solution at all (debt repudiation).

In this work, we will try to show the contrary; to the extent that in practice any “justiciable” conflict between creditors and debtor States can be solved by the courts, the “external debt” problem is a subject ascertainable by law. This study also aims at explaining that the proper jurisdiction of a State is not a national foreign court but a court of international law applying the principles, doctrines, rules and disciplines of the law of recovery of State debts, as recognized by evolving public international law.

(iii) Some specific legal and organizational aspects of the “external debt” have, up to now, surprisingly, received little attention from international decision- and policy-makers, governments, scholars, and civil society. These are, for instance: (1) the contentious issues and aspects arising from the recovery, by arbitral or judicial means, of State external debts and international financial and monetary obligations in general; (2) the developing role that international and municipal courts and arbitral tribunals may have in setting international principles and standards for lawfulness in relation to the repayment of State debts and other State external pecuniary obligations; (3) the categorical necessity for creating an “integrated” dispute settlement system for the resolution of all State international financial and monetary disputes, as it has been achieved successfully for the resolution of international trade, and trade-related disputes; (4) whether the present state of affairs in international economic relations generated by the lack of binding and enforceable rules for the settlement of international monetary problems, including the “external debt”, is likely to endanger the normal operation of the multilateral trading system; (5) whether maintenance of the present floating exchange rates mechanism—the key factor in determining the exact amount in a given time of an external monetary debt—can continue to be viewed as viable under the new globally-integrated world economy, which requires, as basic operational premises,

that a degree of legal certainty, predictability, and transparency shall be provided for the system.

In view of the recent positive developments in conflict resolution in other areas of the more general field of international relations (for instance, the law of the sea or international trade law), there exists a clear indication that predominance of the “pragmatic approaches” of power-politics inside the international financial and monetary sectors are to come to an end, and that disputes over the repayment of State debts should be expected to be covered soon by a similar device on dispute settlement as that for the resolution of international trade, and trade-related disputes. The present work helps in that it shows, notwithstanding the lack of international conventional law on the matter, the presence of concrete law on the subject of the recovery of State external debts, for which the setting up of a proper international jurisdiction is a necessary implication, in order to provide for international legal remedies to both, creditors and debtor States, under a rational and unbiased law.

(iv) With the emergence of a globally-integrated economy, international financial and monetary law has to undergo a far-reaching transformation as it has been the case for international trade law, because unrestricted financial and monetary operations cannot escape to the new imperatives brought by the globalizing economic process to the more general field of international economic relations, for which a degree of legal certainty, predictability, and transparency have become recognised (not only by the international community, but primarily by the global markets) as indispensable.

C. Problematic of the subject matter and resolution

At present, public international law and international economic organizations fail to provide an adequate mechanism for the resolution of disputes over State external debts. On the face of it, some current judicial doctrines arising, mainly, from common law jurisdictions, have been seen as providing a useful legal framework for the mitigation of conflicts between creditors and debtor States. More recently, a new rescheduling mechanism has been proposed in the context of the IMF for the treatment of “unsustainable” sovereign debts. However, they cannot be deemed adequate, as it is

clear that they do not help to address the problem generated by the following concurrent factors:

- (a) the lack, in public international law and international relations, of adequate international economic regulation, and functional institutions and mechanisms over State external debts and international financial and monetary disputes in general; and
- (b) the simultaneous existence, at the global economic level, of chronic systemic disfunctions affecting “externally”, but directly and adversely, the discharge and performance of the pecuniary liabilities assumed or contracted by debtor States.

In this regard, we maintain that if a major international problem exists today on the subject of the “external debt”, it is because of the existence of these concurrent factors.

This problem is exacerbated by (c) the fact that the various methods of recovery so far applied throughout history have proved to be rather incompatible with the inherent objective of the globally-integrated world economy, which is that of attaining a rules-based international economic order. Some of these methods, such as the use of force to recover State debts, or *in situ* foreign financial interventions, were recognized as unacceptable for constituting a manifest violation of the fundamental principle of sovereign equality of States. The former was banned by the international community and the latter became obsolete. Others were, and still are, accepted (for instance, diplomatic pressure) insofar as it is difficult in practice, and the means are lacking at international law, to determine a legitimate claim from an economic coercion circumstance inside a framework still dominated by power politics, such as it is the fields of international finance and money.

At domestic law level, it seems apparent that (d) the “judgment” and “execution” of debtor States, by their creditors, are primarily conceived to solve the problem from the standpoint of the protection of creditors and their interests (these are equated, by some domestic courts, with those of their States of which they are nationals), and the preservation of the status of one major world financial center. As a consequence, the creditor/debtor State contractual relationship is unbalanced, in law, and the development of the law of recovery of State external debts, atrophied and misdirected.

Given that the ideal course of legal development of this discipline should be the same as that implemented by the WTO Agreement for the resolution of international trade, and trade-related disputes, it is also argued that disputes over State external debts, and international financial and monetary disputes in general, have to pass upon the realm of public international law and international economic organization, by way of multilateral “integrative” regulation (*i.e.*, legally binding and enforceable collective law).

In addressing the problem generated by (a) the lack of international conventional law on the matter, (b) the simultaneous existence of chronic systemic disfunctions adversely affecting the discharge and performance of the pecuniary liabilities assumed or contracted by debtor States, (c) the use of defective methods for debt collection and debt settlement, and (d) the recent unwise course of development taken by this branch of international law at domestic law level, this work aims at throwing some light on the “external debt” problem by unveiling the *corpus* of the law of recovery of State external debts, by placing it in the broader field of international law, by showing its main trends of evolution, and by prospecting certain premises regarding the creation of an international financial and monetary dispute settlement “integrated” mechanism.

D. Methodology

The methodology in this research is inductive and principally based upon the arbitral and judicial practice, domestically and internationally. Thus, the study of case law necessarily integrates both domestic and international legal analyses in the general fields of comparative private and public international law. To date, much literature has focused on the legal aspects of the “external debt” from a solely municipal or private international law perspective. Similarly, other studies have considered questions of sovereign lending from the perspective of international law, but relating primarily to the non-judicial dispute resolution practice of international financial and monetary disputes. What we propose is to bridge, and develop upon, these two general approaches.

Since clear and significant changes and new trends in the law and practice of recovery of State external debts have taken place before and after the two world wars, this work

has been divided as follows: (1) the first chapter treats the legal practice of recovery until World War I; (2) the second chapter takes into account developments in the period in between the two World Wars; (3) the third chapter the legal practice after World War II; and (4) the fourth chapter takes stock of the legal value of the practice of recovery of State external debts

As already stated, in the main, this work explores a long list of selected cases on the recovery of State external debts, as well as another type of cases containing issues related to it, decided in a variety of arbitral and judicial jurisdictions, domestically and internationally. It also surveys the evolution of the principal methods deployed by creditors, and their States, for the recovery of State debts arising from loans, investments, indemnities or torts, from the end of the 18th century through the 19th and 20th centuries until the present period. Thus, we trace developments from the first judicial actions brought by public and private creditors against debtor States, their agencies and instrumentalities, before creditor's municipal courts; the first diplomatic, financial and military interventions of creditor's States (namely, Great Powers); the significance of The Hague Peace Conference of 1907 to inter-State relations generally and, more concretely, to international economic and financial relations; the principles applied by, and the role of, the League of Nations on the issue of State loans (including its plan to create an International Loans Tribunal), as well as on the more general issue of "State economic and financial reconstruction"; and, finally, the IMF's methods and role in maintaining the present unregulated financial and monetary regime, where *soft law* creation and application, and *hard* sanctions, are coupled with "pragmatism" (e.g., debt negotiation, renegotiation, reschedulings, and restructurings) as the prevailing mechanisms for the settlement of State external debts.

With respect to the limitations to this research, given that a critical mass of case law on the matter is now shown to exist, it is evident that absence of international conventional law on the same will not henceforth make it insufficient to support all aspects of a discussion on the question of the recovery of State external debts. However, absence of extensive recognized *lex lata* on the matter will still impose other kind of limitations to this research: the tasks of identification of some truly-permanent international financial and monetary laws, the comparison of relevant case law, the analysis of municipal judicial doctrines, principles, remedies, and issues on various aspects of the recovery of

State external debts arising therefrom, and the determination of whether they may influence, redress or have a role in prescribing or developing rules at evolving public international law, remains almost entirely to be done. Hence, for the time being, we will conclude by making some proposals *de lege ferendae*.

Chapter 1. International Practice on the Recovery of State Debts before World War I

During this period, international practice on the recovery of State external debts arising from loans, investments, indemnities, torts, and other pecuniary claims showed the following trend of evolution: (a) at the beginning, recourse by bondholders to their municipal courts soon made it plain that there was a lack of judicial remedies at domestic law on the issue of the repayment of principal and interest of State loans, and a practical impossibility to compel and execute sovereign debtors in foreign and municipal courts; (b) as a result, recourse to diplomatic protection by the creditors' governments for the recovery of State external debts started to be employed with success; (c) the threat or the use of force by creditors' States arose as another effective means for the recovery of State debts; (d) another method commonly employed by creditors' States was the control of the public finances of the debtor countries. Very often the use of these alternative methods were combined; for instance, if diplomatic pressure failed, the use of force was employed and then a financial control *in situ* could be imposed. The following sections surveys the use of these methods of debt recovery and debt settlement from the beginning of our subject matter, by the end of the 18th century, until World War I.

A. The impossibility to sue debtor States in municipal courts: the lack of judicial remedies in creditor States

As stated, the major legal problem faced by bondholders during the 19th century until the inter-War period was the lack of judicial remedies and established procedures in municipal and international law for the recovery of the defaulted monetary obligations owed by debtor States to private creditors.

At that time, some States, especially the newly independent ones of Latin America, engaged in financial operations by way of issuing bonds to the public in the

international capital markets (especially, London and Paris).¹ However, by causes and circumstances which, one way or another, are different at each given period of time, they defaulted, leaving their private creditors with the impossibility to sue and execute them before their municipal courts, for it was widely accepted that States,² by virtue of being sovereigns, were immune *de jure* and *de facto* from foreign jurisdictions.³ Thus private creditors neither before their municipal courts nor before the courts of the debtor States could envisage to sue them as, in practice, no effective legal remedies were available to compel payment of the defaulted bonds by unwilling debtor States.⁴

As the case law of the 19th century shows, bondholders and creditors, in general, in the main international financial places, Belgium, England and France, faced primarily limitations arising from established public international law rules. The principles of *par in parem non habet jurisdictionem*, independence and equality of States, and the rule of absolute immunity were applied consistently by municipal courts to deny a suit against a foreign State seeking to obtain in that jurisdiction a money judgment or the repayment of a debt, or if the suit was already initiated, to deny its continuation. In the United States, bondholders and creditors in general, faced primarily the limitations arising from the common law rule by which States cannot be sued without their consent, and by the Eleventh Amendment to the Constitution of the United States, which precluded citizens from the States of the Union to sue other States.

¹ Non-independent States, such as the confederated States of Maryland and Pennsylvania, which by virtue of their legal capacity to contract domestic and foreign debts, were also among those engaged in foreign borrowing. In 1842, “[b]oth States defaulted on repayment of principal amounts. Earlier, following the economic crisis of 1839, Mississippi and Louisiana also defaulted on payments of these principal amounts. [...] In fact, Pennsylvania repaid all its loans from Barings in 1945. In 1868 British creditors formed the Council of Foreign Bondholders. The purpose of this Council was to coordinate their efforts and to force Mississippi to honor its foreign debts. [...] Mississippi formally repudiated its debts in 1875 and to this day has not repaid them. [...]”: see DAMMERS Clifford, “A Brief History of Sovereign Defaults and Rescheduling”, *Default and Rescheduling, Corporate and Sovereign Borrowers in Difficulty* (ed. by D. Suratgar), 1984, p. 78.

Also New York, Illinois, Indiana, Minnesota, Tennessee and Virginia “have for shorter or longer periods been delinquent on bonds, principal or interests, or both”, while North and South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Arkansas had bonds still unsettled by 1931; see RANDOLPH Bessie C., “Foreign Bondholders and the Repudiated Debts of the Southern States”, *AJIL*, Vol. 25, 1931, p. 64.

² In the doctrine, *inter alios*, by: Calvo, Philimore, Holtzendorff, Westlake, Gianzana, Von Bar, Heffter, Lawrence, Bluntschli. See IMBERT Henri Marc, *Les emprunts d’États étrangers*, 1905, pp. 26-28.

³ At that time, this view was generally accepted : “L’autorité de l’Etat auquel appartiennent les prêteurs ne peut s’exercer sur l’emprunteur, sa souveraineté se butte ici à sa propre limite qui n’est autre que la souveraineté égale des Etats existant à coté de lui”, see IMBERT Henri Marc, *ibid.*, p. 3.

In the following sub-sections we examine the main cases brought, against sovereigns or States debtors, before the courts of the main creditors' countries, namely, Belgium, England and France, and also the United States' courts, on matters dealing with the recovery of State external debts, and on directly related issues (broadly speaking, money judgments against a defendant State, including, incompetence of the courts, and immunity of jurisdiction and of execution). The period covered in this section comprises case law brought from the end of the 18th century, 19th century, until World War I and the inter-war period, in the 20th century.

a) Belgium. Since the 19th century, a number of important cases on the subject of recovery of State pecuniary debts, and on directly related issues, was brought before municipal courts in Belgium. In this country, although many judicial decisions confirmed directly or indirectly the complete immunity of States *vis-à-vis* foreign domestic courts, some of them involved distinctions between sovereign and civil acts of foreign States. Generally, during this period, when a foreign State was made a defendant, the Belgian courts declared themselves incompetent, but, by the end of the 19th century, they started to distinguish between the States' sovereign and civil capacities, and whenever it was felt that jurisdiction could be assumed without violation of the principles of sovereignty and independence of States, they declared themselves competent. It is in the beginning of the 20th century that Belgian courts gave rise to a new judicial and doctrinal development in the matter of State immunity. The following are the main cases dealing with the subject of recovery of State external debts and related issues during this period.⁵

– On December 30, 1840, in *Société générale pour l'industrie nationale c. Syndicat d'amortissement, et Gouvernements des Pays-Bas et Belge*, the Fourth Chamber of the Court of Appeal of Brussels,⁶ relying upon the principles of international law, annulled a decision of June 20, 1840, of the Tribunal at Brussels,

⁴ As pointed out by IMBERT Henri Marc, *ibid.*, p. 1, this was “le point de départ de toute la question, la cause de toutes les anomalies”.

⁵ See ALLEN Eleanor W., *The Position of Foreign States Before Belgian Courts*, 1929, 40 p.; see also: IMBERT Henri Marc, *op. cit.*, Ch. I; and POLITIS Nicolas E., *Les emprunts d'État en droit international*, thèse, 1894, IV Partie, Ch. I.

which attempted to extend the application of the Civil Code to a foreign State. In this case, the Belgian Society for Promoting National Industry owned certain property in Holland, and bonds issued in June 1830 by the Dutch Syndicate of Amortization, which were delivered to it by the Dutch Syndicate in 1830, but for which it had not yet settled the price. By October 1830, the Dutch King decreed the transfer to the Dutch Treasury of property belonging to the Belgian Society. After the Peace Treaty of April 1839 this decree was still under execution, despite protests of the Belgian Society. In August 1839, certain securities in the hands of an agent of the Belgian Society in Amsterdam were attached at the request of the Dutch Syndicate. The former requested the Tribunal at Brussels to vacate the order of attachment and took advantage of the same opportunity to bring a suit against the Dutch Syndicate, and the Dutch Government demanding the restitution of the goods and titles seized in Amsterdam. Notification of this action was served to the Belgian Government.

The Dutch Government notified that it was not obliged to justify its governmental acts before a foreign tribunal and refused to appear; the Dutch Syndicate entered a plea to the jurisdiction of the Tribunal. The lower court reasoned as follows: because of the fact that the Dutch Syndicate acted under the orders and for the account of the Dutch Government it had to be considered that it was a part of the general administration of that government, and subject to the same considerations regarding the competence of the court. The tribunal then considered that Article 14 of the Civil Code enabled Belgians having any claims against foreigners to bring suit in their own courts; that the mere fact that a Dutch subject, relying upon a similar rule of Dutch law had already seized a Dutch court with the case, could not oust the jurisdiction of the Belgian court. Moreover, as the jurisdiction of Belgian courts over foreigners was clearly attributed to them by the Civil Code, this extended to the Dutch Government in the present case, for the fundamental law of Holland made such a suit, if brought by a Dutch subject against the Dutch Government, subject to settlement in Dutch courts. In other words, in regard to such a suit in Holland, the Dutch Government found itself on the same footing as a private individual, therefore, it could be treated as a private foreigner by the courts of Belgium.

⁶ *Société générale pour l'industrie nationale c. Syndicat d'amortissement, et Gouvernements des Pays-Bas et Belge*, C.A. de Bruxelles, December 30, 1840, *Pasicrisie Belge*, 1841, p. 33.

These conclusions were rejected by the Court of Appeal of Brussels, which held that the Government of Holland, and the Syndicate, a public administrative body of that country, represented the Dutch nation; that in their relations with Belgium, foreign States were subject only to the law of nations. The mutual independence and equality of nations precluded any one of them imposing its particular laws or its courts upon another for the settlement of differences between them. Therefore, there was no ground for claiming that Belgium intended to subject foreign States to the jurisdiction of its courts by reason of Article 14 of the Civil Code. Such an extraordinary innovation, had it been intended, would have been expressed in clear and precise language; that it was not permissible to infer it from an article which in its natural sense applied only to private foreign citizens. The Court held that the Tribunal at Brussels did not have jurisdiction and, consequently, annulled its judgment. The Court said:⁷

“LA COUR;--Sur l’exception d’incompétence :

[...]

Attendu que le gouvernement du royaume des Pays-Bas et le syndicat d’amortissement, administration publique de ce royaume, représentent la nation hollandaise ;

Attendu que dans leurs rapports avec la Belgique les nations étrangères ne sont soumises qu’au droit des gens ;

Attendu que l’indépendance mutuelle des nations et leur égalité devant le droit des gens ne permet pas à l’une d’imposer à l’autre ses lois particulières ou ses tribunaux pour la décision des contestations qui les divisent ;

[...]

Attendu que rien n’autorise à penser que la Belgique ait voulu rendre les nations étrangères justiciables de ses tribunaux, et cela par l’art. 14 du code de ces lois civiles, article que l’on confesse n’être pas obligatoire pour les ambassadeurs qui représentent ces nations ;

Attendu qu’une innovation aussi extraordinaire si elle eût été résolue aurait été écrite dans un texte clair et précis, mais qu’il n’est pas permis de l’induire de l’article précité qui, par le sens naturel de ses termes, ne concerne que les personnes privées étrangères ; [...].”

— On November 11, 1876, in *Gouvernement Ottoman c. Sclessin*,⁸ the Civil Tribunal at Antwerp was called upon to decide over the validity of a seizure of certain Krupp cannons belonging to the Ottoman Government on their way to Turkey. The action was brought by the Turkish Government for the purpose of vacating the

⁷ *Ibid.*, p. 53 [emphasis added].

⁸ *Gouvernement Ottoman c. Sclessin*, Trib. civ. d’Anvers, Novembre 11, 1876, *Jur. d’Anvers*, 1876, p. 357.

attachment authorized by the president of the Commercial Tribunal of Antwerp, in an action in which the attaching company sued for the payment of damages for the non-execution of a contract entered into with a representative of the Turkish Government for certain supplies and labour. The attachment was provisional pending the appeal brought by the Turkish Government to the Civil Tribunal for a judgment which would declare the attachment null and void, or would enable the attaching company to transform it into a levy of execution.

In determining the case the Civil Tribunal presupposed the competence of Belgian judges to take cognizance of suits between their nationals and a foreign government, and to execute a judgment against property, of a government, found accidentally within Belgian territory. The Turkish Government claimed immunity, and the creditor company alleged that, by coming to the Civil Tribunal, the Turkish Government gave voluntarily its consent to the jurisdiction of the tribunal. The president of the Commercial Tribunal, sitting *en référé*, assumed arbitral jurisdiction by virtue of an arbitration agreement between the parties.

The Civil Tribunal held that the parties were subject to international law; that, by way of exception to the general rule, and for reasons of international necessity, Article 14 of the Civil Code, as modified by the law of March 25, 1876, permits Belgians, in certain cases involving the exercise of civil rights, to cite foreigners before Belgian courts, and as such must be interpreted strictly; that taken in their natural sense, the wording of that article only refers to individual foreigners, and not to foreign governments; that, it was expressly declared, at the time of drawing up the Code, that foreigners clothed with a representative character were not subject either to the civil or criminal courts of the country; it was therefore inconceivable that, where the representative was granted such immunity, the State itself should enjoy less protection, and should be assimilated to the status of a private individual; such assimilation would, moreover, be contrary to the fundamental principle of international law, by which States were deemed to be equally sovereign and independent; and that the assumption of jurisdiction by the tribunal would not imply perfect equality, but subordination. For these reasons, the Civil Tribunal, basing its decree upon the lack of jurisdiction of Belgian tribunals, declared the

attachment null and void, ordered the immediate release of the cannons, and condemned the defendant company to pay costs:⁹

“[...] écartant toute conclusion contraire, donne acte à la Société défenderesse de ce qu’elle renonce à la saisie conservatoire pratiquée à sa requête le 24 octobre dernier et est prête à en donner main-levée ; déclare nulle et sans effet à défaut de juridiction des magistrats belges, la saisie-arrêt pratiquée le 20 octobre ; condamna la Société défenderesse à en donner main-levée ; faute de quoi le présent jugement tiendra lieu de main-levée ;

Ordonne au sieur Deppe sous les réserves par lui faites et au gardien Roefs de laisser suivre les canons saisies ; déclare sur ce point, vu l’urgence, le jugement exécutoire par provision nonobstant appel, sans caution et même sur minute ; condamna la Société défenderesse aux dépens qui comprendront les frais extraordinaires causés par la saisie [...]”

– On November 28, 1876, the Commercial Tribunal at Antwerp declared itself competent to consider a case arising out of the following facts: the plaintiffs were holders of securities of a 6% loan of the State of Peru, issued by the defendants, Dreyfus Brothers, under guarantee by them to the subscribers that their holdings were specially secured by the value of certain guano, the monopoly of which they had obtained from the Government of Peru. The bondholders claimed that the defendants entered afterwards into a contract with the State of Peru which deprived them of the special security guarantee. Interests had not been paid on these bonds for some months, and the plaintiffs brought an action for damages of Fr.300,000, claiming that the defendants disposed for their own profit and for the profit of the Government of Peru of the security which belonged to them and which was in the hands of the defendants.

On these facts, on August 4, 1877, the Court of Appeal of Brussels, in *Dreyfus frères et Cie. c. Godderis frères*,¹⁰ held that the Commercial Tribunal correctly assumed jurisdiction over the case, since the action brought was exclusively directed against Dreyfus Brothers, and not against Peru. Hence the question of the right of Belgian courts to review the acts and obligations of a foreign government was not involved. The Court of Appeal of Brussels stated notwithstanding:

⁹ *Ibid.*, p. 361.

¹⁰ *Dreyfus Frères et Cie. c. Godderis Frères*, C.A. de Bruxelles, August 4, 1877, *Pasicrisie Belge*, 1877, p. 307: see *Jdip et jc (Clunet)*, Tome 5, 1878, pp. 515-516 [emphasis added].

“Attendu que les obligations contractées par le gouvernement du Pérou, dans l’article 6 de l’obligation générale, lorsqu’après une indication de ses ressources, il déclare que, sous la foi nationale, il engage les revenus généraux de la République et spécialement les revenus nets provenant des expéditions du guano [...], ne sont évidemment que des engagements d’honneur comme l’a décidé la Cour suprême de justice de l’Angleterre du 18 avril 1877.

Qu’ils l’obligent autant que de pareils engagements peuvent obliger un gouvernement dont la première obligation est de pourvoir à la continuation de son existence. Ce ne sont pas, disait cette Cour, des contrats dont les tribunaux d’un pays étranger ou même les tribunaux ordinaires du pays qui émet les bons puissent forcer l’exécution sans le consentement du gouvernement de ce pays ;

Attendu que les souscripteurs n’ont pas pu se méprendre sur le caractère de ces engagements ; que d’une part ils n’ont pas pu croire qu’il y avait affectation réelle à leur profit du domaine public du Pérou ; que d’autre part aucun acte déterminé ne leur assurant dans les formes légales soit un droit privatif quelconque, soit un ordre déterminé de paiement entre les divers créanciers de la République, ils n’ont pas pu compter sur une obligation légale du gouvernement de payer par priorité les coupons du nouvel emprunt.”

— On March 14, 1879, in *Rau c. Duruty*,¹¹ the Court of Appeal of Ghent rendered a decision in the matter of the *Havre*. The captain of this vessel had delivered a cargo of guano from Peru to one Rau at Ostend and ultimately brought suit before the Commercial Tribunal of Ostend against him for payment of the freight. At first no question was raised as to the competence of the court, but Rau later alleged that he was an agent of the Government of Peru, and hence not liable to be sued in a Belgian court. In condemning Rau to pay the freight, the Commercial Tribunal said that the right of a State to claim immunity was restricted to the accomplishment of its governmental mission, and the taking of measures for its own preservation or general interests; hence, the principle of immunity could not be invoked when the State, by selling guano, entered into a commercial contract similar to those regularly subject to the jurisdiction of commercial tribunals. The Court of Appeal of Ghent held:¹²

“Ce principe peut valoir lorsqu’un gouvernement, restant dans la limite de sa mission gouvernementale, prend des mesures dans l’intérêt de sa conservation ou pour des actes qui lui dicte l’intérêt général, mais il ne peut plus en être question alors que le gouvernement vend du guano, et, soit par lui-même, soit par l’intermédiaire, pose des actes et des contrats qui, de tout temps et partout, ont été considérés comme des contrats commerciaux soumis à la juridiction des tribunaux de commerce. Dans le contrat, le demandeur ne s’est mis directement ni indirectement soumis à la juridiction du gouvernement du Pérou ; il n’existe

¹¹ *Rau c. Duruty*, C.A. de Gand, March 14, 1879, *Jdip et jc (Clunet)*, Tome 8, 1881, pp. 82-83.

¹² *Ibid.*

aucune trace au procès indiquant que le gouvernement péruvien aurait réclamé pareille dérogation ; bien au contraire, les parties, en stipulant que la pénalité, s'il échéait, serait déduite du fret, ont virtuellement reconnu qu'elles s'en référaient au droit commun, soumettant au tribunal du lieu de débarquement toutes contestations relatives au fret. [...].”

– A case involving a different method of payment of a State debt, and a different phase of the question of competence, was the *Peruvian Guano Company c. Dreyfus frères et al.* The action presented complicated issues between two parties to whom the Peruvian authorities had at different times granted monopoly concessions of guano. The main question was the right of both concessionaries to seize a cargo of guano claimed by each as its property. On August 10, 1880, the Court of Appeal at Brussels¹³ delivered a judgment which decided on previous rulings by the Civil and Commercial Tribunals of Antwerp.¹⁴

Before the Court of Appeal, the defendants, Dreyfus Brothers, claimed that they had the right to seize the guano because the guano cargo was an agreed method of repayment of a debt contracted by the Peruvian Government. The Court recognized this assertion in the following terms:¹⁵

“Qu'en 1869, il a été stipulé entre autres, que si, contre toute atteinte, Dreyfus était créancier du Gouvernement à l'expiration du contrat, il continuerait à exporter et à vendre le guano jusqu'à ce qu'il ait recouvré tout ce qui lui était dû ; qu'en 1874, [...] il a été dit que si, après examen de la Cour de Comptes, le solde de tous les comptes à présenter était au débit du Gouvernement, il serait immédiatement remboursé à Dreyfus par les nouveaux contractants, et que, si ce solde ne lui était pas payé, la maison Dreyfus userait des droits indiqués ci dessus, c'est-à-dire, pourrait exporter et vendre du guano pour se couvrir de sa créance ;

Attendu que, si lors du contrat de 1876, le Gouvernement péruvien a imposé à l'appelante de payer par son ordre, à Dreyfus, ce qui serait dû à ce dernier, en stipulant que de son coté l'appelante recevrait tout excédant au-dessus des deux millions de tonnes arrivées ou à arriver ; *c'était là un mode de paiement de la créance Dreyfus que le gouvernement se réservait*, sans pour cela porter atteinte aux droits de l'intimé, antérieurement acquis ;

¹³ *Peruvian Guano Company c. Dreyfus frères et al.*, C.A. de Bruxelles, August 10, 1880, *Jur. d'Anvers*, 1881, p. 147. See also: *ibid.*, C. de Bruxelles, August 10, 1880, *Pasicrisie Belge*, 1881, p. 313.

¹⁴ *Dreyfus frères et al. c. Peruvian Guano Company*, Trib. com. d'Anvers, July 2, 1880, *Jur. d'Anvers*, 1880, p. 298; *ibid.*, Trib. civ. d'Anvers, June 19, 1880, *Jur. d'Anvers*, 1880, p. 295 ; *ibid.*, Trib. com. d'Anvers, June 17, 1880, *Pasicrisie Belge*, 1881, p. 13.

¹⁵ *Peruvian Guano Company c. Dreyfus frères et al.*, C.A. de Bruxelles, August 10, 1880, *Jur. d'Anvers*, 1881, pp. 148-149 [emphasis added].

Attendu que, plus tard, en janvier 1880, [...] *qu'il a été dit que le paiement de cette somme se ferait en livraisons de guano conformément aux stipulations du traité de 1869* ; [...]

[...] il s'ensuit que l'appelante, ainsi que Dreyfus, ont le droit d'exporter, la première, en vertu de la consignation, le second pour se couvrir de sa créance ; [...].”

The appellants proved, however, that the guano was their property, that they had charged it as consignees and not as mere carriers; that Dreyfus Brothers had knowledge of these facts; and that the guano was shipped by fraudulent bills of lading made out under coercion of the *de facto* authorities in the Peruvian guano islands. The Court held:¹⁶

“1° Que le navire *State of Maine* a été affreté par l'appelante ; qu'il a été chargé de guano par ses soins ; qu'elle a payé pour frais de ce chargement 10 shellings par tonne et que les connaissements qui avaient été signés par le capitaine dans la forme habituelle, ont été remis à ses agents ;

2° Que ces connaissements ont été déchirés malgré les protestations les plus vives et que le capitaine a été contraint de signer de nouveaux connaissements pour compte du Gouvernement péruvien et sans mention aucune de la société appelante ; que ce sont ces connaissements qui ont été endossés à Dreyfus ; [...].”

Under these circumstances the Peruvian Government sought to intervene as a third party to the suit, and claimed that its mere statement that it wished to intervene was sufficient to render the Court of Appeal competent to hear the case. On January 22, 1881, the Court of Appeal at Brussels¹⁷ dismissed such a contention on the grounds that the formalities for intervention by a third party were laid down in the Code of Civil Procedure, which rules, in default of a treaty to the contrary, were applicable even to foreign States. According to these provisions, intervention was permitted only when the judgment of the suit at issue was of such a nature that it might have prejudiced the rights of the intervening third party. Peru contended that its rights were involved, because the final judgment could render nugatory its right to discontinue its contract with the appellant and its right to transfer possession and title to the cargo in question to the appellee. In denying this contention, the Court pointed out the very fact that the transfer of possession from the Government to the appellee proved that even a decision against the latter would not prejudice any rights of the State of Peru, any more than a decision

¹⁶ *Ibid.*, pp. 151-152.

¹⁷ *Peruvian Guano Company c. Dreyfus frères et al.*, C.A. de Bruxelles, January 22, 1881, *Jur. d'Anvers*, 1881, p. 152. See also: *ibid.*, C.A. de Bruxelles, January 22, 1881, *Pasicrisie Belge*, 1881, p. 319.

in his favour; that authorizing a release of the property would in any way affect the rights of Peru. The Court declared itself competent to decide the case, and denied the State of Peru the right to intervene. The Court said:¹⁸

“La Cour, [...] déclare le suprême gouvernement du Pérou non recevable en son intervention et en sa tierce opposition, le condamna aux dépens y afférents ainsi qu’à une amende de fr. 50 ;
Et, statuant entre les autres parties, met au néant le jugement dont appel du 2 juillet 1880 ;
Emendant, dit que Dreyfus frères et Cie. n’ont aucun droit à faire valoir sur le chargement du *State of Maine* en opposition à ceux de la consignation concédée à l’appelante, ordonne au séquestre de remettre à celle-ci ledit chargement ; [...].”

– On December 29, 1888, in *Société pour la fabrication des cartouches c. ministre de la guerre de la Bulgarie*,¹⁹ a suit brought by the plaintiffs against the Minister of War of Bulgaria for the payment of the sum of Fr.105,000 and interest for certain shipments of bullets supplied by them to the defendant for the Bulgarian army, the Civil Tribunal of Brussels declared itself incompetent to take cognizance of the claim.

In this case, the defendant had excepted to the jurisdiction of the Civil Tribunal, which admitted that Belgian courts would be incompetent to review the act of a government taken in its sovereign capacity. But such an act, as a manifestation of sovereign authority to command, was incompatible with the idea of a contract, to which both parties had bound themselves freely and reciprocally. In making a contract with the Belgian company for the purchase of bullets, the Bulgarian State had acted as a private person, thus submitting itself to all the civil consequences of that contract, including the rules governing judicial competence. It followed that the defendant was wrong in thinking that he could base the incompetence of Belgian courts upon principles of international law. On the contrary, the tribunal would deduce its incompetence, or incompetence, from the contract between the parties by which they had expressly agreed that for the settlement of any disputes arising under it, recourse was to be had to the ordinary Bulgarian courts, the plaintiffs renouncing for this purpose to the Belgian consular jurisdiction. The Civil Tribunal held that this choice of jurisdiction was

¹⁸ *Ibid.*

¹⁹ *Société pour la fabrication des cartouches c. ministre de la guerre de la Bulgarie*, Trib. civ. de Bruxelles, December 29, 1888, *Pasicrisie Belge*, 1889, p. 62.

binding between the parties, and, as it contained nothing contrary to public policy, it held that it should be respected. It therefore declared itself incompetent.

– On July 1, 1891, in *De Bock c. l'Etat indépendant du Congo*,²⁰ the Court of Appeal at Brussels affirmed a decision of the Civil Tribunal in which it declared itself incompetent to decide a suit arising from the following circumstances: the plaintiff alleged that he had been engaged by the Free State of the Congo as a civil agent for a term of three years, and had been discharged before that time, for which he claimed damages amounting to Fr.15,000. The Court held that, even if one were to admit the competence of Belgian courts as regarded a foreign State acting in its civil capacity, yet courts were always incompetent to take cognizance of a sovereign act of a foreign State in the exercise of its *imperium*, such as the employment or discharge of an agent. It was established that the plaintiff was engaged as a civil agent, and was in fact performing acts for his superior proper to such a position, and not such as a person ordinarily performed as the result of a contract on the basis of mutual equality. Irrespective of the instrument by which the plaintiff placed himself at the disposition of the State, it was certain that he had demanded and obtained a post which put him in a position of subordination to the administrator of the Congo, and which made him an official, engaged and paid by the Free State of the Congo, a sovereign power, which might command him and dismiss him, and whom he was obliged to obey. Hence the courts of Belgium were absolutely without competence to take cognizance of a claim brought by such an agent who alleged that he had been unjustly discharged by the administrative power of the country to whom he had offered his services.

– On December 9, 1893, in *Croenenbergh c. Strauch*,²¹ the Civil Tribunal of Brussels held that a State loan was a sovereign act. This suit involved a request that the Administrator-General of the Congo Free State be subjected to certain interrogatories in connection with a claim of the plaintiff for remuneration on the score of participation in a State loan. The tribunal held that it was incompetent to order the investigation, for it was incompetent to decide the main issue. Moreover, the Administrator-General, in

²⁰ *De Bock c. l'Etat indépendant du Congo*, C.A. de Bruxelles, July 1, 1891, *Pasicrisie Belge*, 1891, p. 419.

²¹ *Croenenbergh c. Strauch*, Trib. civ. Bruxelles, December 9, 1893, *Pasicrisie Belge*, 1896, p. 32.

showing a willingness to renounce for himself the benefit of his extraterritoriality, could not be deemed to renounce it for the State which he represented.

– On January 4, 1896, in *De Croonenbergh c. l'Etat indépendant du Congo*,²² the same tribunal declared itself competent to take cognizance of a claim for wages alleged to be due from the Congo Free State. The plaintiff sought to obtain the payment of remuneration for his services as an agent in negotiations with a banking house, Landerbank of Vienna, and other financial institutions, for a loan of Fr.50,000,000 for the Free State of the Congo. The Civil Tribunal held that the obligation to remunerate the agent was essentially a civil obligation, whether it were entered into by an individual or by a State. In Belgium, litigation involving civil rights belonged to the exclusive jurisdiction of the courts (Article 92 of the Constitution), even if the State is involved. Moreover, the same provision existed in the legislation of the Congo. A foreign State, acting in its civil capacity, was deemed to have submitted itself in advance to all the civil consequences of contracts entered into by it, including, except for express stipulations to the contrary, the ordinary rules governing the competence of the courts. In the present case, the obligation assumed by the Congo Free State had its origin not in an act of sovereignty, but in a contract (in the instant case, a bilateral agreement), undertaken in Belgium, the place where it also had to be executed. Hence the court was competent.

– In a similar case, *Boshart c. l'Etat indépendant du Congo*,²³ decided on February 5, 1898, the Tribunal of First Instance of Brussels held that a State in engaging or dismissing its functionaries acted not in its civil, but in its sovereign capacity. The suit was brought against the Free State of the Congo by one who had been appointed a captain of the public forces of that State. The question involved the reinstatement on the terms of the original agreement after a leave of absence granted for illness. The plaintiff maintained that his action was brought upon a bilateral contract and sued for the payment of the sum of Fr.3,500, for his services. The Congo Free State excepted to the competence of the tribunal, which held that engaging a captain of the public forces, subject to the authority and discipline of the State, was not a contract of hire, but a

²² *De Croonenbergh c. l'Etat indépendant du Congo*, Trib. civ. de Bruxelles, January 4, 1896, *Pasicrisie Belge*, 1896, p. 252.

sovereign political act, regarding the legality of which Belgian courts were incompetent to decide.

– On April 28, 1902, in *Braive c. Gouvernement Ottoman et Carathéodory*,²⁴ the Tribunal of Justice of the Peace at Brussels held that the Ottoman Government could not be prosecuted except in conformity with the prescriptions of Turkish law. The suit was brought against the Imperial Ottoman Government in connection with some repairs ordered upon a building it was renting for its embassy in Brussels. The Government failed to make an appearance. This was considered tantamount to a denial of competence of the tribunal. The consideration of this question of competence afforded the tribunal an opportunity to review the doctrine whereby a distinction was made between acts of the State *juri imperii* and acts *juri gestionis*.

The tribunal said that it had been maintained that States only appeared as sovereign when they commanded, not when they acted as mere individuals in ordinary civil life. If one were to adopt this reasoning, the courts would be competent to hear any suit against a foreign State growing out of a contract for the rental and repair of a building. The *nature* of the act and not its *purpose* would furnish the criterion:²⁵

“Attendu que, d’après une opinion professée par certains auteurs [...] et consacrée par certains arrêts et jugements, les Etats n’apparaissent comme souverains ou pleinement indépendants que dans les cas où ils agissent à titre d’autorité, en vertu de leur *imperium*, c’est-à-dire quand ils commandent ; il en est autrement, quand ils agissent comme de simples particuliers [...];

Attendu que, pour ce faire, *il ne faudrait pas envisager le but de l’acte, le service en vue duquel il a été accompli, mais sa nature* [...];

[...] Mais attendu que *cette opinion est erronée* parce qu’elle emprunte les éléments de solution du droit public interne et au droit privé, alors que *cette solution doit être poursuivie par l’application des principes du droit des gens* ; [...].”

The tribunal also found that the judiciary was only an instrument whereby the State exercised its sovereign authority. In elaborating its functions the judiciary could not be

²³ *Boshart c. l’Etat indépendant du Congo*, Trib. 1e instance de Bruxelles, February 5, 1898, *Pasicrisie Belge*, 1898, p. 305.

²⁴ *Braive c. Gouvernement Ottoman et Carathéodory*, Trib. de paix de Bruxelles, April 28, 1902, *Pasicrisie Belge*, 1902, p. 240.

²⁵ *Ibid.*, pp. 240-241 [emphasis added].

presumed to have intended to extend its jurisdiction beyond the limits of their own polity. Article 92 of the Belgian Constitution had in view a separation of powers within the State. Its intent was to prevent any other Belgian authority than the courts from passing judgment in litigation involving civil rights. But that was not to say that the national tribunals might take cognizance of all civil litigation, irrespective of the parties thereto, for international law proclaimed the mutual independence of sovereign States, one of the consequences of which was to preclude any nation from being obliged to accept the jurisdiction of another:²⁶

“Attendu que le droit des gens proclame l’indépendance des nations souveraines l’une vis-à-vis de l’autre;

Qu’une des conséquences de cette souveraineté et de cette indépendance est de mettre obstacle à ce qu’aucune nation soit contrainte d’accepter la juridiction d’une autre nation ; [...].”

Furthermore, the fact that the property of a foreign State was not liable to seizure was tending to become one of the best established principles of international law. To admit the competence of the court when its decision could result only in an empty judgment, a command without a sanction, an injunction without coercive force, would be neither reasonable nor conformable with the dignity of the judiciary. In conclusion, the Tribunal of Justice of the Peace said that, even where it is necessary to admit a distinction between acts of a foreign State in its sovereign and civil capacity, renting a place for an embassy had the requisites of an act of *puissance publique*:²⁷

“Attendu que ce même arrêt constate que la jurisprudence de différents Etats d’Europe ne fonde, en général, aucune distinction sur le point de savoir si le gouvernement de l’Etat défendeur a agi comme représentant la puissance publique (*juri imperii*) ou comme accomplissant des actes de la vie civile (*juri gestionis*) ;

Attendu au surplus, que pareilles distinctions ne seraient pas rationnelles en présence de motifs d’ordre supérieur qui ont fait adopter le principe de l’indépendance réciproque des nations souveraines ; [...]

Attendu que d’autre part, que *l’insaisissabilité des biens d’un Etat étranger tend à devenir un des principes les mieux établis du droit des gens* [...];

Que l’on ne peut admettre comme rationnelle et conforme à la dignité du pouvoir judiciaire une compétence qui se traduirait par des jugements non exécutoires, par un commandement sans sanction, par des injonctions sans force coercitive ; [...]

²⁶ *Ibid.*, p. 241 [emphasis added].

²⁷ *Ibid.*, p. 241 [emphasis added].

[...] la location d'un local pour l'installation d'une ambassade revêt bien le caractère d'un acte de puissance publique.”

– On April 20, 1903, in *Tilkens c. l'Etat indépendant du Congo*,²⁸ the president of the Civil Tribunal at Brussels made a ruling, in *référé*, holding that according to international law, the Free State of the Congo was not subject to judicial process in Belgian courts. The plaintiff had tendered to the Free State of the Congo certain government paper owned by him as security for his appearance in a suit pending against him in the Congo. He brought a suit for unpaid interest on that paper. The tribunal held that the interest would follow the fate of the securities themselves, and that in holding the latter for the purpose above named, the State was acting in his sovereign capacity. As the Congo was an independent sovereign State, recognized as such by the family of nations, it followed that, according to international law, was not subject to the process of foreign courts. The tribunal, therefore, declared that it had no competence to decide the case.²⁹

“Attendu que la demande avait pour objet de faire dire que l'Etat défendeur sera tenu, [...], de payer au demandeur les arrérages échus de l'inscription de rente au grand livre de la Dette publique de l'Etat ; [...] Attendu que les Etats souverains ne reconnaissent pas d'autorité étrangère qui ait le pouvoir de leur commander ; que le droit des gens les proclame indépendants [...]; Attendu qu'il est surtout ainsi lorsque l'acte, à l'occasion duquel l'Etat étranger est assigné, a été accompli par lui dans l'exercice de sa puissance souveraine, de son *imperium* [...].”

– On June 11, 1903, in *Société des chemins de fer Liégeois-Luxembourgeois c. Etat Néerlandais*,³⁰ the Court of Cassation for the first time approved the distinction between the competence of national courts over the sovereign and the civil acts of foreign States, thus setting forth the “Belgian doctrine” on State immunity, in the suit brought by a Belgian railway company against the Dutch Government to recover its expenses (Fr.70,822) for enlarging a railway station in Holland used by both parties.

²⁸ *Tilkens c. l'Etat indépendant du Congo*, Trib. civ. de Bruxelles, April 20, 1903, *Pasicrisie Belge*, 1903, p. 180.

²⁹ *Ibid.*, p. 241.

³⁰ *Société des chemins de fer Liégeois-Luxembourgeois c. Etat Néerlandais*, Cour cass., June 11, 1903, *Pasicrisie Belge*, 1903, p. 294.

The Court of Cassation held that the rule of international law which proclaimed the independence of nations was derived from the principle of their sovereignty, and that it was without application when such sovereignty was not involved. As sovereignty was not involved except by acts of the political life of the State, the State need not, however, confine itself to its political role; it might acquire property, contract, become a creditor or a debtor. In so doing it was not exercising its sovereign power, but was acting as a private person. When, in such capacity, it contracted with another party as an equal, litigation resulting therefrom involved civil rights, to which the courts have jurisdiction by virtue of Article 92 of the Constitution. Foreign States, as juridical persons, were held to be subject to Belgian courts on the same ground as other private foreigners. The sovereignty of such States was no more involved than was that of the Belgian State, when sued in its civil capacity. Moreover, there might surely be an implicit renunciation of immunity in the case of a contract, since the validity of such a renunciation was recognized in cases involving inalienable prerogatives. Furthermore, if the foreign State might use the courts for the prosecution of claims against its debtors, it should be responsible before them to its creditors:³¹

“LA COUR ; — Sur l’unique moyen du pourvoi accusant la violation des articles 52, 53 et 54 de la loi du 25 mars 1876, de l’article 14 du code civil et de l’article 92 de la Constitution et *fausse application des principes du droit des gens, en ce que l’arrêt attaqué décide qu’un Etat étranger, ayant traité comme personne civile, ne peut être justiciable des tribunaux belges, et ce à raison de sa souveraineté ;*
 Attendu que la règle du droit des gens qui proclame l’indépendance des nations, découle du principe de leur souveraineté ; qu’elle est, dès lors, sans application quand la souveraineté n’est pas en cause ;
 Attendu que n’est engagé que par les actes de la vie politique de l’Etat ; [...]
 Mais attendu que l’Etat ne doit pas se confiner dans son rôle politique ; qu’en vue du besoin de la collectivité, il peut acquérir et posséder des biens, contracter, *devenir créancier et débiteur* ; qu’il peut même faire le commerce, se réserver des monopoles ou la direction de services d’utilité générale ;
 Que, dans la gestion de ce domaine ou de ces services, l’Etat ne met pas en œuvre la puissance publique, mais fait ce que des particuliers peuvent faire, et partant, n’agit que comme personne civile ou privé ;
 Que lorsqu’en cette qualité il est engagé dans un différend, après avoir traité d’égal à égal avec son cocontractant ou a encouru la responsabilité d’une faute étrangère à l’ordre politique, la contestation à pour objet un droit civil du ressort exclusif des tribunaux, aux termes de l’article 92 de la Constitution ;
 Attendu que les Etats étrangers sont, en tant que personnes civiles et au même titre que les autres étrangers, justiciables des tribunaux belges ;
 Que pour ces Etats, comme pour l’Etat belge, la souveraineté n’est pas en jeu, quand ils sont en cause, non pas comme pouvoir, mais uniquement pour l’exercice ou la défense d’un droit privé ; [...]

³¹ *Ibid.*, pp. 301-302 [emphasis added].

Qu'il ne se voit pas, en effet, en quoi l'Etat abdiquerait sa souveraineté en se soumettant à la juridiction des tribunaux étrangers pour les jugements des conventions qu'il a librement formées, [...]

Qu'en réalité, dans toutes les hypothèses, la compétence dérive, non du consentement du justiciable, mais de la nature de l'acte et de la qualité en laquelle l'Etat y est intervenu ; *que si l'Etat étranger peut saisir nos tribunaux de poursuites contre ses débiteurs, il doit répondre devant eux à ses créanciers* ; [...].”

The Court also held that the validity of a judicial decision was independent of the difficulties which might be presented by its execution; that it was wrong to lose sight of the moral influence which is attached to a judicial decision rendered by independent judges, because a judgment founded on the principle of eternal and universal justice has of itself an effect, upon the public conscience, more powerful than the most energetic methods of coercion.

For the above mentioned reasons, it reversed the decision of the Court of Appeal at Brussels³² which found that Belgian courts were incompetent to hear the case on the ground that the question could be decided only according to the principles of international law which proclaimed the mutual independence of sovereign nations, one of the results of which was to prevent any one nation from being constrained to submit to the jurisdiction of another; that the jurisprudence of the different States of Europe made no distinction between cases where the defendant State acted in its sovereign or in its civil capacity; that the State performed no juridical act which was not, directly or indirectly, political in its aim; and that the State, even when it contracted, it acted not in its personal interests, but only with a view to fulfilling its high governmental mission.

— On November 22, 1907, in *Feldman c. Etat de Bahia*,³³ the Court of Appeal of Brussels rendered a decision in a case brought by a private individual, against the State of Bahia, for damages resulting from an alleged violation of an agreement, by an agent of the State, empowered to negotiate a loan for the State of Bahia. The defendant

³² *Etat Néerlandais c. Société du chemin de fer Liégeois Limbourgeois*, C.A. de Bruxelles, February 7, 1902, *Pasicrisie Belge*, 1902, p. 162. This case was brought, on appeal, from the first instance by the Dutch State, where, in May 22, 1901, the Civil Tribunal at Brussels declared itself competent and held that States “appeared as sovereign and fully independent only when they acted in the exercise of *imperium*, i.e., when they commanded”; but that such was not the case when they acted in a civil or private capacity; that under such circumstances, States, placed themselves on an equality with mere individuals and were subjects like them to municipal law and the courts; that therefore there was no reason to abandon this distinction when a foreign government was sued in Belgian courts, see ALLEN Eleanor W., *op. cit.*, pp. 20-21.

excepted to the competence of the Court, alleging that it was a sovereign State, forming part of the Federal Republic of Brazil, and that it was sued for a sovereign act. The Court held that it was to be considered as acting in a sovereign capacity if it were exercising a right reserved to it exclusively both by its own Constitution and by the Constitution of the Republic of Brazil; and that under these circumstances Belgian courts would be incompetent. The Court held specifically that both the acts of authorizing and contracting a loan were sovereign acts according to the law of the State in question, but the acts not indispensable to the issuing of the bonds, even though connected therewith, were not sovereign acts, but simple agreements, of which Belgian courts might take cognizance.

The facts appeared to be that the Government of the State of Bahia had authorized a certain individual endeavour to procure a loan abroad for the State, the Government pledging itself to grant to the above person, or to anyone indicated by him and approved by the Government, the necessary power to sign the contract after the preliminaries should have been arranged. The power thus delegated vested ultimately in one Worms, who concluded with the plaintiff the contract here in question. The Court held that the delegation of authority by the Governor of Bahia did not constitute an act of sovereignty or delegation of power, but a mere mandate to make certain preliminary arrangements, which could only give rise to civil rights, and did not in any way involve the sovereignty of Bahia. Belgian courts, incompetent to judge of the legality or opportuneness of the authority given to the governor of Bahia to contract the loan, were nevertheless competent to take cognizance of the relations between the latter and third persons with a view to finding investors and discussing the conditions of the loan. No law, the Court said, gave to a foreign State the right to decline the competence of Belgian courts in litigation arising from contracts of purely civil rights:³⁴

“Attendu que le fait de contracter un emprunt autorisé par le pouvoir législatif est un acte d’un pouvoir souverain de l’Etat de Bahia ; [...]

Attendu qu’aucune loi ne donne à un Etat étranger, attrait devant les tribunaux belges à raison des conventions ou de droits purement civils, la faculté de décliner leur compétence ;

³³ *Feldman c. Etat de Bahia*, C.A. de Bruxelles, November 22, 1907, *Pasicrisie Belge*, 1908, p. 55. See also: *Jdip et jc (Clunet)*, Tome 35, 1908, p. 210.

³⁴ *Ibid.*, pp. 57-59 [emphasis added].

Attendu que l'indépendance réciproque des Etats souverains exige, il est vrai, que l'acte souverain d'un Etat ne puisse être jugé par un autre ; mais que cela revient à rechercher si l'acte, dont les conséquences sont soumises aux tribunaux, émane de la souveraineté de l'Etat étranger ou relève du droit civil ; s'il a été accompli par le souverain ou par une entité exerçant des droits privés ; — Attendu qu'il suit de ces considérations que les tribunaux belges, incompétents pour juger de la légalité et de l'opportunité de l'autorisation donnée au Gouvernement de l'Etat de Bahia de contracter l'emprunt dont s'agit au procès et du fait même de sa réalisation par le chef du pouvoir exécutif de l'Etat, sont compétents pour apprécier les rapports qui ont existé entre lui et des tiers dans le but de rechercher des prêteurs et de discuter leurs conditions ; mais que semblable mandat est purement civil et ne revêt aucun caractère commercial ; [...] — Attendu que le fait par un Etat de contracter un emprunt ne constitue aucun des actes de commerce énumérés par les art. 2 et 3 de la loi du 15 décembre 1872 ; [...] — Par ces motifs : — La Cour, rejetant toutes conclusions contraires ou plus amples, infirme la décision attaquée ; évoquant et statuant par disposition nouvelle, dit pour droit que les tribunaux belges sont compétents pour connaître des conventions intervenues entre l'appelant et l'Etat de Bahia ou ses mandataires relativement à certain emprunt que voulait contracter cet Etat ; [...].”

Summary of Belgian practice. Before World War I, Belgian courts failed to bring an adequate level of protection to claims brought by a number of private creditors against foreign States on the subject of recovery of State pecuniary debts. Failure was due basically to the lack of judicial remedies and specific legal procedures, including the impossibility of executing Belgian courts' decisions against foreign States.

More precisely, at the beginning of this period, when a foreign State was made a defendant, Belgian courts could not declare themselves competent because it was widely recognized that “foreign States were only subject to the law of nations” (*Société générale pour l'industrie nationale c. Syndicat d'amortissement, et Gouvernements des Pays-Bas et Belge*³⁵, *Gouvernement Ottoman c. Sclessin*³⁶). The complete immunity of States *vis-à-vis* foreign domestic courts was also confirmed indirectly in *Dreyfus frères et Cie. c. Godderis frères*.³⁷ However, distinctions between sovereign and civil acts of foreign States were already taking root, as in *Rau c. Duruty*³⁸ and *Société pour la*

³⁵ *Société générale pour l'industrie nationale c. Syndicat d'amortissement, et Gouvernements des Pays-Bas et Belge*, C.A. de Bruxelles, December 30, 1840, *Pasicrisie Belge*, 1841, p. 33.

³⁶ *Gouvernement Ottoman c. Sclessin*, Trib. civ. d'Anvers, Novembre 11, 1876, *Jur. d'Anvers*, 1876, p. 357.

³⁷ *Dreyfus Frères et Cie. c. Godderis Frères*, C.A. de Bruxelles, August 4, 1877, *Pasicrisie Belge*, 1877, p. 307: see *Jdip et jc (Clunet)*, Tome 5, 1878, pp. 515-516.

³⁸ *Rau c. Duruty*, C.A. de Gand, March 14, 1879, *Jdip et jc (Clunet)*, Tome 8, 1881, pp. 82-83.

fabrication des cartouches c. ministre de la guerre de la Bulgarie,³⁹ until Belgian courts, by the end of the 19th century, started to distinguish between the States' sovereign and civil capacities (*De Bock c. l'Etat indépendant du Congo*⁴⁰, *Boshart c. l'Etat indépendant du Congo*⁴¹, *Braive c. Gouvernement Ottoman et Carathéodory*⁴²). Since then, whenever it was felt that jurisdiction could be assumed without violation of the principles of sovereignty and independence of States, they declared themselves competent (*Société des chemins de fer Liégeois-Luxembourgeois c. Etat Néerlandais*⁴³). Belgian courts, then, applied distinctions between "acts authorizing and contracting a loan", which were considered sovereign acts, and "acts not indispensable to the issuing of the bonds, even though connected therewith", which were not sovereign, but simple agreements of which Belgian courts could take cognizance (*Feldman c. Etat de Bahia*⁴⁴).

Thus, it is only at the beginning of the 20th century that Belgian courts gave rise to a new judicial and doctrinal development in the matter of State immunity. Prior to this development, the recovery of State external debts by judicial means did not constitute an efficient and effective method of recovery.

b) England. By and from the second half of the 19th century several decisions by municipal courts in England also confirmed the complete immunity of foreign sovereigns or States *vis-à-vis* English domestic courts. As in Belgium and France, the English courts considered the principles of sovereignty and independence of paramount importance, and declared itself incompetent whenever a foreign State was made a defendant. English courts developed the common law rule that foreign sovereigns or States cannot be sued without their consent. The following are the main cases, during this period, dealing with our subject, and its related issues.

³⁹ *Société pour la fabrication des cartouches c. ministre de la guerre de la Bulgarie*, Trib. civ. de Bruxelles, December 29, 1888, *Pasicrisie Belge*, 1889, p. 62.

⁴⁰ *De Bock c. l'Etat indépendant du Congo*, C.A. de Bruxelles, July 1, 1891, *Pasicrisie Belge*, 1891, p. 419.

⁴¹ *Boshart c. l'Etat indépendant du Congo*, Trib. 1^e instance de Bruxelles, February 5, 1898, *Pasicrisie Belge*, 1898, p. 305.

⁴² *Braive c. Gouvernement Ottoman et Carathéodory*, Trib. de paix de Bruxelles, April 28, 1902, *Pasicrisie Belge*, 1902, p. 240.

⁴³ *Société des chemins de fer Liégeois-Luxembourgeois c. Etat Néerlandais*, Cour cass., June 11, 1903, *Pasicrisie Belge*, 1903, p. 294.

– On July 31, 1848, in *Duke of Brunswick v. King of Hanover*,⁴⁵ a case on appeal before the House of Lords, it was decided that a foreign sovereign, coming into England, cannot be made responsible in the courts for acts done by him, as a sovereign, in his own country. In this case, the appellant sought a declaration that 1) the appointment of the Duke of Cambridge as guardian of the fortune and property of the appellant, and subsequent appointment of the respondent as such guardian were absolutely void and of no effect; and 2) “the respondent was liable and ought to account to the appellant for the personal estate, property, and effects, and the rents and profits and produce of the sale of the real estates of the appellant, possessed or received by the respondent, or any person or persons by his order or for his use, since his appointment as guardian, by virtue of the said instrument [a decree signed by William the Fourth, as King of Hanover, and Duke of Brunswick and of Lunebourg; and by William, Duke of Brunswick and of Lunebourg, the appellant’s brother], including therein the personal estate and effects, rents, profits, and produce paid or accounted for to the respondent by the Duke of Cambridge as aforesaid.”⁴⁶

The House of Lords held, that the King of Hanover, who was in England exercising his rights as a British subject, could not be made to account to the Court of Chancery for acts done by him in Hanover and elsewhere abroad, in virtue of his authority as a sovereign. In this case a distinction was drawn between acts to be attributed to the character of sovereign and acts to be attributed to the character of subject. It was assumed that, the defendant, though King of Hanover, might be subject to the jurisdiction of the courts in respect of acts done otherwise than in his character as a sovereign. This was a peculiar case, because the King of Hanover, who was also a British peer, was sued in that character, and it was argued that the transactions in respect of which it was sought to make him amenable to the jurisdiction of the courts had nothing to do with his character of King of Hanover.

44 *Feldman c. Etat de Bahia*, C.A. de Bruxelles, November 22, 1907, *Pasicrisie Belge*, 1908, p. 55. See also: *Jdip et jc (Clunet)*, Tome 35, 1908, p. 210.

45 *Duke of Brunswick v. King of Hanover*, (1848) 2 H.L.C. 1: see *BIL Cases*, Vol. 3, 1965, pp. 138-148.

46 *Ibid.*, p. 141.

On May 28, 1851, Lord Campbell, CJ, delivered the judgment of the Court of Queen's Bench in two cases on appeal: *Wadsworth v. Queen of Spain*, and *De Haber v. Queen of Portugal*.⁴⁷ He said that property in England, belonging to a foreign sovereign in his public capacity, cannot be seized under process, in a suit instituted against him.

— *Wadsworth v. Queen of Spain*⁴⁸ was a suit brought by T.P. Wadsworth against the Queen of Spain for the payment of £10,000 sterling for interest alleged to be due to him upon certain bonds or certificates, dated 10th December 1834, entered by Her Majesty the then Queen Regent of Spain, in the name of her daughter (the present Queen, then a minor), on 16 November, 1834, by virtue of the law decreed by the Cortes and sanctioned by Her said Majesty. The deponent, George Stone and his partners, all bankers in the City of London, and the president of the Spanish Financial Commission, in London, appointed by the Spanish Government to manage, in England, the affairs relative to its "Public Debt", and the payment of interest or dividends payable on account of the said kingdom to the holders in England of certain bonds or certificates, and of other public securities issued by or on behalf of the kingdom of Spain, all were served with the following document, addressed to them by the Lord Mayor's Court Office: "Take notice that, by virtue of an action entered in the Lord's Mayor Court, London, against Her most Christian Majesty Doña Isabel Segunda Queen of Spain, defendant, at the suit of Thomas Page Wadsworth, plaintiff, in a plea of debt upon demand of £20,000, I do attach all such moneys, goods and effects as you now have, or which hereafter shall come into your hands or custody, of the said defendant, to answer the said plaintiff in the plea aforesaid: and that you are not to part with such moneys, goods or effects without license of this Court."⁴⁹

Although the action was not, in form, brought against the Queen as a sovereign, it appeared sufficiently clear, in the proceedings, that she was charged with liability in that character (Wadsworth's affidavit of debt in the cause, and the bonds and certificates referred to the "Public Debt of Spain"). The Court held that a foreign sovereign could not be held to bail, nor "required to appear [and answer] without a breach of the law of

⁴⁷ *In the matter of Wadsworth and the Queen of Spain; in the matter of De Haber and the Queen of Portugal*, (1851) 17 Q.B. 171: see *BIL Cases*, Vol. 3, 1965, pp. 151-170.

⁴⁸ *Wadsworth v. Queen of Spain*, (1851) 17 Q.B. 171: see *BIL Cases*, Vol. 3, 1965, p. 151.

⁴⁹ *Ibid.*, p. 152.

nations: the plea to the jurisdiction could only have been pleaded by her in her proper person; the garnishee has an interest in setting aside an attachment improperly executed if he has funds of the defendant in his hands; [...].”⁵⁰ The garnishee, after pleading *nil habet*, moved for the prohibition “to prevent further proceedings in an action which ought never have been commenced”.⁵¹ The Court of Queen’s Bench granted the prohibition. The Court also found that “in the case at Bar, the inferior court had no jurisdiction to entertain the cause; and, before the prohibition was applied for, the inferior court had committed a manifest error and had clearly exceeded its jurisdiction by summoning the Queen of Spain, and issuing an attachment against her.”⁵²

– The other case, *De Haber v. Queen of Portugal*,⁵³ was a suit entered in the Mayor’s Court of London by Maurice de Haber against the Queen of Portugal for the payment of a sum of Portuguese money equivalent to £12,136 sterling, taken by and on behalf of the nation of Portugal by Her said Majesty; and for summoning the defendant to appear and answer the plaintiff in the plea aforesaid. The plaintiff alleged that the garnishee, Senhor de Brito, of the City of London, had money, goods and effects of the defendant in his hands, and prayed process according to custom to attach the said defendant by the said money; he was served with the following document, addressed by the Lord Mayor’s Court Office: “Take notice that, by virtue of an action entered in the Lord’s Mayor Court, London, against Her most Faithful Majesty Doña Maria da Gloria, Queen of Portugal, defendant, at the suit of Maurice de Haber, plaintiff, in a plea of debt upon demand of £24,000, I do attach all such moneys, goods and effects as you now have, or which hereafter shall come into your hands or custody, of the said defendant, to answer the said plaintiff in the plea aforesaid: and that you are not to part with such moneys, goods or effects without license of this Court.”⁵⁴

In this case, Lord Campbell, CJ, expressed “very great regret that the action should have been brought, [and] I have no hesitation in saying that such actions do not lie; I am very sorry to find that this has been persisted in. The only question is as to the proper mode

50 *Ibid.*, p. 169.

51 *Ibid.*

52 *Ibid.*, p. 170.

53 *De Haber v. Queen of Portugal*, (1851) 17 Q.B. 171: see *BIL Cases*, Vol. 3, 1965, p. 151.

54 *Ibid.*, p. 165.

of stopping it, whether by a plea in the Court or by prohibition.”⁵⁵ He further stated that “an action cannot be maintained in any English Court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as a representative of the nation of which he is the head; and that no English court has jurisdiction to entertain any complaints against him in that capacity. Redress for such complaints affecting a British subject is only to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations, remonstrances or acts of the British Government. To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations and an insult which he is entitled to resent.”⁵⁶ The garnishee moved for the prohibition. The Court of Queen’s Bench granted the prohibition. The Court also found that the inferior court exceeded its jurisdiction by summoning the Queen of Portugal, and issuing an attachment against her. “What has been done in this case by the Lord’s Mayor Court must be considered as peculiarly in contempt of the Crown, as being an insult to an independent sovereign, giving that Sovereign just cause of complaint to the British Government, and having a tendency to bring about a misunderstanding between our own Gracious Sovereign and her ally the Queen of Portugal.”⁵⁷

– On December 11, 1862, in *Gladstone v. Musurus Bey*,⁵⁸ Sir Page Wood, VC, held that the Court of Chancery was not competent for the plaintiffs to move against the Turkish Ambassador, who represented the Sultan of Turkey in this case. For “[s]ince the well-known case of the Ambassador of the Czar of Muscovy and the statute which was passed in the reign of Queen Anne [cited: 7 Anne, c. 12], there have been no instance of an attempt to make an ambassador party to a suit. All that could be done in this case was, to say that the Court declined to entertain any jurisdiction against the Turkish Ambassador.”

In this case the Bank of England held a fund deposited by the plaintiffs in order to secure a contract of concession between the plaintiffs and the Turkish Government, for the purposes of carrying on banking business at Constantinople. As per contract, the

55 *Ibid.*, p. 164.

56 *Ibid.*, p. 165.

57 *Ibid.*, p. 168.

58 *Gladstone v. Musurus Bey*, (1862) 1 H. & M. 495: see *BIL Cases*, Vol. 3, 1965, pp. 477-482.

fund held could be withdrawn by the sole order of Musurus Bey. But the Court felt to be “bound to keep the fund safe”, for the fund was not property of the Sultan, it was a fund *in medio*, “which is one contingent event to become the Sultan’s property, and in another contingency to become the plaintiff’s, that it is, therefore, a fund in which both the Sultan and [the plaintiffs] have contingent interests.” On the basis of the facts, the Court doubted as to the entitlement of the Turkish Government to treat the concession as abandoned by the plaintiffs. As the ambassador threatened to withdraw the deposit on the ground of an alleged breach of contract by the plaintiffs, the Court granted an interim injunction to protect the Bank of England from any proceedings by the ambassador, and to restrain the bank from parting with the fund, until the hearing of the cause. The Court stated that “[w]here the intention to commit a breach of trust is charged against a person who happens to be out of the reach of the Court, the Court does not hesitate, on a proper case being made, to preserve the trust fund *in medio* by an interim order [...] though the absence of the alleged trustee is due to his privilege as an ambassador.”⁵⁹

– On February 27, 1863, in *Gladstone v. Ottoman Bank*,⁶⁰ Sir Page Wood, VC, held that inasmuch as the Court of Chancery had no jurisdiction on the contract as against the Sultan of Turkey it had none against the Ottoman Bank and its directors. The contract was one of a concession to the plaintiffs of the exclusive right of issuing bank notes or paper money, which are to be the legal tender within the Turkish dominions. The plaintiffs claimed that in derogation of that grant the Sultan’s Government had subsequently made a similar concession to the defendants, the Ottoman Bank, and prayed a declaration of the plaintiffs’ exclusive right, and an injunction against the Ottoman Bank and its directors. The Vice-Chancellor stated:⁶¹

“[...] I think it is quite clear that *an engagement entered into with a foreign government such as that upon which the plaintiffs’ rights depend, is not an engagement which the Court can enforce, or against the breach of which it can give any relief.*

[...] the fact that the sovereign has the control of the money current in his kingdom only amounts to this: that it is a privileged enjoyed by him for the public purposes of his country. The right of ascertaining what shall be the current coin of the kingdom is vested in the sovereign of the country, but that right, like

⁵⁹ *Ibid.*, p. 481.

⁶⁰ *Gladstone v. Ottoman Bank*, (1863) 1 H. & M. 505: see *BIL Cases*, Vol. 3, 1965, pp. 482-486.

⁶¹ *Ibid.*, pp. 484-486[emphasis added].

every other right which he holds *quà* sovereign, is presumed to be exercised for the benefit of the community upon public grounds. *This is not a contract for the private benefit of the sovereign, of which this Court might take cognizance*, but simply a grant of the sole right of issuing notes as part of the current coin of his realm, made by the Sultan in his public capacity as the sovereign of the country.

[...] *those who depend upon the grant of a foreign sovereign cannot obtain the aid of this Court* against the act of the foreign sovereign in making a second grant inconsistent with the first. *It is the act of a foreign sovereign power which overrides everything.* [...] It seems to me it is impossible to hold, that this Court has jurisdiction to interfere with any step which the Ottoman Government may take in this matter according to its own sole will and discretion.”

– On May 27, 1869, in *Smith v. Weguelin*,⁶² Lord Romilly, MR, held that the Chancery Court had no jurisdiction to compel the Guano Consignment Company, in Great Britain, nor the agents of the Peruvian Government (which was made defendant, but did not appear), to apply the proceeds of the guano, in the hands of its agents in England, to the redemption of a loan contract. The plaintiffs, bondholders of a loan, contended that the agents of the Consignment Company in London were trustees of the proceeds of the guano for the bondholders, that the matter had to be disposed of according to the English law of trusts, and sought to obtain the enforcement of the contracts of the Peruvian Government against its property in England. As per one contract, all guano to be exported from Peru to Great Britain and Ireland was consigned to the company, and it was agreed that the company should sell the guano, and hold a certain portion of the proceeds at the disposal of the Government. Subsequently, the Peruvian Government contracted a loan in England upon which it was stipulated that all Peruvian guano to be imported into Great Britain and Ireland, and Belgium should be hypothecated for the repayment of the loan, and that a certain amount, out of the proceeds of the guano, should be applied half-yearly in redemption of the loan. In this much cited case, Lord Romilly stated:⁶³

“The Consignment Company are bound to follow the directions of the Government, and to account to the Government. If the Consignment Company misapply the proceeds, they are accountable to the Government, and to no one else. *The Peruvian Government are not here, and are not amenable to this jurisdiction*, and the Court is asked, because the Peruvian Government have entered into another and distinct contract with the plaintiff in common with the other bondholders [...] to take an account arising

⁶² *Smith v. Weguelin*, [1869] L.R. 8 Equity Cases 198. See also: [1861-73] All E.R. 717; *BIL Cases*, Vol. 3, 1965, pp. 486-496; and *Jdip et jc (Chunet)*, Tome 3, 1876, pp. 125-127.

⁶³ *Ibid.*, pp. 213-214 [emphasis added].

from a foreign contract between the foreign Government and the foreign company, which can bind no one and can have no possible result.

[...] And if the Court make such an attempt [i.e., to interfere], it would fall into this dilemma: either it would simply make itself ridiculous in attempting what is impossible, or if it could assume that the foreign Government was answerable to this Court, and bound to pay according to its decrees, and then found property belonging to the foreign Government in this country, *it might alter the relation between the two countries, and enable a bondholder by the aid of the Court of Chancery practically to declare war against a foreign country*, for it is clear that if the Court of Chancery could seize all the guano belonging to the Peruvian Government it might as well seize Peruvian vessels under the Article which declares that all the other property and sources of revenue of the Republic should be applicable to payment of the loan.”

The Court also found that the Peruvian Government complied with the loan by cancelling half-yearly bonds, which had been given up to it in exchange for bonds of a subsequent loan, to the stipulated amount at the price at which the subsequent loan was contracted, being a higher price than the price of the bonds of the first loan as quoted on the London Stock Exchange.

– On March 5, 1872, in *Larivière v. Morgan*,⁶⁴ Sir R. Malins, VC, delivering the judgment of the Court of Chancery, stated that “no foreign government could be sued in this Court, as was clearly laid down in *Wadsworth v. Queen of Spain* (17 Q.B. 171), nor could the agents of a foreign government be sued: *Gladstone v. Ottoman Bank* (1 H. & M. 505).”

In this case the French Government (which did not avail itself of an opportunity to appear) and their bankers in London were sued by a contractor for the payment of £40,000 and for an inquiry. The facts were as follows: the French Government contracted in England for the purchase of a large number of cartridges, which were to be inspected, and when accepted were to be paid through the French Ambassador. Their bankers in England, Messrs. Morgan & Gooch, who had in their hands funds belonging to the French Government, wrote to the contractor in England that a special credit for £40,000 had been opened in his favour, and would be paid to him upon the receipt of the certificates from the French ambassador. Some cartridges were supplied and paid for, and others were delivered to agents for the French Government; but other agents of the

⁶⁴ *Larivière v. Morgan*, (1872) L.R. 7 Ch. App. 550: see *BIL Cases*, Vol. 3, 1965, pp. 497-503.

French Government alleged that the time for the delivery had expired. Certificates were refused, and the bankers refused to make any further payments.

The Vice-Chancellor Malins made a declaration that the plaintiff was entitled to be paid out of the £40,000, and that the limits of time had been waived by the French Government; he directed inquiries accordingly, and ordered the balance of the £40,000 to be brought into Court. Afterwards, on June 5, 1872, before the Court of Appeal in Chancery, Lord Hatherley, LC found that “there was a plain and clear trust impressed on this fund, under which those who had the benefit of the trust would be entitled, if they performed their contract, to receive the money.”⁶⁵ The Lord Chancellor also declared the plaintiff entitled to be paid rateably for all the cartridges supplied to and received by the French Government under the contract, declared the limits of time waived, and ordered an inquiry.

On appeal, on February 11, 1875, in *Morgan v. Larivière*,⁶⁶ the decision of the Lord Chancellor Hatherley was reversed by the House of Lords. Lord Cairns held that the letter, by which the bankers undertook to give credit and pay, did not constitute Messrs. Morgan & Gooch trustees for Larivière, as to the sum named, nor constitute an equitable assignment of a fund in their hands, and that consequently there was not a matter for the exercise of the jurisdiction of the Court of Chancery.

— In an action decided on July 5, 1873, in the case of *Crouch v. Crédit Foncier of England*,⁶⁷ Mr. Justice Blackburn, delivering the judgment of the Court of Queen’s Bench, stated that bonds payable to bearer, issued by a foreign government, “only create a debt in the nature of a debt of honour which cannot be enforced by any foreign tribunal, nor by the tribunal of the borrowing State itself, unless with the consent of its government.”⁶⁸ The learned judge, then, set up a distinction between two categories of instruments: “English instruments made by an English company in England”, and “public debts created by foreign and colonial governments”. He said:⁶⁹

65 *Ibid.*, p. 501.

66 *Morgan v. Larivière*, (1875) L.R. 7 H.L. 423: see *BIL Cases*, Vol. 3, 1965, pp. 504-511.

67 *Crouch v. Credit Foncier of England*, [1873] L.R. VIII Q.B. 375.

68 PHILLIMORE Sir Robert, *Commentaries upon International Law*, Vol. II, 1882, p. 18.

“[...] Foreign and colonial governments frequently create a public debt, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder. *There can hardly properly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government.* [...]”

This was an action brought by Mr. Crouch in his own name against the Credit Foncier for the payment of a debenture (issued by that company on behalf of one Macken), which the defendants, having taken notice that title was derived from a robbery, refused to pay arguing that it was not a negotiable instrument. The Court held that the contract contained in the conditions prevented the debenture from being a promissory note, and that the custom to treat these instruments as negotiable was only of a recent origin and not based upon the law merchant, therefore, the plaintiff could not recover.⁷⁰

– On November 19, 1874, in *The Corporation of Foreign Bondholders v. Pastor*,⁷¹ Sir R. Malins, VC, held that “although no decree might be able to be made against a foreign government itself, yet the agent of that government might be restrained from taking away securities deposited in this country.” In this case, the defendant, Pastor, contended that a foreign government could not be sued in this country, and that as an agent of a *de facto* government, was, therefore, not amenable to the jurisdiction of the Court of Chancery. The Vice-Chancellor Malins clarified that the rule was not that a foreign government could in no case be sued, but that it could not be sued unless it consented to submit to the jurisdiction. The object of the suit was to restrain Pastor, the London financial agent of the Spanish Government, from transmitting to Spain certain promissory notes of the Rio Tinto Company which should have been deposited in England as security to Spanish bondholders for overdue interest.

– On June 1, 1876, in *Goodwin v. Robarts*,⁷² an action of recovery of the value of certain scrips (or scrip receipts), containing public debt obligations from the Austrian, Hungarian, and Russian Governments, the House of Lords unanimously held, *inter alia*, that these were negotiable instruments, transferable by mere delivery to a *bona fide*

⁶⁹ *Crouch v. Credit Foncier of England*, p. 384 [emphasis added].

⁷⁰ *Ibid.*, p. 374.

⁷¹ *The Corporation of Foreign Bondholders v. Pastor*, (1874) 23 W.R. 109: see *BIL Cases*, Vol. 3, 1965, pp. 512-513.

⁷² *Goodwin v. Robarts*, [1876] I A.C. House of Lords 476.

holder for value. Lord Selborne, in his speech stated that the scrip contract promised to give the bearer a bond for the amount paid, and that the contracting party was the foreign government, and not the English agent. To put it plainly, he went to explain the nature of the scrip contract; he said that one has to distinguish between “English instruments made by an English company in England”, and “public debts created by foreign and colonial governments”. Citing *Crouch v. Crédit Foncier of England*, where, as to public debts, it was said that “there can hardly properly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government”, he added that:⁷³

“The Russian and the Austrian scrip now before your Lordships belongs, in my judgment, to the latter and not to the former category; and I know no rule or principle of English law which should prevent such instruments of title to shares in foreign loans from being transferable in this country, according to any custom or usage of trade which may be shown to prevail, if consistent with what appears upon the face of the instruments.

Considering it to be clear that the engagement (whatever may be its effects) which appears on the face of this scrip is that of the foreign Government, and not of Messrs. Rothschild, I desire to express my entire agreement with what was said by the late Master of the Rolls (Lord Romilly) in *Smith v. Weguelin* [cited: *Law Rep. 8 Eq. 212, 213*]:

‘It is, in my opinion, a complete misapprehension to suppose that, because a foreign Government negotiates a loan in a foreign country, it thereby introduces into that transaction all the peculiarities of the law of the country in which the negotiation is made. The place where the loan is negotiated does not, in my opinion, in the least degree affect the question of law. The contract is the same, and the obligations are the same, whoever may be the bondholders.

Suppose a French or Belgian company, residing in Paris or in Brussels, should instruct an agent in London to subscribe for some of these bonds, is the contract between the Peruvian Government and a French company, or between the Peruvian Government and a Belgian company to be regulated by the English law, because the contract is made by their agents in London, or are the contracts to vary according to the domicile of the subscriber of the loan?

If the French Government should negotiate a loan on certain specified terms, whether negotiated in Brussels, in London, or in Paris, the same law must regulate the whole, and that law is the law of France, as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So, if the English Government were to negotiate a loan in Paris or in New York the English law must be applied to construe and regulate the contract.’ [...].”

73 *Ibid.*, p. 495.

– On April 18, 1877, in *Twycross v. Dreyfus*,⁷⁴ the Court of Appeal affirmed a previous decision of the Vice-Chancellor Hall, and held that in an action against a foreign government for arrears of interest on bonds issued by that government, the agents, who have issued the bonds in England, cannot be sued in the absence of the principal. The claim was filed by James Twycross and other holders of the bonds of the Peruvian Republic against Messrs. Dreyfus Brothers, J.H. Schröder & Co., and the Peruvian Guano Company Ltd., agents of the Peruvian Government in England.

In this case the plaintiff contended that the Peruvian Government had from time to time forwarded to the defendants large quantities of guano for the purpose of paying the interests on the bonds, which they refused to apply for that purpose; he claimed that he and the other bondholders had a claim upon the proceeds of the guano, moneys, funds, and securities, then in the hands of the defendants, in priority to any claims by the defendants; that in view that the foreign government made no claim to the fund, it has therefore nothing more to do with it, and the only claimants to the fund are the bondholders and the defendants, who themselves claim a lien on it. The defendants denied that they had received any guano for the purposes of paying the interest of the bonds thereout or out of the proceeds of the sale thereof. The Court found that there was no fiduciary relation between the defendants and the plaintiff with respect to the property or the proceeds of it; that there was neither a trust nor anything amounting to an equitable assignment; that the guano being property of a foreign government, the Court had no jurisdiction to attach it or the proceeds of the sale thereof; and that the defendants, being agents of the foreign government, could not be sued in the absence of the principal. On the claim upon the loan, the Vice-Chancellor Hall observed:⁷⁵

“Passing by for a moment any specific claim which is made upon the guano, *the case of a foreign government contracting a loan is one which apparently cannot be properly the subject of an action at all.* This is observed by Mr. Justice Blackburn in the case of *Crouch v. Crédit Foncier of England* [cited: Law Rep. 8 Q.B. 374]. There the question was not that which is now being considered; but in reference to such contributors to a foreign loan, he makes this observation: ‘Foreign and colonial governments frequently create a public debt, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder. There can hardly properly be said to be any right of

⁷⁴ *Twycross v. Dreyfus*, [1877] L.R. 5 Ch.D. 605. See also: [1874-80] All E.R. 132; and *BIL Cases*, Vol. 3, 1965, pp. 513-521.

⁷⁵ *Ibid.*, p. 611 [emphasis added].

action on such instruments at all, though the holder has a claim on a foreign government'. I need not to say *in this case an action upon the bond is entirely out of question*. No such action as that could be maintained.”

On appeal, Sir George Jessel, MR, dismissing the appeal stated:⁷⁶

“The first and most important point we are called upon to decide is: What is the meaning of a bond given by a foreign government to secure the payment of a loan? As I understand the law, the municipal law of this country does not enable our tribunals to exercise any jurisdiction over foreign governments as such. Nor, so far as I am aware, is there any international tribunal which exercises such a jurisdiction. The result, is, that *these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign country, or even by the ordinary tribunals of the country which issues them, without the consent of the government of that country*. That being so, it appears to me that the bond in question confers no right of action on the plaintiffs [...]

[...] You cannot sue the agent in the absence of the principal. The principal is the Peruvian Government. *You cannot sue the Peruvian Government at all*, and, therefore, you cannot sue its agents. There is no question of trusteeship, it is simply a case of agency. I am of opinion that the decision of the Vice-Chancellor was correct, and that it must be affirmed.”

Lord Justice James was of the same opinion, and added that:⁷⁷

“*You cannot sue the Peruvian Government, and, in my opinion, it would be a monstrous usurpation of jurisdiction to endeavour to sue a foreign government indirectly by making its agents in this country defendants, and then saying: ‘You have got the money of the government, and you ought to apply that.’ It really would be indirectly endeavouring to make the foreign government responsible to the jurisdiction of this court.*”

– In *The Parlement Belge*,⁷⁸ an action was instituted against the steamship and her freight to recover damages caused by a collision. The Attorney General filed a protest on behalf of her Majesty the Queen, asserting that the court had no jurisdiction to entertain the suit as the vessel was the property of the King of the Belgians. It appeared that the boat was a mail packet and was officered by officers of the Royal Belgian Navy, and that, besides, carrying mail, she carried merchandise and passengers and their

⁷⁶ *Ibid.*, p. 616 [emphasis added].

⁷⁷ *Ibid.*, p. 618 [emphasis added].

⁷⁸ *The Parlement Belge*, (1879) L.R. 4 P.D. 129; and *ibid.*, (1880) L.R. 5 P.D. 197; see *BIL Cases*, Vol. 3, 1965, pp. 305-321, and 322-334, respectively.

luggage for hire. In the Admiralty Division, judge Sir Robert Phillimore held that the court could exercise its jurisdiction because the law of England, which “has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors”, has not given the “Crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons, who are not really ambassadors.”⁷⁹

The Crown appealed, and, on February 27, 1880, the Court of Appeal unanimously reversed the judgement of the lower court. The Court held that an unarmed packet belonging to the sovereign of a foreign State, and in the hands of the officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit *in rem* to recover redress for a collision. Brett, LJ, delivering the judgment of the Court held that:⁸⁰

“[...] the public property of every state, being destined for public uses, cannot with reason be submitted to the jurisdiction of the courts of such state, because such jurisdiction, if exercised, must divert the public property from its destined public uses; and that, *by international comity, which acknowledges the equality of states*, if such immunity, grounded on such reasons, exist in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all other states. *The dignity and independence of each state require this reciprocity.* [...]”

Lord Justice Brett, after reviewing at length the English and United States case law, stated the conclusion of the Court as follows:⁸¹

“The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.”

79 *The Parlement Belge*, (1879) L.R. 4 P.D. 129: see *BIL Cases*, Vol. 3, 1965, p. 321.

80 *Ibid.*, (1880) L.R. 5 P.D. 197: see *BIL Cases*, Vol. 3, 1965, p. 329 [emphasis added].

81 *Ibid.*, p. 331.

– On November 17, 1880, in *Strousberg v. Republic of Costa Rica*,⁸² the Court of Appeal confirmed that a foreign sovereign or State is exempted by international law, founded upon the comity of nations, from the jurisdiction of English tribunals, and therefore an action is not maintainable in English courts against them. Lord Justice James declared that the only exceptions to that rule are: (1) where a foreign sovereign or State waives the privilege he possesses, and comes into the municipal courts to obtain relief, in which case the defendant may assert any claim he has by way of cross action, or counter-claim, to the original action in order that justice must be done (it really is not a process against the foreign sovereign but only a mere matter of course); and, (2) where there are moneys in the hands of third parties or a trustee over whom the English courts have jurisdiction, to which a foreign sovereign may have a claim and in which case he may be named as a defendant, in this case notice of an action against the third parties in relation to those moneys may be given to the foreign sovereign that he may have an opportunity of putting forward his claim (in this case the only jurisdiction of the Court is not over the sovereign, or over his property, but over its own subjects and over the property which is within its own jurisdiction).

In this case, the plaintiff, claimed 1) for an injunction to restrain the Republic from enforcing or otherwise proceeding upon any order, decree, judgment, or certificate in the action of *The Republic of Costa Rica v. Strousberg*, an action in which Costa Rica obtained, in 1879, a final judgment for the payment of the sum of £23,000 by Mr. Strousberg, as long as Costa Rica makes default in the payments to the plaintiff as claimed hereinafter; 2) payment of £175,000 to the plaintiff, by Costa Rica, with interest thereon in respect of overdue arrears of interest, coupons, or bonds of the defendant Republic, belonging to the plaintiff; 3) payment to the plaintiff, by Costa Rica, of remuneration, commission, compensation, and damages, in respect of his employment by and services to the Republic, and in respect of wrongful dismissal from such employment; 4) discovery from the defendant Republic in respect of matters in question in the above-mentioned action. The action was brought before the Chancery Division in which the Republic entered a conditional appearance and then moved for the discharge of the order. But Baron Pollock, sitting as vacation judge, refused. On the appeal by the

⁸² *Strousberg v. Republic of Costa Rica*, (1881) 44 L.T. (N.S.) 199; see *BIL Cases*, Vol. 3, 1965, pp. 527-531.

Republic the order was discharged by the Court of Appeal. The Master of the Rolls, Sir George Jessel said:⁸³

“This is simply an action against a foreign State, and no such action can be maintained [...] it ought to be refused upon the ground that is purely vain and futile, not to say vexatious; [...] the order of Pollock, B. must be discharged.”

– On November 29, 1893, in *Mighell v. Sultan of Johore*,⁸⁴ the Court of Appeal held that the courts of England have no jurisdiction over an independent foreign sovereign unless he submits to the jurisdiction; such submission cannot take place until the jurisdiction is invoked. In this case, it was pointed out, by Lord Lawrance, that the only two exceptions to the general rule that the courts cannot exercise jurisdiction over an independent foreign sovereign were those stated by Lord Justice James in *Strousberg v. Republic of Costa Rica*. In dismissing the appeal, Lord Esher, MR, held that the Court had no jurisdiction to enter into any inquiry into the matters alleged by the plaintiff (a breach of promise of marriage), the defendant “being an independent sovereign, and not submitting itself to the jurisdiction”.

Summary of English practice. Until World War I, English courts also failed to bring an adequate level of protection to claims brought by private creditors against foreign States on the subject of recovery of State pecuniary debts. As in other creditor countries, failure was due essentially to the lack of judicial remedies and specific legal procedures, including the impossibility of executing the judicial decisions againsts foreign sovereigns.

Likewise, during this period, English courts developed the common law rule that foreign sovereigns or foreign States cannot be sued without their consent, and they repeatedly found that the principles of sovereignty and independence were of paramount importance. As a consequence, they declared themselves incompetent whenever a foreign State was made a defendant.

83 *Ibid.*, p. 529.

84 *Mighell v. Sultan of Johore*, [1894] 1 Q.B. Court of Appeal 149.

These were the cases in: *Wadsworth v. Queen of Spain*, and *De Haber v. Queen of Portugal*,⁸⁵ where the Court of Queen's Bench held that property in England, belonging to a foreign sovereign in his public capacity, cannot be seized under process, in a suit instituted against him; *Smith v. Weguelin*,⁸⁶ where Lord Romilly, MR, held that the Chancery Court had no jurisdiction to compel the agents of the Peruvian Government, to apply the proceeds of the guano, to the redemption of a loan contract; *Larivière v. Morgan*,⁸⁷ where the Court of Chancery stated that "no foreign government could be sued in this Court, [...], nor could the agents of a foreign government be sued: [...]; *Crouch v. Crédit Foncier of England*,⁸⁸ where the Court of Queen's Bench stated that bonds payable to bearer, issued by a foreign government, "only create a debt in the nature of a debt of honour which cannot be enforced by any foreign tribunal, nor by the tribunal of the borrowing State itself, unless with the consent of its government"; *Goodwin v. Robarts*,⁸⁹ where the House of Lords held that "there can hardly properly be said to be any right of action on [public debt] instruments at all, though the holder has a claim on a foreign government"; *Twycross v. Dreyfus*,⁹⁰ where the Court of Appeal held that in an action against a foreign government for arrears of interest on bonds, issued by that government, the agents, who have issued the bonds in England, cannot be sued in the absence of the principal; in *The Parlement Belge*,⁹¹ where Lord Justice Brett, stated that "[t]he principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and, therefore, but for the common agreement, subject to

⁸⁵ *In the matter of Wadsworth and the Queen of Spain; in the matter of De Haber and the Queen of Portugal*, (1851) 17 Q.B. 171: see *BIL Cases*, Vol. 3, 1965, pp. 151-170.

⁸⁶ *Smith v. Weguelin*, [1869] L.R. 8 Equity Cases 198. See also: [1861-73] All E.R. 717; *BIL Cases*, Vol. 3, 1965, pp. 486-496; and *Jdip et jc (Clunet)*, Tome 3, 1876, pp. 125-127.

⁸⁷ *Larivière v. Morgan*, (1872) L.R. 7 Ch. App. 550: see *BIL Cases*, Vol. 3, 1965, pp. 497-503.

⁸⁸ *Crouch v. Credit Foncier of England*, [1873] L.R. VIII Q.B. 375.

⁸⁹ *Goodwin v. Robarts*, [1876] I A.C. House of Lords 476.

⁹⁰ *Twycross v. Dreyfus*, [1877] L.R. 5 Ch.D. 605. See also: [1874-80] All E.R. 132; and *BIL Cases*, Vol. 3, 1965, pp. 513-521.

⁹¹ *The Parlement Belge*, (1879) L.R. 4 P.D. 129; and *ibid.*, (1880) L.R. 5 P.D. 197: see *BIL Cases*, Vol. 3, 1965, pp. 305-321, and 322-334, respectively.

its jurisdiction?"; *Strousberg v. Republic of Costa Rica*,⁹² where the Court of Appeal confirmed that a foreign sovereign or State was exempted by international law, founded upon the comity of nations, from the jurisdiction of English tribunals, and therefore no action could be maintained against them; and *Mighell v. Sultan of Johore*,⁹³ where the Court of Appeal held that the courts of England have no jurisdiction over an independent foreign sovereign unless he submits to the jurisdiction.

c) France. From the beginning of the 19th century until the inter-War period, another set of very important cases on the subject of the recovery of State external debts, and related issues, was brought before the municipal courts in France. During this period, almost all decisions by municipal courts in France confirmed, directly or indirectly, the complete immunity of foreign States *vis-à-vis* French courts. Under almost any circumstance, foreign States maintained successfully a position of immunity from process. It did not matter whether they were acting in a private or a public capacity, whether they were taking part in an exposition or raising funds for State purposes. However, if once a foreign State admitted the jurisdiction of a French court, its submission was interpreted strictly in favour of the other party. Likewise, if a foreign State elected to prosecute a suit, it was precluded from enjoying all the advantages of French law, while being held strictly to the requirements beneficial to the defendant. As to the legal bases of the judgments, French courts relied constantly on the principles of international law to deny a suit, or to declare themselves incompetent. The position of French courts had a strong influence on the subsequent judicial and doctrinal developments in other fora, and viceversa. The following are the main cases, during this period, dealing with our subject, and its related issues.⁹⁴

– On January 7, 1825, in *Balguerie c. Gouvernement Espagnol*,⁹⁵ an action for the collection of a debt, Balguerie et Cie., bondholders, sued the Spanish Government, for the payment of Fr 1,194,992.50. The Court of Paris held that the garnishee order and the

⁹² *Strousberg v. Republic of Costa Rica*, (1881) 44 L.T. (N.S.) 199: see *BIL Cases*, Vol. 3, 1965, pp. 527-531.

⁹³ *Mighell v. Sultan of Johore*, [1894] 1 Q.B. Court of Appeal 149.

⁹⁴ See ALLEN Eleanor W., *The Position of Foreign States Before French Courts*, New York, The MacMillan Co., 1929, 42 p. See also: IMBERT Henri Marc, *op. cit.*, Ch. I; and POLITIS Nicolas E., *op. cit.*, IV Partie, Ch. I.

⁹⁵ *Balguerie c. Gouvernement Espagnol*, C. de Paris, January 7, 1825, *Dalloz R.P.*, 1849, note at p. 5.

attachment of moneys of that Government in the hands of Messrs. Ardouin, Hubbard and Laffitte, bankers at Paris, were nul and void. The Court of Paris stated:⁹⁶

“Considérant qu’*on ne saurait assimiler un emprunt créé par un gouvernement étranger pour ses besoins à un contrat de prêt entre particuliers* ; que les deniers d’un pareil emprunt, comme tous autres deniers publics, ne pourraient être frappés de saisie-arrêt ou oppositions, ni être détournés de leur destination spéciale sans paralyser la marche de ce gouvernement ; [...].

[...] la maison Balguerie saisissant sur le gouvernement espagnol, ne pourrait, dans l’état actuel des choses, et *vu le principe de l’indépendance des gouvernements qui domine cette affaire*, procurer aux banquiers Ardouin, Hubbard et Laffitte la sécurité et la décharge valable auxquelles ils auraient droit.”

On May 14, 1827, the Court of Cassation affirmed this decision.⁹⁷

— On May 25, 1827, in *Blanchet c. République d’Haïti*,⁹⁸ a suit brought by Mr. Blanchet against the Government of Haïti, for the collection of a debt in connection with some work he had done on the draft Constitution of the Republic of Haïti, the Civil Tribunal of Havre declared that it was incompetent to take cognizance of that suit, and held that the garnishee order and the attachment of the consignments of coffee, in the hands of Messrs. Baudin-Etesse et Brouard, were null and void; that the right to exercise jurisdiction, one of the attributes of sovereignty, was normally limited to one’s nationals; it was therefore useless to attempt to apply Article 14 of the French Civil Code because it was intended to apply only to individual foreigners and not to States. The Civil Tribunal of Havre stated:⁹⁹

“Attendu que, pour décider si la juridiction française peut s’étendre sur les gouvernements étrangers, sur les souverains ou chefs de ces gouvernements, il convient de remonter à l’origine du droit de juridiction ; —Que sans contredit ce droit émane de la souveraineté ; qu’il ne suffit pas, en effet, de faire des lois, qu’il faut encore en procurer l’exécution ; [...].

Que d’abord un souverain ne pourrait soumettre à la juridiction, qui est une émanation de sa puissance, un autre souverain indépendant ; *qu’en ce cas l’indépendance des nations exige que tout se traite d’égal à égal, et par les voies diplomatiques* ; [...].

96 *Ibid.*, pp. 5-6 [emphasis added].

97 *Ibid.*, p. 6.

98 *Blanchet c. République d’Haïti*, Trib. civ. du Havre, May 25, 1827, *Dalloz R.P.*, 1849, note at p. 6.

99 *Ibid.* [emphasis added].

Qu'il y aurait, au contraire, atteinte portée à la dignité et à l'indépendance des nations à forcer un gouvernement étranger à se défendre devant des autres tribunaux que ceux qui émanent de lui ; — Que la soumission qui, de la part du souverain, de l'autorité duquel ces tribunaux sont dépositaires, est un acte de bienséance et de justice, serait pour le souverain étranger une marque de sujétion et d'abaissement ; [...].

[...] — Qu'ainsi, *sous tous les rapports, les gouvernements sont indépendants de la juridiction instituée chez les autres nations*; que [M. Blanchet] ne pourrait recourir à la justice française ni pour l'autorisation de saisie-arrêt, ni pour les suites de la saisie-arrêt ; *qu'il devait, ou réclamer l'intervention du roi, ou se soumettre à la juridiction instituée dans la République de Haïti ; que telle est l'opinion de Vattel, n° 214, liv. 2, ch. 14 ; [...].*"

— On May 2, 1828, in a similar decision, in *Ternaux-Gandolphe c. République d'Haïti*,¹⁰⁰ the Civil Tribunal of the Seine adverted to further evidence that the scope of Article 14 of the French Civil Code was limited to engagements contracted by individuals. In its decision, the tribunal explicitly recognized that the right to exercise jurisdiction was normally limited to one's nationals, and declared itself incompetent to take cognizance of that suit; it held accordingly that the garnishee and attachment orders were null and void. The Civil Tribunal of the Seine noted:¹⁰¹

"[...] qu'en effet, si les ambassadeurs ne sont pas soumis à la juridiction du pays où il sont envoyés et reçus, à plus forte raison le gouvernement duquel ces ambassadeurs tiennent leurs pouvoirs ne doit pas être soumis à cette juridiction ; — Attendu, en outre, que *les deniers appartenant à un Etat, qui se trouvent dans la main d'un tiers, dans un autre Etat, n'en conservent pas moins le caractère de deniers publics dont la destination est sacrée ; qu'ainsi, ils sont insaisissables* ; — Attendu, d'après ces motifs, que les tribunaux français sont incompetents pour prononcer une condamnation contre le gouvernement d'Haïti ; que les ordonnances qui ont autorisé les saisies-arrêts formées sur le deniers ou valeurs appartenant à ce gouvernement sont incompetemment rendues ; — *Se déclare incompetent pour prononcer la condamnation demandé par Ternaux-Gandolphe et comp. contre la République d'Haïti.* — Déclare nulles et de nul effet comme incompetemment rendues les ordonnances, ainsi que les oppositions, etc. [...]."

— On April 16, 1847, in *Solon c. Gouvernement Egyptien*,¹⁰² a claim brought by an individual for damages, the Civil Tribunal of the Seine held that it was incompetent to take cognizance of that suit; that the garnishee attachment orders on certain articles in

¹⁰⁰ *Ternaux-Gandolphe c. République d'Haïti*, Trib. civ. de la Seine, Mai 28, 1828, *Dalloz R.P.*, 1849, note at p. 6.

¹⁰¹ *Ibid.* [emphasis added].

the hands of Mr. Méhémet-Ali, belonging either to the Egyptian government or to Mr. Méhémet-Ali, were null and void; and that according to the principles of international law French courts have no jurisdiction over foreign governments except, when the action involved real property possessed by them in France, to assume jurisdiction in the present case could involve an examination of an administrative and governmental act, between a foreign government and an individual granted with a mission as an official of that Government, for which the French court was without competence.

– On January 22, 1849, in *Gouvernement Espagnol c. Lambège et Pujol*,¹⁰³ the Court of Cassation confirmed the principle that French courts have no jurisdiction over foreign governments; that the reciprocal independence of States was one of the most universally recognized principles of international law, and that no government could be subjected against its will to the jurisdiction of a foreign State, since the right of jurisdiction was inherent in its sovereignty. The Court said:¹⁰⁴

“[...] — Attendu que l'indépendance réciproque des Etats est l'un des principes les plus universellement reconnues en droit des gens ; — Que, de ce principe, il résulte qu'un gouvernement ne peut pas être soumis, pour les engagements qu'il contracte, à la juridiction d'un Etat étranger ; — Qu'en effet, le droit de juridiction qui appartient à chaque gouvernement, pour juger les différends nés à l'occasion de ses actes émanés de lui, est un droit inhérent à son autorité souveraine, qu'un autre Etat ne saurait s'attribuer, sans s'exposer à altérer leurs rapports respectifs ; [...].”

The case arose out of a contract for the supply of shoes by Messrs. Lambège et Pujol to the Spanish Government, which refused to pay them. On March 7, 1844, the Minister of Finance, representing Spain was cited before the Civil Tribunal of Bayonne, which in a judgment of July 30, 1844,¹⁰⁵ declared Spain a debtor and valid the attachment order of a sum of Fr.5,000, belonging to Spain, in the hands of the garnishee, Mr. Balasque, himself a debtor of that Government. On appeal, by the Spanish Government, the decision was affirmed on May 6, 1845, by the Court of Appeal of Pau,¹⁰⁶ on the grounds that there could be no doubt as to the genuineness of the debt; that the sovereignty and

102 *Solon c. Gouvernement Egyptien*, Trib. civ. de la Seine, April 16, 1847, *Dalloz R.P.*, 1849, note at p. 7.

103 *Gouvernement Espagnol c. Lambège et Pujol*, Cour cass., January 22, 1842, *Dalloz R.P.*, 1849, p. 5.

104 *Ibid.*, p. 9 [emphasis added].

105 *Ibid.*, p. 7.

independence of the governments were not involved in that suit; and, that since the execution was to take place in France there could be no embarrassment on that score.

The case was taken before the Court of Cassation, by the Spanish Government, on the plea of (1) violation of the principle of independence of States, (2) excess of powers and incompetence, and (3) false application of Article 14 of the Civil Code (Spain argued that Article 14, by which foreigners were made subject to French jurisdiction, does not apply to foreign States). The Court said that because, under certain circumstances, Article 14 of the Civil Code authorized summoning foreigners before French courts, it by no means followed that foreign States were subject to similar jurisdiction as the result of engagements entered into by them with Frenchmen. Moreover, whenever an individual dealt with a State, by the very fact of entering into a contract, that individual submitted to the laws and to the judicial or administrative jurisdiction of that State. Hence, the matter of verification, liquidation, or seizure of the credits of a government could only be settled according to the law of that State. In the present case, it was of no importance that the evidence of title to the money claimed by the appellee was an instrument of commerce (a bill of exchange). The form of evidence did not alter the fact that to obtain payment of a debt contracted by a foreign government with a Frenchman, an attachment had been made in France of funds in the hands of a debtor of that Government. Therefore, the rules of international law did not cease to apply. The lower court, in permitting the garnishment, violated the principle of the law of nations which consecrated the independence of States, exceeded its powers, and falsely applied Article 14 of the Civil Code, for Article 14 could not be relied upon to extend the jurisdiction of French courts over the public assets of a foreign government. In reversing the judgment the Court of Cassation said:¹⁰⁷

“[...] — Que si l’art. 14 c. civ. autorise à citer devant les tribunaux français l’étranger qui a contracté des obligations envers un Français, cet article ne porte aucune atteinte au principe de droit des gens énoncé plus haut ; qu’il n’a trait qu’aux engagements privés contractés entre des citoyens appartenant à deux Etats différents et non aux engagements auxquels un Etat étranger a pu se soumettre envers un Français, [...] ;

106 *Ibid.*

107 *Ibid.*, p. 10 [emphasis added].

Attendu, d'ailleurs, qu'avec quelque personne qu'un Etat traite, *cette personne, par le seul fait de l'engagement qu'elle contracte, se soumet aux lois, au mode de comptabilité et à la juridiction administrative ou judiciaire de cet Etat.*"

— On April 7, 1867, in *Porteurs de valeurs du Canal Cavour Co. c. Gouvernement Italien*,¹⁰⁸ the French holders of certain obligations of the Cavour Canal Company brought a suit against the Italian Government for the collection of a debt. They invoked the guarantee made by the Government in reliance upon which they had done business with the company, which was now defaulting. The Commercial Tribunal of the Seine declared itself incompetent, without adducing further reasons than the decision of the Court of Cassation in *Gouvernement Espagnol c. Lambège et Pujol*, a case of January 22, 1849. The Commercial Tribunal of the Seine held:¹⁰⁹

"[...] — Attendu que, dans l'espèce, l'étranger mis en cause est un gouvernement et non un particulier ; qu'il ressort de la jurisprudence, et notamment des termes d'un arrêt rendu par la cour de cassation, en date du 22 janv. 1849, qu'un gouvernement ne saurait à bon droit, pour les engagements qu'il contracte, être soumis à la juridiction d'un tribunal étranger ; que ce cas se produit dans l'espèce, et qu'il y a lieu en conséquence, de se déclarer incompétent [...]"

This application, by a French court of first instance, of the principle of *stare decisis* gave rise, in the doctrinal field, to certain adverse comments. In a note, by Ch. Royer,¹¹⁰ the distinction between governmental acts *jure imperii* and *jure gestionis* was, for the first time, drawn in France. He also questioned the procedural inconsistency of such an unmotivated judgment, holding that foreign governments are not amenable to the French courts while the French Government itself, by virtue of Article 69 of the Code of Civil Procedure, could be cited before the French tribunals.

— In a similar suit, on May 1, 1867, in *Colin c. Bey de Tunisie*,¹¹¹ the First Chamber of the Civil Tribunal of the Seine declared itself incompetent in an action brought by Mr. Pierre Colin, a French engineer, against the Bey of Tunis for the payment of some Fr.4,500,000 alleged to be due to him in connection with work he had

¹⁰⁸ *Porteurs de valeurs du Canal Cavour Co. c. Gouvernement Italien*, Trib. com. de la Seine, April 7, 1867, *Dalloz R.P.*, 1867, note at p. 49.

¹⁰⁹ *Ibid.* [emphasis added].

¹¹⁰ *Ibid.*, p. 50.

¹¹¹ *Colin c. Bey de Tunisie*, Trib. civ. de la Seine, May 1, 1867, *Dalloz R.P.*, 1867, p. 49.

been charged to execute for the restoration of the aqueducts of Carthage. It was held that a foreign government could not be subjected to the jurisdiction of national courts for the engagements to which it was party. The Civil Tribunal of the Seine said:¹¹²

“[...] — Attendu que *c'est un principe invincible du droit des gens, qu'un gouvernement ne peut être soumis, pour les engagements qu'il contracte, à la juridiction d'un Etat étranger* ; — Attendu, en fait, qu'il résulte des documents de la cause et de l'aveu même de Colin, qu'en contractant, soit avec le bey de Tunis, soit avec son premier ministre, il savait contracter et contractait en effet avec le gouvernement tunisien ; — Attendu qu'en conséquence *un tribunal français ne pourrait juger les différends nés à la suite de ces conventions sans porter atteinte au principe de l'indépendance des Etats.*”

— On August 23, 1870, in *Min. public c. demoiselle Masset*,¹¹³ the Court of Appeal of Paris rendered a decision in which a French citizen with a commercial establishment in Russia had suffered alleged illegal arrest at the hands of the Russian police. She instituted a suit for damages against the French Minister of Foreign Affairs and the Tsar of Russia. The Tribunal of the Seine rendered a judgment of first instance in default against the Russian Government in the person of the Tsar. In revising the decision the Court held that the reciprocal independence of States was consecrated by international law; that each State was sovereign within its borders and they administered justice, one of the attributes of sovereignty through its courts, which were invested with jurisdiction and the power to enforce their decisions. It followed that one could not cite a foreign sovereign before one's courts, any more than the diplomatic representative of the State. To do so would be a violation of international law. Nor was it contemplated by Article 14 of the Napoleonic Code, which provision referred only to private individuals, not to foreign sovereigns or States. Thus the incompetence of the court was held to be a matter of public policy, which it was the duty of the attorney-general to defend. The Court of Appeal of Paris said:¹¹⁴

“LA COUR ; — Considérant que *l'indépendance réciproque des Etats est consacré par le droit des gens ; que chaque Etat est souverain sur son territoire, y exerce la justice qui est un attribut de la souveraineté* [...] — Qu'il suit de ces principes qu'on ne peut pas citer devant les tribunaux d'un pays le souverain d'un autre pays, non plus que les agents de la puissance publique qu'il représente ; — Que prétendre les soumettre à la justice, c'est-à-dire au droit de juridiction et de commandement du juge d'un

112 *Ibid.* [emphasis added].

113 *Min. public c. demoiselle Masset*, C. de Paris, August 23, 1870, *Dalloz R.P.*, 1871, p. 9.

114 *Ibid.*, p. 10 [emphasis added].

pays étranger, ce serait évidemment violer une souveraineté étrangère et blesser en cette partie le droit des gens ; [...]

[...] — Que *le jugement* par lequel les premiers juges ont ordonné ce profit-joint du défaut, avec réassignation de Sa Majesté le czar, *a donc fait grief à l'ordre public et porté atteinte aux principes de droit des gens ; [...].*”

— On March 15, 1872, in *Hérit. de l'empereur Maximilien c. Lemaître*,¹¹⁵ a suit was brought against the heirs of Emperor Maximilian of Mexico to recover the amount of a bill for the supply of decorations manufactured in 1865 and 1866 by Mr. Lemaître for the Government of Maximilian. The decorations were to be bestowed on those upon whom an Order was conferred as a reward for public service. The Court of Appeal of Paris held that an order on such decorations was a public administrative act, and that French courts were incompetent to consider contracts made by a foreign sovereign acting as head of State in the exercise of the *puissance publique*, in this regard the Court stated:¹¹⁶

“LA COUR ; — Considérant qu’il est de principe, à raison de *l’indépendance réciproque des Etats, que les tribunaux français n’ont pas juridiction pour juger les engagements contractés par les souverains étrangers, agissant comme chef d’Etat au titre de la puissance publique ;* — Que l’engagement dont Lemaître poursuit l’exécution rentre dans cette catégorie ; [...] — Que vainement, pour effacer le caractère de l’engagement qui exclut la juridiction des tribunaux français, Lemaître allègue, dans l’exploit d’assignation, qu’au cours de la fabrication dont il s’était chargé, il s’est mis en devoir d’obtenir la garantie personnelle de l’empereur Maximilien, agissant non plus comme chef d’Etat, mais s’engageant dans une obligation privée ; [...].”

— Another case, *Isabelle de Bourbon c. Mellerio*,¹¹⁷ was brought before the Civil Tribunal of the Seine against Isabelle de Bourbon, former queen of Spain, for a debt contracted by her in part while she was still reigning, and in part at her deposition by revolution, by a firm of jewellers in Paris for payment for several gems ordered at various times by the defendant. The tribunal held that to justify the exception of competence of the tribunal, the defendant would have to prove that she had purchased the diamonds in her sovereign capacity for the account of the Spanish treasury. That such was not the case was sufficiently evidenced by the facts. The jewels were actually

¹¹⁵ *Hérit. de l'empereur Maximilien c. Lemaître*, C. de Paris, March 15, 1872, *Dalloz R.P.*, 1875, p. 24.

¹¹⁶ *Ibid.* [emphasis added].

furnished for her personal use and as wedding presents for her daughter. Inasmuch as some of the gems were delivered after the revolution, it would be impossible to maintain that they were items on the civil list of Spain. Hence the contract was concerned only with private interest of the Crown, and as such was regulated not by international law, but by the rules of French civil law. Applying Article 14 of the French Civil Code, the plaintiffs were entitled to have this action heard before a French court, and the court was competent to take cognizance of the case. On appeal, by Isabelle de Bourbon, the Court of Paris, affirmed, in June 3, 1872, the judgment of the Civil Tribunal of the Seine, of March 19, 1872, which stated:¹¹⁸

“[...] — Attendu que tout Français a le droit de s’adresser aux tribunaux de son pays pour demander justice ; — Que ce droit, conséquence de la protection due aux nationaux par la puissance publique, est proclamé par l’art. 14 c. civ., d’après lequel l’étranger peut être traduit devant la justice française pour les obligations par lui contractées envers des Français même en pays étranger ; — *Que ce principe ne reçoit exception que dans les cas qui seraient expressément spécifiés par une loi précise ou par le droit international* ; [...]

[...] — Que dès lors, pour décliner la compétence du tribunal, il faudrait que l’ex-reine d’Espagne justifîât avoir acquis les objets figurant aux factures dont on poursuit le remboursement, en sa qualité de personne souveraine et au compte du Trésor espagnol, qui, dans cette hypothèse, se trouverait seul débiteur des frères Mellerio ; [...] — Attendue que cette prétention, loin d’être établie, est repoussée, par les révélations de la procédure ; [...].”

It was clear that no such fundamental distinction could be made in the case of States; whether the question involved a governmental activity or a purely civil relationship, the immunity of the States was equally secure.

— On March 3, 1875, in *Gouvernement Ottoman c. Comptoir d’escompte et consorts*,¹¹⁹ the Civil Tribunal of the Seine, concluded that a foreign State was not entitled to the benefits of the laws of France if it has bound itself to a contrary agreement. On the other hand, the defendants could claim such a protection to the extent of having the costs decreed against the State or requiring security to be given. In making a loan contract with certain bankers in Paris, the Ottoman Government stipulated certain

¹¹⁷ *Isabelle de Bourbon c. Mellerio*, C. de Paris, June 3, 1872, *Dalloz R.P.*, 1872, p. 124.

¹¹⁸ *Ibid.* [emphasis added].

¹¹⁹ *Gouvernement Ottoman c. Comptoir d’escompte et consorts*, Trib. civ. de la Seine, March 3, 1875, *Sirey*, 1877, p. 25.

conditions under which collateral put up by it might be liquidated in the event of default; no mention was made in the agreement that it shall be after a judicial process. According to Article 2078 of the Civil Code, a judicial decision was the prerequisite of any liquidation of collateral. When the Ottoman Government brought a suit against the bankers to have this rule of French law enforced in its own favour, in derogation of the conditions it had itself stipulated, the tribunal refused to grant its request. The Civil Tribunal of the Seine held that the defendant bankers had acted in accordance with the agreement, and that the agreement was not contrary to public policy, it thus should be enforced in France, although it was not in consonance with French law. The Civil Tribunal of the Seine said:¹²⁰

“[...] — Attendu, en droit, qu’il est de principe que toute personne privée qui traite avec un Etat, se soumet, par le seul fait de l’engagement qu’elle contracte, aux lois et à la juridiction de cet Etat ; — Que ce principe derive de l’indépendance réciproque des gouvernements qui ne pourraient être soumis contre leur gré aux lois et à la juridiction d’un gouvernement étranger, sans que les droits inhérents de leur autorité souveraine en fussent mis en péril ; — Attendu que par une conséquence nécessaire, tout Etat qui traite pour des intérêts de son gouvernement avec un citoyen français est présumé traiter sous l’empire de ses lois ; — Qu’à la vérité, il lui est loisible d’accepter la loi de son co-contractant ou de créer par la convention une loi particulière destinée spécialement à régir le contrat ; mais que si, par la convention, il s’est placé sous une loi spéciale, cette loi lui oblige seule, et qu’il peut en réclamer l’exécution en France ; — Que de même il doit se soumettre à la condition qu’il s’est faite par sa propre volonté, comme il se soumettrait à la loi générale de son pays ; mais qu’il ne peut alors répudier cette condition pour invoquer les dispositions de la loi française qui y seraient contraires et les faire prévaloir sur son engagement ; — Que cette règle qui tient aux principes fondamentaux du droit des gens, doit être maintenue toutes les fois que la loi créée par le contrat n’est pas en opposition avec une loi d’ordre public en France, et qu’elle peut être appliquée sans violer les principes essentiels du droit français ; [...]”

— In connection with two loans emitted by Peru in 1870 and 1872, the courts of France were held to be competent. *Dreyfus et al. c. Dreyfus frères*¹²¹ is a suit brought by certain holders of these bond issues, against the bankers, Dreyfus Brothers, who had floated the loan. The bankers were charged with liability either for personal engagements entered into with the plaintiffs, or by virtue of being consignees of the Peruvian guano, which secured the loan issues. The bondholders also demanded the attachment of all the guano in possession of Dreyfus Brothers, and subsidiary, showing

¹²⁰ *Ibid.* p. 26 [emphasis added].

¹²¹ *Dreyfus et al. c. Dreyfus frères*, Cour cass., 14 August, 1878, *Dalloz R.P.*, 1879, p. 57.

all the books of the proceeds of the sale of guano. The action was brought before the Civil Tribunal of the Seine which rejected the principal claims, but admitted the subsidiary one. On appeal by the defendants, they excepted to the jurisdiction of the French courts, but the Court of Appeal at Paris decided, on June 25, 1877, that the Peruvian Government was not a party to the suit, which were against Dreyfus Brothers in their personal capacity, and that the mere fact that condemnation of the latter in this suit might give them recourse against the Peruvian Government would not suffice to prevent the court from taking jurisdiction over the case:¹²²

“[...] — Considérant que la action formée contre eux par les intimés se fonde, indépendamment du mandat qu’ils ont reçu du gouvernement péruvien pour l’émission et le service des emprunts de 1870 et 1872, sur l’existence d’un engagement personnel qu’ils auraient contracté envers les créanciers, soit en vertu de convention, soit même par suite de quasi-délits ; — Que par sa cause comme par son objet, elle rentre dans la compétence des tribunaux français ; — Que le gouvernement péruvien n’y étant pas partie, les appelants ne peuvent invoquer, comme fin de non recevoir contre elle, *le principe du droit des gens qui consacre l’indépendance réciproque des Etats et s’oppose à ce que l’un d’eux usurpe contre l’autre un droit de juridiction à l’effet de connaître des actes et des engagements de ce dernier* ; — Que si l’exécution de leurs obligations prétendues et de la condamnation poursuivie contre eux est de nature à ouvrir en faveur des frères Dreyfus un recours contre le gouvernement péruvien, l’exercice éventuel de ce recours ne saurait exercer aucune influence soit sur la compétence des tribunaux français, soit sur la recevabilité de la demande, qui n’est dirigée que contre les appelants seuls, en leur qualité d’obligés personnels et directs ; [...].”

On the facts, the bankers were held to have entered into no personal engagements with the plaintiffs, but to have acted throughout as agents of Peru. In deciding whether the bankers have been acting in their personal capacities or within the scope of the authority delegated to them by the Peruvian Government, the Court of Appeal stated:¹²³

“[...] il importe d’apprécier d’abord le caractère et la portée des obligations que le gouvernement du Pérou a prises envers les prêteurs, ses créanciers ; que ces obligations sont précisées et définies dans les actes publics, qualifiés d’*obligation générale*, qui forment la loi du contrat entre l’Etat et les tiers ; [...] Considérant que, malgré les expressions souvent répétées d’engagements, d’affectation, d’assignation, d’hypothèque générale et spéciale, il est constant que le gouvernement péruvien n’a fait qu’obliger d’une manière générale, comme un débiteur ordinaire, au service de chacun de ses emprunts, les ressources et facultés qu’il désigne, sans exclure d’ailleurs celles de toute autre nature qui pourraient lui appartenir ; —

122 *Ibid.* [emphasis added].

123 *Ibid.* pp. 57, 58, 59 [emphasis added].

Que d'abord le caractère mobilier des choses offertes en garantie est exclusif de tout droit d'hypothèque, et que, quant au droit de gage, il n'a pas été lui-même régulièrement constitué, à défaut d'une mise en possession effective des créanciers, soit par eux-mêmes soit par représentants ; [...] ; — Que ces créanciers n'ont ainsi, dans les termes des obligations générales, qu'un droit de gage général et commun sur toutes les facultés de l'Etat péruvien, dont ils ont suivi la foi, et qui a lui-même placé les garanties offertes et les engagements contractés par lui sous la foi nationale ;

[...] — Que de l'ensemble de ces stipulations, il ne résulte évidemment aucune obligation directe et personnelle que les frères Dreyfus et comp. auraient contractée envers les créanciers du gouvernement péruvien de leur faire compte, comme s'ils avaient un droit réel de gage [...]

Considérant que dans l'émission et le service des emprunts les frères Dreyfus n'ont agi que comme mandataires et agents financiers du gouvernement du Pérou ; [...]

[...] — *Que ces tiers ne doivent s'en prendre qu'à eux-mêmes de n'avoir pas résisté à la tentation de gros intérêts et d'avoir imprudemment accordé leur confiance à un gouvernement étranger qui l'a trahie ; [...].*"

In August 14, 1878, this decision was approved by the Court of Cassation.¹²⁴

— On December 31, 1877, in *Péan c. de Rothschild*,¹²⁵ the Court of Paris held that the French bankers, who were in charge of paying certain bonds and exchanging titles of the Italian Government, in Paris, according to the conditions set up by the Italian legislation, are not prevented of so doing by the opposition formulated by a proprietary, to whom titles were diverted, where the Italian legislation prohibits, specifically, all challenges to the payment and circulation of these titles. The Court said:¹²⁶

"2. [...] les frères Rothschild ne sont que les agents, les préposés, et, à proprement parler, les caissiers du gouvernement italien, opérant d'ailleurs sous le contrôle d'un délégué le paiement des rentes italiennes à Paris ; qu'en cette qualité ils ne peuvent, vis-à-vis des porteurs de ces rentes, encourir d'autre responsabilité que celle pouvant résulter d'une comptabilité irrégulière, mais que leur responsabilité ne saurait être engagée dans des questions à débattre avec leur mandant, c'est-à-dire le gouvernement italien.

3.« mais considérant que la législation italienne sur les rentes au porteur les met aux risques et péril du propriétaire, et déclare expressément qu'il ne sera pas admis sur les inscriptions ni séquestre, ni empêchement, ni opposition d'aucune sorte ; qu'en payant, malgré l'opposition de Péan, les coupons, et en livrant les titres nouveaux, ils n'ont fait que se conformer aux obligations de leur mandat, et ne sont pas sortis de la situation acceptée par eux vis-à-vis du gouvernement italien.»"

¹²⁴ *Ibid.* p. 60.

¹²⁵ *Péan c. de Rothschild*, C. de Paris, December 31, 1877, *Jdip et jc (Chunet)*, Tome 5, 1878, p. 165.

— *Caratier-Terrasson c. Chemins de fer d'Alsace-Lorraine*,¹²⁷ is a case in which, initially, the Direction General of Railways of Alsace-Lorraine, was condemned to pay, in a suit for damages, the amount of Fr 1,399.10 to Sieur Terrasson, for the loss of certain goods. By virtue of that judgment, Sieur Terrason then seized money and property belonging to the Direction General of Railways of Alsace-Lorraine, in the Railway Station of Nancy. This judgment was afterwards validated by a decision of the Civil Tribunal at Nancy. But, on appeal, the Court of Appeal at Nancy, based on the fact that, by Imperial Order of December 9, 1871, the German Empire set up in Strasbourg, under the name of *Direction générale impériale*, an administration directly linked the office of the German Chancellor, holding the rights, obligations and qualities of the public administration, held: that “the revenues from and the equipment for the exploitation of the railways are belongings of the German Empire, and, as such, they cannot be subject to seizure;” that “it is inadmissible that certain tribunals authorise measures of execution, which constitute a violation of the independence of States”; and, that “it is inadmissible that in France third parties may seize, in order to ensure the execution of a judgment, revenues and property of a State, having a public destination”.¹²⁸ On May 5, 1885, the Court of Cassation rejected the *pourvoi en cassation* brought by the heirs of Sieur Terrasson, and confirmed the judgment of the Court of Appeal at Nancy, in the following terms:¹²⁹

“[...] — Attendu qu'il est de principe absolu en droit qu'il n'appartient pas à un créancier de l'Etat, même pour assurer l'exécution d'une condamnation judiciaire obtenue contre celui-ci, de faire saisir-arrêter, entre les mains d'un tiers, les deniers ou autres objets qui sont la propriété de l'Etat ; — Que cette règle doit recevoir son application, alors que le débiteur est un Etat étranger, et que les sommes ou effets saisis sont en France, comme dans l'espèce ; — Que, par suite, en le décidant ainsi, l'arrêt attaqué n'a violé aucune des dispositions légales visées au pouvo ;

Par ces motifs rejete.”

126 *Ibid.*, p. 166.

127 *Caratier-Terrasson c. Chemins de fer d'Alsace-Lorraine*, Cour cass., 5 May, 1885, *Dalloz R.P.*, 1885, p. 341.

128 *Ibid.*, pp. 341-342.

129 *Ibid.*, p. 343 [emphasis added].

— On April 21, 1886, the Court of Cassation determined a case, *Bernet et autres c. Herran, Dreyfus-Scheyer et autres*,¹³⁰ involving a loan not merely guaranteed, but issued by a foreign government. In 1874 and 1877, suits were brought against several banks that had negotiated a loan for the Republic of Honduras. The bonds became worthless, and the plaintiffs sued for the purchase price, alleging fraud. On March 21, 1878, the Civil Tribunal of the Seine rendered a decision rejecting the claims that the defendants were personally responsible *vis-à-vis* the plaintiffs for a series of acts amounting to a deceit at the time of issuing the bonds.

On appeal, the Court of Appeal, on February 26, 1880, found that the basis of the suit was a State loan emitted in the name and for the account of the Republic of Honduras; that the banks, named agents of the Government of Honduras, were constituted in the form of a committee of surveillance, and that for the acts undertaken in that capacity they could not be subjected to the jurisdiction of French courts, any more than the Government for which they were acting. Thus the Court of Appeal rejected the contention that they had contracted personal engagements toward the plaintiffs, holding that if the prospectus of the loan aimed to deceive, the fraud was a governmental act of an official agent of the Republic of Honduras; that for the review of such an act, the French courts were incompetent:¹³¹

“[...] considérant que l’emprunt dont il s’agit était un emprunt d’Etat, émis au nom et pour le compte du gouvernement de la République du Honduras ; que le caractère qui lui était ainsi attaché ne saurait être sérieusement contesté ; [...]

[...] — Considérant qu’étant ainsi établi ce qui précède que les membres de la commission n’ont tenu leur institution que du gouvernement du Honduras, qu’ils n’ont fonctionné que par sa volonté, en vertu de sa délégation, et en soumettant leurs actes à sa ratification, *il résulte du principe de l’indépendance réciproque des Etats que, pour lesdits actes accomplis dans l’exercice de ces fonctions, ils ne peuvent, pas plus que le gouvernement dont ils ont été les délégués, être soumis à la juridiction des tribunaux français, et que toute action intentée contre eux à ce sujet doit être déclarée non recevable ;*

Considérant qu’on ne saurait prétendre qu’en raison de cette même institution et de ces mêmes actes, lesdits membres de la commission de surveillance aient, en outre, contracté un engagement personnel envers les porteurs de l’emprunt ; qu’ils ne peuvent avoir été tout à la fois les délégués dépendants et subordonnés du gouvernement du Honduras et les mandataires responsables des obligataires ; que la double situation qu’on voudrait ainsi leur créer est inconciliable en fait aussi bien qu’elle est inadmissible

¹³⁰ *Bernet et autres c. Herran, Dreyfus-Scheyer et autres*, Cour cass., 21 April, 1886, *Dalloz R.P.*, 1886, p. 393.

en droit ; — Considérant, au surplus, que cet engagement personnel ne pourrait résulter que d'une convention ; [...]

[...] — Considérant que si les appelants peuvent prétendre que le prospectus de l'emprunt présentait des garanties trompeuses et contenait des réticences calculées, consistant à dissimuler le fait de l'emprunt précédemment émis en Angleterre sous l'affectation des mêmes hypothèques offertes de nouveau en France, il a été reconnu ci-dessus que ledit prospectus constituait un acte gouvernemental, accompli par le ministre plénipotentiaire de Honduras en sa qualité d'agent officiel de cet Etat : *qu'il s'ensuit que les tribunaux français sont sans compétence pour connaître de cet acte et pour apprécier les conséquences dommageables qu'il aurait ainsi entraînées, etc...*"

In April 21, 1886, the Court of Cassation affirmed that decision.¹³²

— On April 10, 1888, in *Rochaïd-Dahdah c. Gouvernement tunisien*,¹³³ the Civil Tribunal of the Seine held that the establishment of a Commission by the Bey of Tunis could not serve to withdraw the case from the jurisdiction of the French courts in favour of that Commission; that the parties having once submitted to its jurisdiction, that jurisdiction remained obligatory upon both parties.

This case was brought by Rochaïd-Dahdah against the Government of Tunis, in connection with the payment of certain bonds ("teskérés") issued by that Government through French banks under an agreement which stipulated, *inter alia*, that all disputes arising in connection therewith should be settled according to French law, more precisely, by the French tribunals of the department of the Seine, to which the parties agreed to grant jurisdiction for that purpose. Notwithstanding that provision, the Bey established a Special Commission for the management and control of his financial affairs, and claimed that Rochaïd-Dahdah renounced to the law and jurisdiction of the French courts by sending the bonds to be recorded in the Book of the Public Debt. The Civil Tribunal of the Seine held that where a foreign government has itself submitted to the jurisdiction of the French courts, such submission was held to be irrevocable as regards that issue; that the submission of one phase of a difficulty to settlement, in France, has been held to include a willingness to subject another phase of the same affair to settlement by an entirely different process. The Tribunal also held that there

131 *Ibid.* pp. 394-395 [emphasis added].

132 *Ibid.* p. 395.

133 *Rochaïd-Dahdah c. Gouvernement tunisien*, Trib. civ. de la Seine, April 10, 1888, *Jdip et jc (Chunet)*, Tome 15, 1888, p. 670.

was nothing to indicate that the Special Commission was invested with judicial powers, and that the fact that the plaintiff had permitted the Commission to list his holdings did not amount to a renunciation on his part to the jurisdiction of the French courts. The Tribunal declared itself competent.¹³⁴

– French courts went even further by deciding that the submission of an issue to a French arbitrator implied submission to the French judiciary of all questions connected with the execution of the award. On June 30, 1891, in *Héritiers Ben Aïad c. le Bey de Tunis*,¹³⁵ the Civil Tribunal of the Seine decided a case brought by the heirs of general Ben Aïad against the Bey of Tunis and the Tunisian Government for the payment of sums granted him by an arbitral award of Napoleon III on November 30, 1856. The Tribunal said that although one government could not be subjected to the jurisdiction of another, this principle gave way before a definite acceptance by that government of a jurisdiction foreign to it. When the Bey of Tunis, upon the occasion of certain difficulties with general Ben Aïad, asked Napoleon III to arbitrate the issue, he thereby accepted all the consequences, and renounced the privilege of invoking the immunities attached to his sovereignty in all that concerned the arbitration or the ensuing execution of the award. Hence, the Tribunal declared itself competent.

– On June 12, 1895, in *De Reilhac c. Comptoir national d'escompte*,¹³⁶ the First Chamber of the Tribunal of the Seine in an action by the bondholders of coupon-bonds (of a loan floated in 1832 by Dom Miguel) against the respondent bank, as agent of the Portuguese Government, held that funds belonging to a foreign State, in hands of a French, cannot be subject to measures of execution, without resulting thereby a violation to the sovereignty of that State. It also held that the only courts competent to entertain a suit against that foreign nation are its own courts; that, French tribunals, under a request of a bondholder, have no competence to decree the consignment of these funds. In the words of the Tribunal:¹³⁷

134 *Ibid.* p. 673.

135 *Héritiers Ben Aïad c. le Bey de Tunis*, Trib. civ. de la Seine, June 30, 1891, *Jdip et jc (Clunet)*, Tome 19, 1892, p. 952.

136 *De Reilhac c. Comptoir national d'escompte*, Trib. civ. de la Seine, June 12, 1895, *Jdip et jc (Clunet)*, Tome 40, 1913, p. 907.

137 *Ibid.*, pp. 907-908.

“Le Tribunal : — Attendu que cette demande est irrecevable; — Attendu, en effet, que le Comptoir National d’Escompte n’a jamais traité avec Reilhac, et qu’aucun lien de droit existe entre eux ; que le Comptoir d’Escompte ne saurait être assigné à fin de consignation des sommes qu’il a retenues sur l’emprunt des Tabacs, et sur lesquelles de Reilhac allègue avoir des droits, hors la présence du prétendu débiteur. L’Etat du Portugal qui a toujours refusé de reconnaître la validité de l’emprunt miguelliste de 1832, et contre lequel, à défaut de reconnaissance volontaire, le demandeur n’a pas fait établir son droit par les tribunaux portugais, seuls compétents pour trancher le différend existant entre lui et l’Etat du Portugal ; — Attendu, d’autre part, que les fonds dont de Reilhac demande le dépôt à la Caisse des consignations de Paris, et sur lesquels il entend poursuivre une contribution judiciaire, appartiennent à l’Etat portugais ; que le principe de la souveraineté des nations oppose à ce que les tribunaux français puissent ordonner aucune mesure d’exécution sur les deniers appartenant à des Etats étrangers, alors même qu’ils se trouvent en France aux mains de Français ; que les nations souveraines ne peuvent être soumises qu’à leurs propres juridictions pour les engagements qu’ils contractent ; que si l’article 14 du Code civil autorise à citer devant les tribunaux français l’étranger qui a contracté des obligations envers un Français, cet article ne porte aucune atteinte au principe du droit des gens ci-dessus rappelé ; qu’il a trait, en effet, qu’aux engagements privés contractés par des citoyens appartenant à des Etats différents, et non aux engagements auxquels un Etat étranger a pu se soumettre envers un Français ; — Par ces motifs, etc.”

— On April 30, 1912, in *Gamen Humbert c. Etat russe*,¹³⁸ the Court of Paris rendered a decision in a suit for the payment of damages brought by a French citizen, Mr. Humbert, for corporal injuries suffered as a result of an accident with a railway wagon belonging to the South East Russian Railways during the Universal Exposition of 1900. He first brought successfully a suit against the carrier, Mr. Portefaix, and the railway company, before the Civil Tribunal of the Seine, but the carrier was insolvent and the Russian company did not pay. Later on, he brought a suit against the Russian Government on the grounds that the railway company was a property of the Russian Government, but, on appeal, the 6th Chamber of the Court of Paris held that by virtue of the reciprocal independence of States, Mr. Humbert cannot cite the Russian State before a French tribunal. The Court said:¹³⁹

“[...] que, toutefois, la souveraineté des Etats, le principe de leur indépendance réciproque et leur autonomie absolue, s’opposent à ce que l’un d’entre eux soit soumis, contre son gré, à la décision de l’autorité judiciaire constituée dans un autre pays ; qu’il n’y a pas lieu de distinguer entre eux, comme pour les souverains qui peuvent abandonner une partie de leur fonction, la personnalité publique qui

¹³⁸ *Gamen Humbert c. Etat russe*, C. de Paris, 30 April, 1912, *Dalloz R.P.*, 1913, p. 201 [emphasis added].

¹³⁹ *Ibid.*, p. 202 [emphasis added].

échapperait à la compétence étrangère, de la personnalité morale qui s'y trouverait, au contraire, assujettie, tous les actes d'un Etat ne pouvant avoir qu'un but et qu'une fin toujours politiques et son unité résistant à ce dedoublement ; [...] — Considérant que Gamen Humbert, victime d'un accident, a obtenu de cette chambre de la cour d'appel de Paris, le 18 janv. 1903, un arrêt condamnant solidairement Portefaix et la Compagnie Sud-Est des chemins de fer de la Russie à lui payer une somme principale de 2,000 fr., ainsi qu'une rente annuelle et viagère de 360 fr., que prétendant que ladite compagnie était la propriété de l'Etat russe, il a assigné en responsabilité ce dernier devant le tribunal civil de la Seine, qui a rejeté sa demande faute de justifications suffisantes ; qu'il convient de maintenir cette décision, mais en déclarant l'action irrecevable ; — Par ces motifs, dit que Gamen Humbert ne pouvait valablement citer devant un tribunal français l'Etat russe, et que son action n'est pas recevable ; confirme, etc.'"

Summary of French practice. As previously stated, from the beginning of the 19th century until the inter-War period, almost all decisions by municipal courts in France confirmed, directly or indirectly, the complete immunity of foreign States *vis-à-vis* French courts.

In almost all reviewed cases foreign States maintained successfully a position of immunity from process. It did not matter whether they were acting in a private or a public capacity (*Balguerie c. Gouvernement Espagnol*¹⁴⁰). However, if once a foreign State admitted the jurisdiction of a French court, its submission was interpreted strictly in favour of the other party (*Gouvernement Ottoman c. Comptoir d'escompte et consorts*¹⁴¹, *Rochaïd-Dahdah c. Gouvernement tunisien*¹⁴², *Héritiers Ben Aïad c. le Bey de Tunis*¹⁴³).

French courts relied constantly on the principles of international law to deny a suit or to declare themselves incompetent (*Blanchet c. République d'Haïti*¹⁴⁴, *Ternaux-Gandolphe c. République d'Haïti*¹⁴⁵, *Solon c. Gouvernement Egyptien*¹⁴⁶, *Gouvernement Espagnol*

140 *Balguerie c. Gouvernement Espagnol*, C. de Paris, January 7, 1825, *Dalloz R.P.*, 1849, note at p. 5.

141 *Gouvernement Ottoman c. Comptoir d'escompte et consorts*, Trib. civ. de la Seine, March 3, 1875, *Sirey*, 1877, p. 25.

142 *Rochaïd-Dahdah c. Gouvernement tunisien*, Trib. civ. de la Seine, April 10, 1888, *Jdip et jc (Clunet)*, Tome 15, 1888, p. 670.

143 *Héritiers Ben Aïad c. le Bey de Tunis*, Trib. civ. de la Seine, June 30, 1891, *Jdip et jc (Clunet)*, Tome 19, 1892, p. 952.

144 *Blanchet c. République d'Haïti*, Trib. civ. du Havre, May 25, 1827, *Dalloz R.P.*, 1849, note at p. 6.

145 *Ternaux-Gandolphe c. République d'Haïti*, Trib. civ. de la Seine, Mai 28, 1828, *Dalloz R.P.*, 1849, note at p. 6.

*c. Lambège et Pujol*¹⁴⁷, *Porteurs de valeurs du Canal Cavour Co. c. Gouvernement Italien*¹⁴⁸, *Colin c. Bey de Tunisie*¹⁴⁹, *Min. public c. demoiselle Masset*¹⁵⁰, *Hérit. de l'empereur Maximilien c. Lemaître*¹⁵¹, *Caratier-Terrasson c. Chemins de fer d'Alsace-Lorraine*¹⁵², *Bernet et autres c. Herran, Dreyfus-Scheyer et autres*¹⁵³, *De Reilhac c. Comptoir national d'escompte*¹⁵⁴, *Gamen Humbert c. Etat russe*¹⁵⁵). Also, to admit claims against the agents bankers, in their personal capacity (*Dreyfus et al. c. Dreyfus frères*¹⁵⁶), or to reject claims against them (*Péan c. de Rothschild*¹⁵⁷, *Bernet et autres c. Herran, Dreyfus-Scheyer et autres*¹⁵⁸), or to declare themselves competent after founding that the debt contract was one concerned only with private interest (*Isabelle de Bourbon c. Mellerio*¹⁵⁹).

d) United States. From the end of the 18th century until the inter-War period, in the 20th century, the courts of the United States confirmed the common law rule that States (confederate or foreign) cannot be sued without their consent. This rule was in harmony with the Eleventh Amendment to the Constitution of the United States, entered into effect on January 8, 1798, which stated that “[t]he judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another States, or by citizens

146 *Solon c. Gouvernement Egyptien*, Trib. civ. de la Seine, April 16, 1847, *Dalloz R.P.*, 1849, note at p. 7.

147 *Gouvernement Espagnol c. Lambège et Pujol*, Cour cass., January 22, 1842, *Dalloz R.P.*, 1849, p. 5.

148 *Porteurs de valeurs du Canal Cavour Co. c. Gouvernement Italien*, Trib. com. de la Seine, April 7, 1867, *Dalloz R.P.*, 1867, note at p. 49.

149 *Colin c. Bey de Tunisie*, Trib. civ. de la Seine, May 1, 1867, *Dalloz R.P.*, 1867, p. 49.

150 *Min. public c. demoiselle Masset*, C. de Paris, August 23, 1870, *Dalloz R.P.*, 1871, p. 9.

151 *Hérit. de l'empereur Maximilien c. Lemaître*, C. de Paris, March 15, 1872, *Dalloz R.P.*, 1875, p. 24.

152 *Caratier-Terrasson c. Chemins de fer d'Alsace-Lorraine*, Cour cass., 5 May, 1885, *Dalloz R.P.*, 1885, p. 341.

153 *Bernet et autres c. Herran, Dreyfus-Scheyer et autres*, Cour cass., 21 April, 1886, *Dalloz R.P.*, 1886, p. 393.

154 *De Reilhac c. Comptoir national d'escompte*, Trib. civ. de la Seine, June 12, 1895, *Jdip et jc (Clunet)*, Tome 40, 1913, p. 907.

155 *Gamen Humbert c. Etat russe*, C. de Paris, 30 April, 1912, *Dalloz R.P.*, 1913, p. 201.

156 *Dreyfus et al. c. Dreyfus frères*, Cour cass., 14 August, 1878, *Dalloz R.P.*, 1879, p. 57.

157 *Péan c. de Rothschild*, C. de Paris, December 31, 1877, *Jdip et jc (Clunet)*, Tome 5, 1878, p. 165.

158 *Bernet et autres c. Herran, Dreyfus-Scheyer et autres*, Cour cass., 21 April, 1886, *Dalloz R.P.*, 1886, p. 393.

159 *Isabelle de Bourbon c. Mellerio*, C. de Paris, June 3, 1872, *Dalloz R.P.*, 1872, p. 124.

and subjects of any foreign State". Despite that the citizens from the States of the Union were precluded to sue other States (confederate or foreign), some attempts to circumvent these rules were nevertheless made later on, and some States of the Union were sued in the United States courts. As to foreign States, during this period, no one was sued in the United States courts; to certain extent this was because of the dissuading effect of these rules, but, mostly, for the simple reason that the United States was not yet a foreign capital exporting country, holding interests abroad; on the contrary, the States of the Union were still foreign capital importing countries; so far, their bond issues of before 1860 were largely negotiated abroad, especially in the London market, and only their bond issues from 1860 onwards were sold mainly in the domestic markets, especially in New York, but were also partly negotiated abroad. Afterwards, when many of these States repudiated their debts,¹⁶⁰ by subsequent acts of their legislatures, no one ever attempted to sue, and seize their property, in the domestic courts of other countries.

The following are the main cases dealing with our subject (the recovery of State external debts), and its related issues (broadly speaking, money judgments against a defendant State), during that period.

— On February 18, 1793, in *Chisholm v. Georgia*,¹⁶¹ the Supreme Court of the United States held that a State may be sued by an individual citizen of another State and that in such a suit judgment may be entered in default of an appearance. This was an action of *assumpsit* brought by a citizen of South Carolina for the recovery of a debt against the State of Georgia. The State of Georgia did not officially appear, but it was submitted on its behalf a written objection and protestation against the exercise of jurisdiction in that cause.

On the question of jurisdiction, the main subject-matter posed before the Court, the Justices who delivered opinion held unanimously that the judicial power of the Supreme Court extended to controversies between two or more States, and between a State and citizens of another State; the State of Georgia, being not a sovereign ("as to the purposes of the Union"), was amenable to the jurisdiction of the Court. On the matter of the claim

¹⁶⁰ After the disastrous experience of the civil war and consequent economic crisis, "[t]he period of reconstruction in the South furnished both reason and excuse for repudiation": cf. RANDOLPH Bessie C., *op. cit.*, p. 74.

of a debt against a State, while all the Justices who expressed opinion assumed that Georgia was liable to such action of *assumpsit*, Mr. Justice Jay expressed a reservation:¹⁶²

“I am far from being prepared to say, that an individual may sue a State on bills of credit issued before the constitution was established, and which were issued and received on the faith of the State, and a time when no ideas or expectations of judicial interposition were entertained or contemplated. [...]”

On the same subject, Mr. Justice Iredell was more explicit. He declared that suing a State for the payment of money, although a justiciable matter in its nature, was nonetheless an action without a remedy:¹⁶³

“None can, I apprehend, be directly claimed but in the following instances. 1st. In case of a contract of a legislature itself. 2d. In case of a contract with the executive, or any other person, in consequence of an express authority from the legislature. 3d. In case of a contract with the executive, without any special authority. In the first and second cases, *the contract is evidently made on the public faith alone*. Every man must know that *no suit lie against a legislative body*. His only dependence, therefore, can be, that the legislature, on principles of public duty, will make a provision for the execution of their own contracts, and if that fails, whatever reproach the legislature may incur, *the case is certainly without remedy in any of the courts of the State*. [...] In the third case, a contract with the governor of a State, without any special authority. [...] A governor of a State is [...] without power to effect one shilling of the public money, but as he is authorized under the constitution, or by a particular law; [...] therefore, all who contract with him, do it at their own peril, and are bound to see (or take the consequence of their own indiscretion) that he has strict authority for any contract he makes. Of course such a contract, when so authorized, will come within the description I mentioned, of cases where *public faith alone is the ground of relief*, and the legislative body, the only one that can afford a *remedy, which, from the very nature of it, must be the effect of its discretion, and not of any compulsory process*. [...]”

— *Ware v. Hylton*,¹⁶⁴ was an action of debt brought by a British creditor against an American debtor to recover upon a bond executed (before the war and declaration of independence of the United States) in pursuance of an act to sequester British property passed by the Assembly of Virginia on October 20, 1777, by which the American debtor was discharged from his British creditor by paying a part of the debt into the Loan

161 *Chisholm v. Georgia*, 2 Dall. 419.

162 *Ibid.*, p. 478.

163 *Ibid.*, p. 445 [emphasis added].

164 *Ware v. Hylton*, 3 Dall. 199.

Office of Virginia, in which he obtained a certificate from the commissioners, and a receipt from the Governor and the Council of Virginia.

The main questions of the case were: Whether the Definitive Treaty of Peace, done at Paris, between Great Britain and the United States, on September 3, 1783, revived the creditor's right to recover it against the original debtor (Virginia claimed that the treaty did not remove the bar to the recovery of the debt imposed by the act of its Assembly). And whether it intended to annul the law passed by Virginia, and destroyed the rights acquired under it? Article 4 of the peace treaty provided that "[...] creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts, heretofore contracted." The case was brought in 1796 to the Supreme Court of the United States by a writ of error from the Circuit Court of the District of Virginia.

The Supreme Court, after great consideration, reversed the judgment of the lower court, and the Justices delivered their opinions, *seriatim*; thus Mr. Justice Chace stated that:¹⁶⁵

"If the treaty had been silent as to debts, and the law of Virginia had not been made, *I have already proved that debts would, on peace, have revived by the law of nations*. This alone shows that the only impediment to the recovery of the debt in question, is the law of Virginia, and the payment under it; and the treaty relates to every kind of legal impediment.

But it is asked, did the 4th article intend to annul a law of the state? And destroy rights acquired under it? I answer that the 4th article did intend to destroy all lawful impediments, past and future; and that the law of Virginia, and the payment under it, is a lawful impediment; and would bar a recovery, if not destroyed by this article of the treaty.

This stipulation could not intend only to repeal laws that created legal impediments, to the recovery of the debt (without respect to the mode of payment) because the mere repeal of a law would not destroy acts done, and rights acquired, under the law, during its existence and before the repeal. This right of repeal was only admitted by the council for the defendants in error, because a repeal would not affect their case; but on the same ground that a treaty can repeal a law of the state, it can nullify it. I have already proved, that a treaty can totally annihilate any part of the Constitution of any of the individual states, that is contrary to a treaty. It is admitted that the treaty intended and did annul some laws of the states, to wit, any laws, past or future, that authorised a tender of paper money to extinguish or discharge the debt, and any laws, past or future, that authorised the discharge of executions by paper money, or delivery of property at appraisement; because if the words *sterling money* have not this effect, it cannot be shown

¹⁶⁵ *Ibid.*, pp. 242-243 [emphasis added].

that they have any other. If the treaty could nullify some laws, it will be difficult to maintain that it could not equally annul others.

It was argued, that the 4th article was necessary to revive debts which had not been paid, as it was doubtful, whether debts not paid would revive on peace by the law of nations. I answer, that the 4th article was not necessary on that account, because there was *no doubt that debts not paid do revive by the law of nations*; as appears from Bynkershock, Lee, and Sir Thomas Parker. And if necessary, this article would not have this effect, because it revives no debts, but only those to which some legal impediment might be interposed, and there could be no legal impediment, or bar, to the recovery, after peace, of debts no paid, during the war to the state.

[...] The article relates to either to debts not paid, or, to debts paid into the treasuries, or loan offices. It has no relation to the first, for the reasons above assigned; and if it does not include the latter it relates to nothing.”

Mr. Justice Paterson said:¹⁶⁶

“I feel no hesitation in declaring, that it has always appeared to me to be incompatible with the principles of justice and policy, that contracts entered into by individuals of different nations, should be violated by their respective governments in consequence of national quarrels and hostilities. National differences should not affect private bargains. The confidence, both of an individual and national nature, on which the contracts were founded, ought to be preserved inviolate. [...] *The relation, which the parties stood in to each other at the time of contracting these debts, ought not to pass without notice.* The debts were contracted while the creditors and debtors were subject of the same king, and children of the same family. They were made under the sanction of laws common to, and binding on, both. A revolution-war could not, like other wars, be foreseen or calculated upon. [...] *Contracts entered into in such state of things ought to be sacredly regarded. Inviolability seems to be attached to them.* Considering then the usages of civilized nations, and the opinion of modern writers, relative to confiscation, and also the circumstances under which these debts were contracted, *we ought to take the expressions in this fourth article in their most extensive sense.*”

Mr. Justice Iredell, having taken part in the decision of the Circuit Court, autoexcluded from voting, but nevertheless delivered his opinion in support of the judgment of the lower court. Other Justice, Mr. Wilson, said:¹⁶⁷

“[...] even if Virginia had the power to confiscate, the treaty annuls the confiscation. The fourth article is well expressed to meet the very case: it is not confined to debts existing at the time of making the treaty; but it is extended to debts *heretofore contracted*. It is impossible by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital. Independent, therefore, of the

¹⁶⁶ *Ibid.*, p. 255 [emphasis added].

Constitution of the United States, (which authoritatively inculcates the obligation of contracts) the treaty is sufficient to remove every impediment founded on the law of Virginia. The State made the law; the State was a party to the making of the treaty: a law does nothing more than express the will of a nation; and the treaty does the same.

Under this general view of the subject, I think the judgment of the Circuit Court ought to be reversed.”

Mr. Justice Cushing was also of opinion that the judgment of the Circuit Court ought to be reversed.

– *The Exchange v. McFaddon*,¹⁶⁸ is a case involving a “very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States?”¹⁶⁹ On March 3, 1812, Chief Justice Marshall, delivering the opinion of the Supreme Court of the United States said:¹⁷⁰

“This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to the another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another [...].”

Though this case does not relate to a judicial action of collection of a State debt, however, this is a leading case of the nineteenth century on territorial jurisdiction and on the rule of sovereign immunity, in which future decisions relating to the collection of State debts were to be relied upon.

– On March 3, 1821, in *Cohens v. Virginia*,¹⁷¹ a case of a writ of error to a judgment rendered by the court of Husting for the borough of Norfolk against the defendant State, on “an information for selling lottery-tickets contrary to an act of the legislature of Virginia”,¹⁷² which involved, *inter alia*, the question of whether the jurisdiction of the Supreme Court is excluded by the character of the parties (one of

167 *Ibid.*, p. 281.

168 *The Exchange v. McFaddon*, 7 Cranch 116.

169 *Ibid.*, p. 135.

170 *Ibid.*, p. 137.

171 *Cohens v. Virginia*, 6 Wheat. 264.

them being a State, and the other a citizen of that State); Chief Justice Marshall, delivering the opinion of the Supreme Court of the United States, stated:¹⁷³

“It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehension that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases: and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding the cause. *Those who were inhibited from commencing a suit against a State, or prosecuted one which might be commenced before the adoption of the amendment, were person who might probably be its creditors.* There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.’ [...]”

The Court also held that the “universally received opinion is, that no suit can be commenced or prosecuted against the United States; [and] that the judiciary act does not authorize such suits.” However, it further clarified that “[i]f this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted ‘by a citizen of another state, or by a citizen or subject of any foreign state’. It is not then within the amendment, but it is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.”¹⁷⁴

— On December 1850, in *Woodruff v. Trapnall*,¹⁷⁵ the Supreme Court of the United States held that although a State has the right to repeal a contract made with the holders of the notes of a bank owned and guaranteed by it, which enable the bearers, or *bona*

172 *Ibid.*, p. 373.

173 *Ibid.*, p. 406 [emphasis added].

174 *Ibid.*, p. 412.

175 *Woodruff v. Trapnall*, 10 U.S. 190.

fide holders, to pay the State any debt they may owe it in the paper of the bank, it stated that “the notes in circulation at the time of the repeal are not affected by it. The holder may still claim the right, by the force of the contract, to discharge any debt he may owe to the State in the notes thus issued.”¹⁷⁶

This case was one of a collection of a debt brought before the Pulaski Circuit Court by the Attorney-General of the State of Arkansas against the principal and sureties upon an official bond executed by the Treasurer of the State, under the alleged breach that he did not pay over to his successor a certain amount of money. A judgment of recovery was thus issued for \$3,359.22 and costs, but, in the course of the execution the plaintiff tendered to the defendant in error the full amount of the judgment, interest, and costs, in the notes of the Bank of the State of Arkansas, which were refused on the ground that the defendant was not authorized to receive them in satisfaction of the judgment, because the section 28 of the bank charter, under which alone the plaintiff could claim a right so to satisfy the judgment, was repealed by an act of the legislature approved on January 10, 1845.

The case was then brought up, by writ of error, from the Supreme Court of Arkansas to Supreme Court of the United States, who held that the undertaking by the State of Arkansas to receive the notes of the bank constituted a contract (within the meaning of the Constitution of the United States, which prohibits a State from impairing the obligations of a contract) between the State and the holders of these notes, which the State was not at liberty to break, although notes issued by the bank after the repeal were not within the contract, and might be refused by the State. The Court said:¹⁷⁷

“The power of the legislature to repeal the section, the stock of the bank being owned by the State, is not controverted; but that act cannot affect the notes in circulation at the time of the repeal. [...] It would be a most unwise policy for a State to improve its currency through a violation of its contracts. In such a course, the loss of the State would be incomparably greater than its gains. [...]

Whatever may be the demerits of the plaintiff in error, they do not affect the nature and extent of the obligation of the State. And that obligation cannot be withdrawn from this paper. Into whosoever hands it shall come, it carries with it the pledge of the State to receive in payment of its debts. In this case the payment is made by the securities of Woodruff, and exacted by the State, to whose organization and

176 *Ibid.*, p. 205.

177 *Ibid.*, pp. 207-208 [emphasis added].

management of the bank may be attributed its insolvency. In procuring the notes of the bank, these securities had a right to rely, and no doubt did rely, upon the guarantee of the State to receive them in payment of debts. [...] For the reasons stated, the judgment of the Supreme Court is reversed, and the cause is remanded for further proceedings to that court, [...].”

– On December 1850, in *Reeside v. Walker*,¹⁷⁸ the Supreme Court of the United States held that where the United States were the plaintiffs in an action in which they claimed to have overpaid the defendant, and a verdict was rendered that they were instead indebted to the defendant for the amount of \$188,496.06, and an application for a *mandamus* was made to compel the Secretary of the Treasury Department of the United States, Robert J. Walker, to credit the defendant upon the books of the Treasury with the amount of the verdict and to pay the same, the *mandamus* was properly refused by the Circuit Court, because 1) this only lies “against a ministerial officer to do some ministerial act connected with the liabilities of the government, yet it must be where the government itself is liable, and the officer himself has improperly refused to act”,¹⁷⁹ that 2) no judgment of indebtedness existed against the United States; and that 3) there is no law, general or special, requiring him to enter such claims as these on the books of the Treasury Department, or to pay them. The Court also stated that:¹⁸⁰

“It is well settled, too, that *no action of any kind can be sustained against the government itself, for any supposed debt, unless by its own consent*, under some special statute allowing it, which is not pretended to exist here. [cited: *Briscoe v. Kentucky Bank*, 11 Pet. 321; 4 How. 288; 9 How. 389].

The sovereignty of the government not only protects it against suits directly, but against judgments even for costs, when it fails in prosecution [cited: 4 How. 288].

Such being the settled principle in our system of jurisprudence, it would be derogatory to the courts to allow the principle to be evaded or circumvented.

They could not, therefore, permit the claim to be enforced circuitously by *mandamus* against the Secretary of the Treasury, when it could not be directly against the United States; and when no judgment on and for it had been obtained against the United States.”

– On December 1857, in *Beers v. State of Arkansas*,¹⁸¹ three actions (afterwards classed together) were brought in the Circuit Court for Pulanski County to recover the interest due on various bonds issued by the State of Arkansas, which the State had failed

178 *Reeside v. Walker*, 11 How. 271.

179 *Ibid.*, p. 288.

180 *Ibid.*, p. 289 [emphasis added].

to pay according to the loan contracts. While the actions were pending the legislature of Arkansas passed an act allowing the State to be sued upon the State bonds. The act provided that “in every case in which suits or any proceedings had been instituted to enforce the collection of any bond or bonds issued by the State, or the interest thereon, before any judgment or decree should be rendered, the bonds should be produced and filed in the office of the clerk, and not withdrawn until final determination of the suit or proceedings, and full payment of the bonds and all interest thereon; and might then be withdrawn, cancelled, and filed with the State treasurer, by order of the court, but not otherwise.” The act further provided that if the bonds were not produced in court, the suit, proceedings, or cross bill, will be dismissed. Afterwards, the State appeared to the suit, by its attorney, and, without pleading to or answering the declaration of the plaintiff, moved the court to require him to file immediately in open court the bonds on which the suit was brought. The suitor refused to file his bonds and the suit was dismissed. Before the Supreme Court of the State the judgment of the lower court was affirmed. Then the case was brought to the Supreme Court of the United States, but was dismissed for want of jurisdiction. Mr. Justice Taney, delivering the opinion of the Supreme Court held:¹⁸²

“It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.”

On the objection that the law was passed after the suit was instituted, and that it contained regulations with which the plaintiff could not conveniently comply, he stated that the permission to bring the suit was not a contract whose obligations were impaired by the passage of the subsequent law. He said:¹⁸³

[...] the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privileged of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further

181 *Beers v. State of Arkansas*, 20 How. 527.

182 *Ibid.*, p. 529 [emphasis added].

provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were pending.”

– On October 1880, in *Meriwether v. Garrett*,¹⁸⁴ the Supreme Court of the United States declared that “generally everything held for governmental purposes, cannot be subjected for the payment of the debts of the city. That its public character forbids such an appropriation.”¹⁸⁵ It also held that private property cannot be subjected to the payment of the debts of the city, except through taxation, but since the power of taxation is legislative, it cannot be exercised otherwise than under the authority of the legislature.

The facts arising from several cases were as follows: the city of Memphis, in the State of Tennessee, was burdened with many debts and was pursued by her creditors. On January 29, 1879, the State interfered and took the control and custody of her public property. Afterwards, it assumed the collection of the taxes levied and their application to the payment of her indebtedness. Through a series of legislative acts, Tennessee also directed that the judgments of payment against the city cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Robert Garret, and others, filed a suit for the payment of certain overdue and unpaid bonds and coupons amounting to more than \$100,000, for the institution of a special levy of taxes, pursuant to the writs of *mandamus* issued, and by reason of the city’s neglect and failure to levy more taxes, for a constitution of a trust fund for the purpose of payment of these judgments, and for the appointment of a receiver to take charge of these assets (the receiver entrusted with exceptional power was Mr. Meriwether). The plaintiffs also alleged the invalidity of the acts passed.

On the more general question of applying property held by municipal corporations to the payment of its debts, Mr. Chief Justice Waite, delivering the conclusions reached by the Supreme Court, said:¹⁸⁶

183 *Ibid.*, pp. 529-530.

184 *Meriwether v. Garrett*, 102 U.S. 472.

185 *Ibid.*, p. 501.

186 *Ibid.*, p. 513.

“[...] *it is not property held in trust for the public*, for of such property the corporation is the mere agent of the State. [...] *it holds them for public use, and to no other use can they be appropriated without special legislative sanction*. It would be a perversion of a trust to apply them for other uses. [...]”

On the question of collecting taxes for the payment of judgments against municipal corporations, he said that:¹⁸⁷

“[...] we say that *taxes previously levied, but not collected* on the dissolution of the corporation, *do not constitute its property*; and in the absence of statutory authority *they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation*. Taxes are not debts. [...] *Debts are obligations for the payment of money founded upon contracts, express or implied*. [...]”

[...] When they are collected, the moneys in the hand of the collecting officer may be controlled by the process of the courts, and applied by their direction to the uses for which the taxes were levied; but until then there is nothing in existence but a law of the State imposing certain charges upon persons or property, which the legislature may change, postpone, or release, at any time before they are enforced. [...]”

The Court also noted that “the courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation”,¹⁸⁸ because the levying of taxes is not a judicial, but a sovereign act of the legislature, to be performed upon considerations of policy, necessity, and the public welfare. Moreover, on the matter of the remedy of the creditors, the Court held that:¹⁸⁹

“When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by *mandamus* against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but *if those authorities possess no such power*, or their offices have been abolished and the power withdrawn, *the remedy of the creditors is by an appeal to the legislature*, which alone can give them relief. [...]”

The Court found untenable the theory contained in the decree of the Circuit Court which adjudged that “all the property within the limits of the territory of the City of Memphis is liable, and may be subjected to the payment of all the debts”, because “the private

187 *Ibid.*, pp. 513, 515 [emphasis added].

188 *Ibid.*, p. 515 [emphasis added].

189 *Ibid.*, p. 519 [emphasis added].

property of the inhabitants of a municipal body cannot be subjected to the payment of its debts, except by way of taxation".¹⁹⁰

— On October 1880, in *Louisiana v. New Orleans*,¹⁹¹ the Supreme Court of the United States held that an Act by the State requiring the registry of judgments claiming the payment of money or seeking to enforce the recovery of a debt does not impair the obligation of contracts nor does it deprive the executor of the remedy of *mandamus*.

This was a case of collection of a debt in which two judgments of execution amounting to \$170,000, besides costs, were issued against the City of New Orleans and were thereafter returned *nulla bona* (unsatisfied) by reason of the refusal of the officers of the City to provide for the payment. The relator in charge of the execution of the judgments subsequently prayed for an order upon the mayor and administrators to show cause why a writ of *mandamus* should not issue to compel them to levy and collect a tax to satisfy the judgements. The Third District Court of the Parish of Orleans granted the order to show cause, but the respondents filed a peremptory exception to the relator's demand denying that he was entitled to the relief prayed. After that, the District Court granted the writ, which, on appeal to the Supreme Court of the State, was reversed and a decree entered dismissing the petition. The case was then brought before the Supreme Court of the United States.

Here the City authorities resisted the demand of the relator for the *mandamus*, on the ground that he has not registered his judgments as required by the provisions of the Act No. 5 of 1870. The Supreme Court, after finding that nothing impeded the collection of the relator's judgments, or prevented his resort to other remedies, if the payment by means of the registry was not obtained, held that "[t]he registry is a convenient means of informing the city authorities of the extent of the judgments, and that they have become executory, to the end that proper steps may be taken for their payment. It does not impair existing remedies. [...] If such a warrant, when obtained, be not paid, or provision be not made for its payment upon the meeting of the city council, the relator can pursue further remedies for the collection of his judgments."¹⁹²

190 *Ibid.*

191 *Louisiana v. New Orleans*, 102 U.S. 203.

192 *Ibid.*, p. 207.

– On October 1882, in *Louisiana v. Jumel* and *Elliott v. Wiltz*,¹⁹³ the Supreme Court of the United States held that a State cannot be sued in the courts of the United States by a citizen of another State.

In this case, the plaintiffs (Elliott, Gwynn, and Walker, holders and bearers of bonds and unpaid coupons to the amount of \$98,900) brought in the State court of Louisiana a suit for a *mandamus*, against the auditor and treasurer of the State and other members of the board of liquidation (of the new bonds for the old), requiring them to apply and pay the funds in the treasury derived from the taxes levied or to be levied for the retirement of the bonds, and to execute, according to its intent and purpose, the Act No. 3 of 1874, of the legislature of Louisiana, which provided for the consolidation of certain bonds of the State, for the purpose of reducing the floating and bonded debt. The suit was afterwards removed into the Circuit Court for the Eastern District of Louisiana against the same defendants; here the plaintiffs applied for an injunction forbidding them to recognize as valid an Ordinance of the State of Louisiana that forbade the payment of the interest due January, 1880, and withdrew from the officers of the State the means of carrying her contract into effect; they also prayed for the full execution of the said Act and the constitutional amendment, of the State of Louisiana, adopted in 1874, which provided that “[t]he issue of the State bonds [...] is hereby declared to create a valid contract between the State and each every holder of said bonds, which the State shall by no means and in no wise impair. [...] The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation and appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury.”¹⁹⁴

The Circuit Court denied the relief prayed and stated that the respondents “had no relation to the funds collected, or to be collected, except as such officers; [...] by the organic law of the State under which their offices were created and exist, the provisions

193 *Louisiana v. Jumel*, 107 U.S. 711.

194 *Ibid.*, p. 714.

of which constitute their sole mandate, are prohibited from so doing.”¹⁹⁵ It also concluded that the State was the party, which, by its action had rendered the execution of its contract impossible, that the question presented was political rather than judicial, and could not be adjudicated without calling the State to the bar of the court. The two suits were considered together as they presented substantially the same questions.

On appeal, the Court held that the money in the State treasury is the property of the State; “[t]rue, the money was raised to pay this particular class of debts, and the agreement was that it should not be used for any other purpose; but, notwithstanding this, the State has undertaken to appropriate it to defray the expenses of the government. In this way the State has violated its contract, and, if it could be sued, might perhaps be made to set aside its wrongful appropriation of the money already in hand, and raise more by taxation, if necessary.”¹⁹⁶ The Court held that, as the defendants were constitutional officers of the State of Louisiana, who were merely obeying the positive orders of the supreme political power of the State, it found that the execution of the contract could not be enforced, nor the relief sought be awarded, in a suit to which the State is not a party. The Court also found that the State treasurer holds the money of the State not in trust for her creditors, but as the agent of the State, and “[i]f there is any trust, the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders.”¹⁹⁷

Mr. Justice Field, in his dissenting opinion, criticised the Court for recognizing that, in fact, it had no power to halt the repudiation by the State of her engagements. The new Constitution, he said, “in these provisions, is a repudiation of the act of 1874 and of the constitutional amendment of that year, and is a direct violation of the inhibition of the Federal Constitution against the impairment of the obligation of contracts.”¹⁹⁸

195 *Ibid.*, p. 719.

196 *Ibid.*, pp. 720-721.

197 *Ibid.*, p. 723.

198 *Ibid.*, p. 733.

– On March 5, 1883, in *New Hampshire and New York v. Louisiana*,¹⁹⁹ the Supreme Court of the United States held that under the operation of the Eleventh Amendment to the Constitution of the United States (entered into effect on January 8, 1798) States were precluded to assume the collection of the debts of its citizens from other States of the Union.

In these suits the States of New York and New Hampshire brought each a separate action, in equity, against the State of Louisiana and its officers of the board of liquidation, for the collection of a debt (consolidated unpaid bonds, on assignment for the purposes of their collection by the States). The Court determined, “beyond all doubt”, that New York and New Hampshire were “nothing more nor less than mere collecting agents” of the owners of the bonds and coupons, and “while the suits are in the name of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them.”²⁰⁰

As the Amendment in question established that: “The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another States, or by citizens and subjects of any foreign State”, individuals were clearly precluded from prosecuting these suits in their own name; but as to the States bringing their claims on their behalf (for both States contended that they were “sovereign and trustee of its citizens” and that they were “clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former”), the Court stated:²⁰¹

“All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of States of the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, ‘enter into any agreement or compact with another State.’ Art. 1, sec. 10, cl. 3.

199 *New Hampshire and New York v. Louisiana*, 108 U.S. 76.

200 *Ibid.*, p. 89.

201 *Ibid.*, pp. 90-91 [emphasis added].

But it is said that, even if a State, as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another State by force, it got in lieu the constitutional right of suit in the national courts. *There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation.* [...] the evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, and in our opinion, one State cannot create a controversy with another State [...] by assuming the prosecution of debts owing by the other State to its citizens.”

– On December 10, 1883, in *Canada Southern Railway Co. v. Gebhard*,²⁰² the Supreme Court of the United States held that it would not regard as impairing the obligation of a contract if a “plan of adjustment” is done by virtue of a statute of the United States, enacted under the provisions of the Constitution conferring power to establish uniform laws on the subject of bankruptcy; the Court also held that “every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.”²⁰³

The suits were brought by certain citizens of the State of New York, holders of mortgage bonds, and of extension bonds, of the Canada Southern Railway Company, to recover on their extension bonds and past due coupons of their mortgage bonds. The railway company pleaded, as a defence, a “scheme of arrangement” (binding upon all the bondholders and shareholders of the company, entered into and confirmed by the “Canada Southern Arrangement Act, 1878”), and at the trial tendered the new bonds in exchange for the old. The Circuit Court for the Southern District Court of New York decided that the scheme of arrangement was not a bar to the actions, and gave judgments in each of them against the company for the full amount of the extension bonds and coupons sued for. To reverse these judgments writs of error were brought.

202 *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527.

203 *Ibid.*, p. 537.

The Supreme Court of the United States reversed the judgments and instructed to enter judgment in favour of the railway company in each of the cases. Mr. Chief Justice Waite, delivering the opinion of the Court said:²⁰⁴

“There is no constitutional prohibition in Canada against the passage of laws impairing the obligation of contracts, and the Parliament of the Dominion of Canada had, in 1878, exclusive legislative authority over the corporation and the general subjects of bankruptcy and insolvency in that jurisdiction. [...]

Hence it seems to eminently proper that where the legislative power exists some statutory provision should be made for binding the minority in a reasonable way by the will of the majority [...] *when insolvency is threatened, and the interest of the public, as well as creditors, are imperilled by the financial embarrassment of the corporation, a reasonable ‘scheme of arrangement’ may, in our opinion, as well be legalized as an ordinary ‘composition in bankruptcy’.* In fact such ‘arrangement acts’ are a species of bankrupt acts. Their object is to enable corporations created for the good of the public to relieve themselves from financial embarrassment by appropriating their property to the settlement and adjustment of their affairs, so that they may accomplish the purposes for which they were incorporated. [...]

What is needed is to bind those who are abroad. Under these circumstances *the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.*”

Mr. Justice Harlan, in his dissenting opinion, said that this would amount to repudiation; “the discharge in Canada, by statute, of this foreign railway company from all obligation to pay these bonds according to their terms—whatever may be the binding force of such legislation upon persons resident in that country, or upon those who may assert their rights under the original contract in the courts of Canada—can have no extraterritorial effect; [...]”;²⁰⁵ he also argued that the principle of comity operates only when neither the State nor its citizens would suffer any inconvenience from the application of the foreign law.

— In *United States v. North Carolina*,²⁰⁶ decided on May 19, 1890, an action was brought by the United States against North Carolina to recover interest on bonds issued by North Carolina. The Supreme Court of the United States confirmed the common law rule that a State is not liable to pay interest on its debts, unless its consent to do so has

²⁰⁴ *Ibid.*, pp. 532, 535, 359 [emphasis added].

²⁰⁵ *Ibid.*, p. 544.

²⁰⁶ *United States v. North Carolina*, 136 U.S. 211.

been manifested by an act of its legislature, or by a lawful contract of its executive officers.

In this case the payment of the bonds was demanded and refused several times in the years 1884 and 1885. Subsequently, in 1889, all coupons upon the bonds were paid, and \$147,000 was paid upon account of whatever might then remain due upon the bonds. The United States then contended that interest had accrued upon the principal of the bonds since their maturity, and such payment still left unpaid upon the debt the sum of \$41,280. North Carolina argued that no interest had accrued upon the principal of the bonds after their maturity, and therefore such payment was in full of such debt.

The case was determined upon its merits and judgment was rendered for the State. Mr. Justice Gray, delivering the opinion of the Court held that:²⁰⁷

“Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, *as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by lawful contract of its executive officers.*”

— On November 29, 1897, in *Underhill v. Hernandez*,²⁰⁸ a claim for the payment of an indemnity for damages, the Circuit Court of Appeals held that the Circuit Court for the Second Circuit was justified in concluding that 1) “the acts of the defendant were the acts of Venezuela, and as such are not properly the subject of adjudication in the courts of another government” [cited: 26 U.S. App. 573],²⁰⁹ and that 2) “[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.”²¹⁰

²⁰⁷ *Ibid.*, p. 216 [emphasis added].

²⁰⁸ *Underhill v. Hernandez*, 168 U.S. 250 (on certiorari to the United States Court of Appeals for the Second Circuit).

²⁰⁹ *Ibid.*, p. 252.

In this case the suit was brought by George F. Underhill, a citizen of the United States, against General Hernandez, the chief commander of the revolutionary army in ciudad Bolivar, whose government (the Crespo Government) was, after success, formally recognized by the United States as the legitimate government of Venezuela. Underhill sued Hernandez to recover damages caused by the refusal to grant the passport, for alleged confinement of him to his own house, and for alleged assaults and affronts by Hernandez's soldiers. He had applied for a passport to leave the city, which Hernandez refused, in order to coerce him to operate his waterworks system and his machinery-repair business for the benefit of the community and the revolutionary army forces. The Circuit Court ruled that, upon the facts, the plaintiff was not entitled to recover on the ground that the acts of the defendant were those of a military commander of a *de facto* government in the prosecution of a war (he thus was not civilly responsible therefore); it also took into consideration that the defendant's purpose (to coerce him to operate his waterworks system and his machinery-repair business for the benefit of the community and the revolutionary army forces) was not sufficient to warrant a finding by the jury that the defendant was actuated by malice or any personal or private motive.

— On December 8, 1899, in *Hassard v. United States of Mexico*,²¹¹ an action for attachment by John G. Hassard against the Republic of Mexico and the States of Tamaulipas and San Luis Potosi, to secure payment of \$3,075,000, with interest at 7 per cent from September 1, 1865, alleged to be the sum due upon 3,075 bonds of the amount of \$1,000 each, issued by the defendants on July 1865, the Supreme Court of New York, deciding under a motion made by the United States Attorney for the Southern District of New York following the instructions made by the Attorney-General of the United States to vacate the attachment obtained by the plaintiff against the defendants upon the ground that this court has no jurisdiction of the subject-matter, held, that State courts have no jurisdiction against a foreign sovereign State or a political subdivision thereof. The Supreme Court of New York said:²¹²

“That the court is without jurisdiction seems to be a proposition beyond serious dispute. The principal defendant is an independent sovereign nation, having treaty relations with this country, and the other

210 *Ibid.*

211 *Hassard v. Mexico*, 61 N.Y. Supp. 939.

212 *Ibid.*, pp. 939-940 [emphasis added].

defendants are subordinate divisions thereof. *It is an axiom of international law of long-established and general recognition that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission.* [...] So far as this doctrine is applied to foreign powers, it is based upon sound considerations of international comity and peace, [...] So far as jurisdiction is concerned, there is no difference between suits against a sovereign directly and suits against its property. [...].”

– In *United States v. Michigan*,²¹³ decided on June 1, 1903, the United States filed a bill in equity against the State of Michigan for an accounting and a recovery of money arising from the surrender, by the State of Michigan, of the St. Mary’s River Canal to the Federal Government. The United States sustained that the intention for the granting of lands to Michigan, for the purpose of enlarging the canal, was to create a trust of which the State of Michigan was the trustee. The defendant filed a demurrer substantially for want of equity and denied the existence of a trust. Mr. Justice Peckham, delivering the opinion of the Supreme Court, made the following statement:²¹⁴

“We are of opinion that the bill shows a cause of action against the State of Michigan as trustee, and its liability to pay over the surplus moneys, (if any,) which upon an accounting it may appear have arisen from the sale of the granted lands, over and above all costs of the construction of the canal and the necessary work appertaining thereto, and the supervision thereof, together with the surplus money arising from the tolls collected, which latter sum by the demurrer is admitted to amount to \$68,927.12. This sum the United States in substance (especially in the fourth paragraph of the bill) admits is all that is due from the State on account of such tolls. [...].”

– On February 1, 1904, in an action for the collection of a debt brought by the State of South Dakota against the State of North Carolina (*South Dakota v. North Carolina*),²¹⁵ the Supreme Court of the United States ordered the State of North Carolina to pay \$27, 400 to the State of South Dakota. The Court decided:²¹⁶

“A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars (\$27,400), (no interest being recoverable, *United States v. North Carolina*, 136 U.S. 211), and that the same are secured by one hundred shares of the stock of the North Carolina Railway Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before

213 *United States v. Michigan*, 190 U.S. 379.

214 *Ibid.*, p. 405.

215 *South Dakota v. North Carolina*, 192 U.S. 286.

216 *Ibid.*, pp. 321-322 [emphasis added].

to the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the Marshall of this court, directing him to sell at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol Building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington.”

In delivering the opinion of the Court, Mr. Justice Brewer said that “[t]he title of South Dakota is as perfect as though it had received these bonds from North Carolina. We have, therefore, before us the case of a State with an unquestionable title to bonds issued by another State, secured by a mortgage of railroad stock belonging to that State, coming into this court and invoking its jurisdiction to compel payment of those bonds and a subjection of the mortgaged property to the satisfaction of the debt.”²¹⁷ This was a case in which the amount due on the bonds and coupons were secured by 100 shares of the North Carolina Railroad Company, belonging to the State of North Carolina, but the defendant objected to the title of South Dakota to the bonds, for they were given as a gift by certain private individuals, with the clear intention of their collection by South Dakota, in view of the fact that they could not maintain a suit against a State on these bonds (they were advised that suits against a State upon the claims of private individuals were absolutely prohibited by the Eleventh Amendment, but that such a suit could be maintained by another State, or by a foreign one). On this assertion the Court found that the bonds were “not held by the State [of South Dakota] as representative of individual owners, as in the case of *New Hampshire v. Louisiana*, 108 U.S. 76, for they were given outright and absolutely to the State. [...] the motive with which a gift is made, whether good or bad, does not affect its validity or the question of jurisdiction. This has been often ruled.”²¹⁸

As to the question of its jurisdiction upon the subject matter of the claim, the Court said:²¹⁹

“The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the thing in controversy. Obviously, too, the subject-matter is one of judicial cognizance. *If anything can be considered as justiciable it is a claim for money due on a written promise to pay.* [...]”

²¹⁷ *Ibid.*, p. 312.

²¹⁸ *Ibid.*, p. 310.

The present claim is one ‘directly affecting the property rights and interests of a State.’ [...] *A claim for money due being a controversy of a justiciable nature, and one of the most common of controversies, would seem to naturally fall within the scope of the jurisdiction thus intended to be conferred upon the Supreme Court.*”

The Court went on to explain that, after *Chisholm v. Georgia*, where it was held that a citizen of the United States might maintain in this Court an action of *assumpsit* against another State, the “Eleventh Amendment was adopted, which provides that ‘the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.’” To explain that the Eleventh Amendment did not affect the jurisdiction of the Court over controversies between two or more States, the Court quoted, *inter alios*, Chief Justice Marshall in *Cohens v. Virginia* (February 1821), [cited: 6 Wheat. 264, 406] where it was held that that case was governed entirely by the Constitution as originally framed and not by the 11th amendment.²²⁰

Summary of the U.S. practice. By the end of the 18th century, the Supreme Court of United States held that a State can be sued by an individual citizen of another State and that in such a suit judgment may be entered in default of an appearance (*Chisholm v. Georgia*²²¹). This rule was almost immediately modified by the 11th Amendment to the Constitution of the United States, which precluded the citizens of the Union to sue States (confederate or foreign).

In spite of this, some attempts to circumvent the 11th Amendment under different claims were made afterwards, as in *Cohens v. Virginia*²²², where the Supreme Court held that the “universally received opinion is, that no suit can be commenced or prosecuted against the United States; [and] that the judiciary act does not authorize such suits”; and, in *New Hampshire and New York v. Louisiana*²²³, where the Supreme Court held that there was “no principle of international law which makes it the duty of one

219 *Ibid.*, pp. 312, 314 [emphasis added].

220 *Ibid.*, pp. 315-316. [see *Cohens v. Virginia*, 6 Wheat. 264, 406 at p. 62]

221 *Chisholm v. Georgia*, 2 Dall. 419.

222 *Cohens v. Virginia*, 6 Wheat. 264.

223 *New Hampshire and New York v. Louisiana*, 108 U.S. 76.

nation to assume the collection of the claims of its citizens against another nation. [...] the evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, and in our opinion, one State cannot create a controversy with another State [...] by assuming the prosecution of debts owing by the other State to its citizens". The 11th Amendment was further clarified in *South Dakota v. North Carolina*²²⁴, where the Supreme Court of the United States held that controversies between the States of the Union are governed entirely by the Constitution and not by the 11th Amendment.

By the end of the 19th century until the inter-War period, in the 20th century, the United States courts confirmed the common law rules that confederate or foreign States cannot be sued by citizens without their consent (*Reeside v. Walker*²²⁵, *Beers v. State of Arkansas*²²⁶, *Meriwether v. Garrett*²²⁷, *Louisiana v. Jumel* and *Elliott v. Wiltz*²²⁸), nor they were liable to pay interest in their debts without their consent (*United States v. North Carolina*²²⁹).

In general, during this period, only a few foreign States were sued in the United States courts (*Underhill v. Hernandez*²³⁰, *Hassard v. United States of Mexico*²³¹), to a great extent because of the dissuading effect of these rules, but also by the fact that the United States was not until the end of the 19th century a foreign capital-exporting country holding interests abroad.

B. Recourse to diplomatic intervention for the recovery of State external debts

As a result of the general principle of incompetence of domestic tribunals to adjudicate upon claims brought by private individuals against foreign States, and the lack of

²²⁴ *South Dakota v. North Carolina*, 192 U.S. 286.

²²⁵ *Reeside v. Walker*, 11 How. 271.

²²⁶ *Beers v. State of Arkansas*, 20 How. 527.

²²⁷ *Meriwether v. Garrett*, 102 U.S. 472.

²²⁸ *Louisiana v. Jumel*, 107 U.S. 711.

²²⁹ *United States v. North Carolina*, 136 U.S. 211.

²³⁰ *Underhill v. Hernandez*, 168 U.S. 250 (on certiorari to the United States Court of Appeals for the Second Circuit).

effective legal remedies to recover State debts, a partially accepted doctrine emerged; it held that State debts are “debts of honour”.²³² According to it, as no compulsory process was possible against debtor States, in the eventuality of a judgment delivered holding a foreign State liable on the bonds, its execution, however, rested on the good faith of the debtor State.²³³

Before such a situation, individual creditors started to press their governments to intervene on their behalf, at the diplomatic level. However, this method of collection of foreign debts was, in the beginning, not fully accepted. In January 1848, for example, Lord Palmerston, in a much-quoted circular to the British representatives abroad, stated his rationale for intervention on this subject:²³⁴

“Her Majesty’s Government *had frequently had occasion* to instruct her Majesty’s representatives in various foreign States *to make earnest and friendly, but not authoritative representations, in support of the unsatisfied claims of British subjects who are holders of public bonds and money securities* of those States.

As some misconception appears to exist in some of those States with regard to the just right of her Majesty’s Government to interfere authoritatively, if it should think fit to do so, in support of those claims, I have to inform you, as the representative of her Majesty in one of the States against which British subjects have such claims, *that it is for the British Government entirely a question of discretion, and by no means a question of International Right, whether they should or should not make this matter a question of diplomatic negotiation.* If the question is to be considered simply in its bearing upon International Right, there can be no doubt whatever of the perfect right which the Government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the Government of another country, or any wrong which such foreign Government those subjects may have sustained; and if the Government of one country is entitled to demand redress for any one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the Government of another country, the right so to require redress cannot be

231 *Hassard v. Mexico*, 61 N.Y. Supp. 939.

232 “C’est donc, en fait tout au moins, une obligation d’une nature exceptionnelle et *sui generis*, en quelque sorte une *dette d’honneur*, que l’Etat débiteur doit s’acquitter s’il ne veut se déshonorer, et voir son crédit disparaître”: cf. POLITIS Nicolas E., *op. cit.*, pp. 16, 217-227. See also IMBERT Henri Marc, *op. cit.*, pp. 1, 60-99. A “debt of honour”, in this context, was “only, a moral, and not a legal obligation”, see BORCHARD Edwin M., *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, 1919, p. 304 [hereinafter: BORCHARD Edwin, *Diplomatic Protection*, 1919].

233 “If there were still any doubt as to the impracticability of relief by suit against a foreign government in municipal courts, it would be dispelled by the certainty that execution of the judgment, even if obtainable, is practically impossible. No legal process lies against the property of a foreign State, and even the jurisdictional distinction made by some courts between acts *jure imperii* and *jure gestionis* is disregarded in the matter of execution”: see BORCHARD Edwin M., *ibid.*, p. 307.

234 PHILLIMORE Sir Robert, *op. cit.*, pp. 9-11 [emphasis added].

diminished merely because the extent of the wrong is increased, and because instead there being one individual claiming a comparatively small sum, there are a great number of individuals to whom a very large amount is due.

It is therefore simply a question of discretion with the British Government whether this matter should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations.

It has hitherto been thought by the successive Governments of Great Britain undesirable that British subjects should invest their capitals in foreign loans to foreign Governments instead of employing it in profitable undertakings at home; and *with a view to discouraging hazardous loans to foreign Governments*, who may either be unable or unwilling to pay the stipulated interests thereupon, the British Government has hitherto thought *it is the best policy to abstain from taking up as International Questions the complaints* made by British subjects against foreign Governments which have failed to make good their engagements in regard to such pecuniary transactions.

For *the British Government has considered that the losses of imprudent men who have placed mistaken confidence in the good faith of foreign Governments, would prove a salutary warning to others, and would prevent any other foreign loans being raised in Great Britain, except by Governments of known good faith and of ascertained solvency.* But nevertheless, it may happen that the loss occasioned to British subjects by the non-payment of interest upon loans made by them to foreign Governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it may become the duty of the British Government to make these matters the subject of diplomatic negotiation.

In any conversation which you may hereafter hold with the –Ministers upon this subject, you will not fail to communicate to them the views which her Majesty’s Government entertain thereupon, as set forth in this despatch. I am, &c. PALMERSTON”

Generally, by the middle of the 19th century the governments of the “major powers were highly skeptical of the wisdom of international lending.”²³⁵ During those years, despite that there were “various instances of unofficial and even direct diplomatic interference,”²³⁶ the Government of Great Britain rarely accepted to espouse claims arising out of unpaid bonds held by British subjects and to intervene on their behalf for the payment of these debts. For instance, on April 26, 1871, a high official of the Foreign Office, in answer to a request for intervention, wrote a letter to the Secretary of the Council of Foreign Bondholders stating that:²³⁷

²³⁵ HOEFLICH Michael H., “Historical Perspectives on Sovereign Lending”, *Sovereign Lending: Managing Legal Risk* (ed. by M. Gruson and R. Reisner), 1984, p. 22.

²³⁶ PHILLIMORE Sir Robert, *op. cit.*, p. 13.

²³⁷ “The interests of the debt of Colombia and Ecuador, for example, have been allowed to be paid through the British Ministers accredited to those States”, *ibid.*, pp. 12-13 [emphasis added].

“[...] Her Majesty’s Government are in no way party to private loan transactions with foreign States. *Contracts of this nature rests only between the Power borrowing and the capitalists who enter into them as speculative enterprises, and who are content to undertake extraordinary risks in the hope of large contingent profits.* [...] her Majesty’s Government have determined, as a matter of wise policy, to abstain from taking up as international questions the complaints of British subjects against foreign States which fail to make good their engagements in regard to such pecuniary transactions; or to interpose, except by good offices, between Bondholders and the States by which they may be wronged.

Her Majesty’s Government will, however, be at all times ready to give their unofficial support to Bondholders in the prosecution of their claims against defaulting States; and such parties may always count upon the moral influence of this country being exerted, though unofficially, on their behalf; but the parties must not expect that forcible measures, such as reprisals, and still less any of a more decidedly warlike character, will ever be resorted to by her Majesty’s Government in support of their claims.”

The foreign offices of the other European powers were also cautious²³⁸ and self-restrained from protecting their citizens, as against foreign States, except in cases of claims arising out of violations of “ordinary contracts”²³⁹ or flagrant violations of international law. Other reasons by which major powers hesitated to intervene on behalf of their nationals, apart from that mentioned by Lord Palmerston (“hazardous loans to foreign Governments”) were, that: (i) foreign loans were recognized, in theory and in practice, as “sovereign acts”, for they were acts emanating from independent and sovereign legislatures, and this was a common feature in debtor as well as in creditor countries;²⁴⁰ and that (ii) in general, they refused to be regarded by their citizens as international debt collectors.

In the beginning, diplomatic interventions were presented on the basis of international comity, often calling to “the honour” of the parties. Moreover, unofficial good offices, by consular and diplomatic representatives abroad, were available to promote amicable settlements. Gradually, however, with the increase of its use and a body of precedents, it became customary, for protecting States, to demand relief as a matter of legal right. This

²³⁸ In 1832, for example, notwithstanding the formal requests made by the French bondholders of the *Emprunt Dom Miguel*, the French Government did not exert any pressure over the Portuguese Government; see CALVO Charles, *Le droit international théorique et pratique*, Tome I, 1896, p. 252.

²³⁹ The governments of major powers distinguished three classes of contractual claims: 1) claims arising out of contracts concluded between individuals who are citizens of different countries; 2) those arising out of contracts between the citizen and a foreign government; and 3) claims arising out of unpaid bonds of a foreign government held by a citizen of another. The latter was not considered an “ordinary contract” but a “hazardous loan contract”. This distinction was important for the interposition of a government; see BORCHARD Edwin, *Diplomatic Protection*, 1919, p. 281.

²⁴⁰ See, *inter alios*, VAN PRAAG L., *Jurisdiction et droit international public*, mai 1915, p. 621.

practice was encouraged by the conclusion of treaties containing provisions recognizing the right of each contracting party to protect the life and property of their nationals in the territory of the other; this right included the settlement of all claims of one party as against the other (e.g., the Jay Treaty of 1794 between Great Britain and the United States, included the settlement of claims for confiscated debts).²⁴¹

Diplomatic protection then became a common feature in international economic relations, partly because it proved that it could be effective as a means for the settlement of all kind of contractual claims, including those arising out of foreign lending, and partly because the major powers found in this new (practical) method of collection of pecuniary claims an important policy instrument for the implementation of their foreign policies, for it could help to broaden their sphere of influence over other nations, and, simultaneously, help to advance their countries' commercial interests.²⁴² Subsequently, these governments started to treat the claims of their nationals as a violation of their legal rights, and justified their interpositions by appealing to principles of international law and the writing of publicists.

a) Vattel's doctrine. By using Vattel's thesis that an injury to a State's national is an injury to the State itself (in fact, a corollary of the State's general duty to protect its nationals), the European powers, and later, the United States, found a convenient legal justification for intervening abroad. Vattel said:²⁴³

"Whoever wrongs the State, violates its rights, disturbs its peace, or injures it in any manner whatever becomes its declared enemy and is in a position to be justly punished. Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must

²⁴¹ Article 6 of the Treaty of Amity, Commerce and Navigation between Great Britain and the United States, signed at London, 19 November 1794, in: PARRY Clive, *The Consolidated Treaty Series*, 1969, Volume 52 (1793-1795), pp. 249-253.

²⁴² "The function of the modern State is to safeguard the rights and advance the interest of its subjects": cf. BORCHARD Edwin M., "The Question of the Limitation of Protection by Contract between the Citizen and a Foreign Government or by Municipal Legislation", *ASIL Proc.*, 1910, p. 46.

²⁴³ DE VATTEL Emeric, *The Law of Nations or the Principles of Natural Law*, Carnegie Institution of Washington, Volume Three, 1916 (translation of the edition of 1758), p. 136 [Book Two, Chapter VI]. In French, *ibid.*, *Le droit des gens ou principes de la loi naturelle*, Carnegie Institution of Washington, Washington, Volume One, 1916, p. 309 [Livre II, Chapitre VI]; see also, DUNN Frederick Sherwood, *The Protection of Nationals: A Study in the Application of International Law*, 1932, p. 48; and, BORCHARD Edwin M., "Protection diplomatique des nationaux à l'étranger", *Annuaire IDI*, Session de Cambridge, juillet 1931, p. 257.

avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.”

This theory was subsequently refined in order to assure compliance with what came to be known as the “international minimum standard”²⁴⁴ of *traitement*, *i.e.*, the standard of substantive and procedural treatment that aliens purportedly should receive in “civilized” States, and which they should receive abroad, under international law. Besides, certain formal requirements evolved, which were designed to discard claims of lesser merit, such as requirements of a bond of nationality, or showing that the espousal of the claim would not adversely affect the national policy, and of evidence that claimants had sought in good faith to obtain relief in the courts of the offending States, or some flagrant violation of international law.²⁴⁵

b) The non-intervention doctrine. During these years, however, it soon became apparent that, diplomatic protection was a practice which strong countries only resorted to against the weak ones, and never against each other; that practice was often abused by the major powers;²⁴⁶ and, that, if left unrestrained, it may lead to the loss of territory either to a European power or to the United States. For these reasons, mainly, the Latin American countries claimed that foreign powers should not interfere in the suits of their citizens, in foreign countries, nor to grant them their protection, save in cases of denial

²⁴⁴ “The establishment of the limit of rights which the State must grant the alien is the result of an operation of custom and treaty, and is supported by the right of protection of the alien’s national State”: *cf.* BORCHARD Edwin, *Diplomatic Protection*, 1919, p. 39.

For an extensive account of diplomatic interventions and its effectiveness as a means to recover State debts, as well as other pecuniary claims, during the 19th century, see: IMBERT Henri Marc, *op. cit.*, pp. 60-99; and POLITIS Nicolas, *op. cit.*, pp. 228-267.

²⁴⁵ Because of the controverted positions set forth in the theory and practice of diplomatic protection, we confine ourselves to the subject-matter of our work and put aside the many important legal questions raised by this institution.

²⁴⁶ For instance, the trade blockade of Greece, by England, in 1850, gave rise to concern by the other major powers. To seek compensation for losses to the private property sustained by Daniel Pacifico, an English/Portuguese subject, resulting from a riot, in Athens, when he was in charge of the General Consulate of Portugal, Lord Palmerston dispatched a warship and imposed a blockade to intimidate the Greek Government. However, the results of an inquiry showed that Mr. Pacifico did not sustain any prejudice; he was nevertheless granted an indemnity of £150; see *Claims of Mr. Pacifico upon the Portuguese Government*, Report of May 5, 1851, of the Mixed Commission under the Convention of 1850 between Great Britain and Greece, *Hertslet’s Commercial Treaties*, Vol. IX, 1856, pp. 501-503 ; in French: *Affaire Pacifico* (Grande Bretagne, Grèce), 5 mai 1851, *Recueil des arbitrages internationaux* (ed. by A.G. de Lapradelle et N. Politis), Tome 1er: 1798-1855, 1905, pp. 580-597. Lord Palmerston’s foreign policy was known as “gunboat diplomacy” and he used military reprisals and the navy in almost all his dealings.

of justice or where the decision was clearly and palpable unjust, or in cases where their citizens, or foreigners in general, had been discriminated against.

Given the frequent occasions under which the Latin American countries were compelled to pay indemnities for injuries to foreigners, they started a practice, which tended to oust the exercise of diplomatic intervention by foreign powers. The quintessence of the doctrine of non intervention, as developed by the Latin Americans, was embodied in the “Calvo Clause” which could be stipulated as follows: “[...] the parties agree that *disputes shall be decided by the judicial [or ‘ordinary’] tribunals of the Republic*”; that “with respect to the claims or complaints of individuals [...] *their diplomatic agents shall not intervene* except in case of a denial of justice [...]; or, after all the legal remedies have been exhausted, for express violation of treaties existing between the Contracting Parties, or of the rules of public and private international law generally recognized by civilized nations.”²⁴⁷

As regards State debts and pecuniary claims in general, Carlos Calvo, a great authority in his time (and later as well), not only opposed to diplomatic intervention, but also to military intervention. He wrote:²⁴⁸

“§ 205. A côté de mobiles politiques, les interventions ont presque toujours eu pour prétexte apparent des lésions d'intérêts privés, des réclamations et des demandes d'indemnités pécuniaires en faveur de sujets ou même d'étrangers dont la protection n'était la plupart de temps nullement justifiée en droit strict. [...] [...] en droit international strict *le recouvrement de créances et la poursuite de réclamations privées ne justifient pas ‘de plano’ l'intervention armée des gouvernements*, et que, comme les Etats européens suivent invariablement cette règle dans leurs relations réciproques, il n'y a nul motif pour qu'ils ne se l'imposent pas aussi dans leurs rapports avec les nations du Nouveau Monde.”

As it gradually became clear that diplomatic interposition alone will never suffice to solve all their claims,²⁴⁹ the foreign offices of the major powers considered other means

²⁴⁷ GARCIA-AMADOR F.W., “Calvo Doctrine, Calvo Clause”, *Ency. PIL* (dir. by R. Bernhardt), Vol. 8, 1981, pp. 62-64 [emphasis added]; LIPSTEIN K., “The Place of the Calvo Clause in International Law”, *BYBIL*, Vol. XXII, 1945, p. 131. See also, *inter alios*, SHEA Donald R., *The Calvo Clause, A Problem of Inter-American and International Law and Diplomacy*, 1955, p. 22.

²⁴⁸ CALVO Charles, *op. cit.*, pp. 350-351 [emphasis added].

²⁴⁹ Indeed, it never proved entirely satisfactory to private creditors. Regarding the limitations of diplomatic protection, Professor Borchard observed: “La protection diplomatique n'est pas un moyen propre à redresser tous les torts et à rendre justice dans tous les cas. C'est une forme restreinte de procédure internationale, destinée à rétablir l'ordre légal dans certaines conditions seulement, à savoir des

of settling the pecuniary claims of their nationals abroad. A combination of the recourse to *ad hoc* tribunals,²⁵⁰ with extraterritorial jurisdiction, and the use of force, or threats of its use, was therefore implemented.

C. The use of force as an effective means for the recovery of State external debts

Examples of use of force, or threats of its use, carried out by the Great Powers, during the 19th and the earlier 20th centuries, to support the pecuniary claims of their nationals, abounded.²⁵¹ For the purposes of our work, however, it will suffice to mention that this practice had many-fold purposes. It served, *inter alia*: 1) generally, as a method to compel the payment of the pecuniary claims of their nationals whether arising out or not of contracts, or torts; 2) as a means for securing compliance of the settlement agreements; and 3) as a pretext for territorial conquests,²⁵² financial or political control, and other foreign policy purposes.

From the numerous cases of concrete military action and display of force, it will be enough to refer to the one which brought a major change in the law of the recovery of State debts, and in the *jus ad bellum*. This is the case of the blockade of Venezuela by Germany, Great Britain, and Italy from December 1902 to February 1903.

conditions légales dont l'Etat demandeur et l'Etat défendeur ont le droit d'invoquer l'existence." cf. BORCHARD Edwin, *Protection diplomatique des nationaux*, p. 275.

²⁵⁰ It has been suggested that, "had the practice of diplomatic protection not developed as a legal institution, some Latin-American countries would have had to pay much higher penalties than they did for the injuries and losses sustained by foreigners within their borders. While that institution did not always operate in the manner which Latin-American writers approved, it unquestionably served to delay or discourage the resort to forceful action by stronger States [...] so long as it was possible to place the discussion of responsibility on the ground of law, the defendant nation could always appeal to arbitration as a last resort": see DUNN Frederick S., *op. cit.*, pp. 57-58.

²⁵¹ For an extensive account of military actions and display of force, see BORCHARD Edwin M., *State Insolvency and Foreign Bondholders*, Vol. I, 1951, p. 269 [hereinafter: BORCHARD Edwin, *State Insolvency*, 1951]. See also, IMBERT Henri Marc, *op. cit.*, pp. 60-99; and POLITIS Nicolas, *op. cit.*, pp. 60-99.

²⁵² As regards the territorial conquests, "[t]he existence of the Monroe doctrine undoubtedly served to discourage the resort to territorial conquests by European States as a means of bringing order and security in the more disturbed regions of South America. However, it was not interpreted, at least in the last century, to bar forceful intervention to compel the fulfilment of international obligations, so long as acquisition of territory was not contemplated. It was likewise no bar to conquest by the United States.": see DUNN Frederick S., *op. cit.*, p. 57.

The facts of this case were as follows: the claims arose out of injuries to foreigners and their property, some tortious, some merely civil war losses, breaches of contract, and seizures of vessels. In September 1902, certain British bondholders asked that their demands for a settlement with Venezuela be joined to the other claims and pressed. To the various offers of arbitration made by the claimant Powers, Venezuela replied, basically, in these terms: 1) that these were matters for the domestic courts; 2) that the general principle of equality between nationals and foreigners precluded diplomatic interposition for the settlement of these claims; and, 3) counter-argued, for instance, to the German Empire, that it had settled its claims against Colombia by accepting to apply the domestic laws of that country. As Venezuela maintained its position the Powers gave first an ultimatum,²⁵³ and then proceeded to bombard La Guaiara, Maracaibo, and Puerto Cabello; established a rigorous blockade of the coast, and seized the Venezuelan fleet and customs-offices until the Venezuelan Government was disposed to settle all their claims.²⁵⁴

The intervention in Venezuela had the desired effect. President Castro entrusted United States' Minister Bowen to conduct the negotiations in Washington on behalf of Venezuela. Although bond claims in this conflict played a minor part, the settlement included a bond arrangement, some small cash payments for what the intervening powers considered their first-line claims, and the setting up of ten arbitration commissions not only for solving the claims of the nationals of the intervening powers, but also for those of the United States, France, Holland, Belgium, Spain, Mexico, and Sweden and Norway.²⁵⁵ When the intervening powers demanded priority for the

²⁵³ President Theodore Roosevelt probably encouraged this intervention. In his statements before the United States Congress, in December 3, 1901, and, in December 2, 1902, he declared that the Monroe Doctrine was not designed to enable the Latin American countries to escape their legal obligations or sanctions for offenses, so long as intervention do not take the form of acquisition of territory by any non-American power; see DE BUSTAMANTE Y SIRVÉN Antonio S., *La Seconde Conférence de la Paix*, 1909, Chap. III (Le recouvrement coercitif des dettes nationales), p. 80; see also, BORCHARD Edwin, *State Insolvency*, 1951, p. 271; and SILAGI Michael, "Preferential Claims Against Venezuela Arbitration", *Ency. PIL* (dir. by R. Bernhardt), Vol. 2, 1981, pp. 234-235.

²⁵⁴ For a detailed account of the facts of the blockade of Venezuela, see BASDEVANT Jules, "L'action coercitive Anglo-Germano-Italienne", *RGDIP*, Tome XI, 1904, pp. 362-458. For the facts prior to the intervention, see "Chronique des faits internationaux", *RGDIP*, Tome II, 1895, pp. 344-354. See also, BORCHARD Edwin, *State Insolvency*, 1951, pp. 270-271.

²⁵⁵ "In general, private claims of a pecuniary nature against Latin American States may be classified as follows: 1, Claims arising from acts of violence or oppression, such as cruel treatment, false imprisonment expulsion or mob violence; 2, those based on losses sustained during civil war and insurrection; 3, those based upon contract, consisting for the most part of claims of bondholders and

payment of their claims, the United States protested; but, in an arbitration held at The Hague, in 1904, between those powers and the United States, their right to a preferential payment of 30 per cent of their claims was recognized on the ground that they had incurred the expense of an intervention which resulted in benefits to others, and by the fact that Venezuela recognized in principle the justice of the blockading powers' claim.²⁵⁶

a) The Drago doctrine. During the course of the intervention in Venezuela, the Argentine Foreign Minister, Dr. Luis Drago, advanced a contention against the used of armed force in the collection of State debts. In December 29, 1902, he sent a note to his minister in Washington to be transmitted to the Secretary of State, John Hay, in which he manifested that:²⁵⁷

"[...] In a word, the principle that she [the Argentine Republic] would like to see recognized is: that the public debt can not occasion armed intervention nor even the actual occupation of the territory of American nations by a European Power."

Dr. Drago's note attracted widespread attention. From the outset he said that he was referring to the forcible collection of public debts, because of the events that had taken place. He argued that the lending capitalist had always taken into account the resources of the country, and the kind of degree of credit and security offered; that, for these reasons, they made the terms of lending more or less onerous; for they also know that they are dealing with a sovereign to whom no proceedings for the execution of a judgment may be instituted or carried out against it. In support of his contention he invoked, *inter alia*, the principles of the freedom and independence of States, and the

investors whose investments have been guaranteed by the defaulting government": see HERSHEY Amos S., "The Calvo and Drago Doctrines", *AJIL*, Vol. 1, No.1, January 1907, p. 31.

²⁵⁶ See BORCHARD Edwin, *ibid.*, p. 271; and SILAGI Michael, *ibid.*, p. 234.

²⁵⁷ *Note of Señor Luis M. Drago, Minister of Foreign Relations of the Argentine Republic, to the Minister of the Argentine Republic to the United States*, Buenos Aires, December 29, 1902, *AJIL*, Vol. I, Supplement No. 1, January 1907, p. 4. See also: DE BUSTAMANTE Y SIRVÉN Antonio S., *op. cit.*, pp. 75-77; BORCHARD Edwin, *ibid.*, p. 271; GARCIA AMADOR F.V., *The Changing Law of International Claims*, Vol. I, 1984, p. 3; and STRUPP Karl, "L'intervention en matière financière", *RCADI*, Tome 8, 1925-III, pp. 85-91.

On the Drago doctrine, see DRAGO Luis, "Les emprunts d'État et leur rapport avec la politique internationale", *RGDIP*, Tome XIV, 1907, pp. 251-287. See same article in English under the title "State Loans in their Relation to International Policy" in: *AJIL*, Vol. 1, 1907, pp. 692-726; and in: *International Law in the Twentieth Century* (ed. by L. Gross), 1969, pp. 483-517. See also MOULIN H.A., "La doctrine de Drago", *RGDIP*, Tome XIV, 1907, pp. 417-472; and VIVOT Alfredo N., *La Doctrina Drago*, 1911, 389 p.

Eleventh Amendment to the Constitution of the United States which provided that “the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.”²⁵⁸

Although Dr. Drago admitted that the payment of a public debt was absolutely binding on the nation concerned, he maintained that this nation has the right to chose the manner and the time of payment, because it has as much, or more, interest, as the creditor himself, in preserving its credit and the national honour involved therein. Moreover, he clarified that his note was not “a defense for bad faith, disorder, and deliberate and involuntary insolvency. It is merely intended to preserve the dignity of the public international entity which may not thus be dragged into war with detriment to those high ends which determine the existence and liberty of nations.”²⁵⁹

In his message of December 5, 1905, President Roosevelt upheld Dr. Drago’s doctrine in the following terms:²⁶⁰

“Our own government has always refused to enforce such contractual obligations on behalf of its citizens by an appeal to arms. It is much to be wished that all foreign governments would take the same view.”

Later on, at the Third Pan-American Conference, at Rio de Janeiro, in July and August 1906, the United States confirmed that its policy was “not to use its armed forces for the collection of ordinary contract debts due to its citizens by other governments.”²⁶¹ However, as the United States also considered that the distinction between bad and good faith in the non-performance of such contracts was fundamental, it concluded as well that the Rio Conference was not the place to put forward such a rule. This view was confirmed, on December 4, 1906, by President Roosevelt, when he stated:²⁶²

“If the Rio conference were to take such action it would have the appearance of a meeting of debtors resolving how their creditors should act, and this would not inspire respect. The true course is indicated

258 HERSHEY Amos S., *op. cit.*, p. 29.

259 *Ibid.*, p. 30.

260 *Ibid.*

261 *Ibid.*

262 President Roosevelt’s message to Congress of December 4, 1906, *ibid.*

by the terms of the program, which propose to request the second Hague conference, where both creditor and debtors will be assembled, to consider the subject.”

The Third Pan-American Conference at Rio, certainly, adopted, without any debate, on August 22, 1906, a resolution “recommending to the governments represented therein that they consider the point of inviting the Second Peace Conference at The Hague to consider the question of the compulsory collection of public debts; and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.”²⁶³ Hence, Dr. Drago succeeded in putting forward his contention, which was to receive worldwide consideration in The Hague.

b) The Second Hague Peace Conference of 1907. In The Hague Conference, as expected, Dr. Drago’s doctrine was subject to criticism because the European powers believed that the Latin-American States sought, by this means, to bypass their pecuniary liabilities.²⁶⁴ However, there was also a growing recognition, especially in neutral countries, that blockades and other compulsory measures, undertaken by Great Powers, disturbed the markets adversely and not only, as argued, commerce between the countries concerned. It was maintained that measures of this kind tended to disturb the “balance of power” and menace the world’s peace.²⁶⁵

In The Hague, as in the Rio Conference, the United States took the lead by proposing the adoption of a convention by which the signatories agree not to have recourse to armed force for the collection of contract debts unless the debtor State refuses or neglects to reply to an offer of arbitration, or, after the arbitration, fails to submit to the award. After several amendments to the original draft proposed by General Horace Porter,²⁶⁶ the Second Peace Conference adopted, *inter alia*, a Convention (II)

²⁶³ See SCOTT George Winfield, “Hague Convention Restricting the Use of Force to Recover on Contract Claims”, *AJIL*, Vol. 2, No. 1, January 1908, p. 86. See also DE BUSTAMANTE Y SIRVÉN Antonio S., *op. cit.*, p. 83.

²⁶⁴ See ALVAREZ Alejandro, *American Problems in International Law*, 1909, p. 66. To some extent this was comprehensible insofar as State loans was the most important subject in international economic relations. In this regard, some authors noted that despite the many State insolvencies registered, the XIX century could be named “le siècle des emprunts d’Etats”, see VAN DAEHNE VAN VARICK A., *Le droit financier international devant la conférence de La Haye*, 1907, p. 6.

²⁶⁵ SCOTT George Winfield, *op. cit.*, p. 87.

²⁶⁶ For a detailed account of the work of the Second Peace Conference on this subject, see DE BUSTAMANTE Y SIRVÉN Antonio S., *op. cit.*, pp. 84-109 (§ 50-69); SCOTT George Winfield, *op. cit.*, pp. 86-94; and STRUPP Karl, *op. cit.*, pp. 95-120. See also, SCOTT James Brown, “The Work of the

Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, which reads as follows:²⁶⁷

“[...] Being desirous of avoiding between nations armed conflicts of a purely pecuniary origin arising from contract debts which are claimed from the Government of one country by the Government of another country as being due to its nationals, have resolved to conclude a Convention to this effect, and have appointed as their plenipotentiaries: [...]

ARTICLE I

The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, after the arbitration, fails to submit to the award.

ARTICLE II

It is further agreed that the arbitration mentioned in paragraph 2 of the foregoing article shall be subject to the procedure laid down in Part IV, Chapter III, of the Hague Convention for the pacific settlement of international disputes. The award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment. [...]

Done at The Hague, the 18th October, 1907, [...].”

To this Convention several reservations were made, especially from the Latin-American countries, which tended to prohibit diplomatic intervention except in cases of denial of justice.²⁶⁸ Apart from that, the Convention was objected on other grounds: firstly,

Second Hague Peace Conference”, *AJIL*, Vol. 2, No. 1, January 1908, pp. 1-28. See also “General Horace Porter’s Address on the Limitation of Force in the Collection of Contractual Debts, July 16, 1907”, *American Addresses at The Second Hague Peace Conference* (ed. by J.B. Scott), 1916, 2nd ed., pp. 25-33.

²⁶⁷ *The Hague Convention (II) of 1907 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*, Pamphlet No. 11, 1915, pp. 1-3 [hereinafter: *The Hague Convention (II) of 1907*, Pamphlet No. 11, 1915]; *The Hague Conventions and Declarations of 1899 and 1907* (ed. by J.B. Scott), 1918, 3rd ed., pp. 89, 91; same text in French: *Les Conventions et déclarations de La Haye de 1899 et 1907*, 1918, pp. 89, 91.

As of January 15, 1931, this Convention was in force in thirty-one States, see LEAGUE OF NATIONS, *Memorandum Relating to the Pacific Settlement of International Disputes Concerning Economic Questions in General and Commercial and Customs Questions in Particular*, January 15, 1931, p. 17 (footnote 1) [emphasis added].

²⁶⁸ The principal reservation was made by Dr. Drago himself, on the part of Argentina: “1. With regard to debts arising from ordinary contracts between the citizen or subject of a nation and a foreign Government, recourse shall not be had to arbitration except in the specific case of denial of justice by the courts of the country which made the contract, the remedies before which courts must first have been exhausted. 2. Public loans secured by bond issues and constituting the national debt, shall in no case give rise to military aggression or the material occupation of the soil of American nations.” In this reservation Argentina was joined by Colombia, Guatemala, Nicaragua, El Salvador and Peru., see *The Hague*

because it seemingly recognized the legality of the use of force for which the recovery of State debts was an exception to an existent rule (*i.e.*, by means of recognizing an exception to an existent but controverted principle, the proponents of its controversial formulation took the opportunity to make it to appear positively in a convention);²⁶⁹ secondly, it gave creditors the right to compel debtor States by choosing either between arbitration or execution by force;²⁷⁰ and, thirdly, it gave arbiters a right without limits to fix the amount of the debt, and the time and mode of payment.²⁷¹

Despite that the Convention could be interpreted in one way or in the opposite, as it happens often with many of them, the Convention, however, solved a practical problem: from that date onwards foreign fleets were banished from the (Latin) American waters and no port was blockaded again upon the excuse that because money was due to a foreigner the armed force could be used to collect such a debt.²⁷² Hence, not only Dr. Drago's doctrine got recognition at the multilateral level, but also the Monroe's doctrine "made its first and formal entry into the public law of Europe as well as the America."²⁷³ At the same time, the European Powers, and the United States as well, laid down, for the first time in a multilateral convention, the legality of the use of force as a positive rule in international relations.²⁷⁴

Convention (II) of 1907, Pamphlet No. 11, 1915, pp. 4-7; see also BORCHARD Edwin, *State Insolvency*, 1951, p. 320.

²⁶⁹ SCOTT George Winfield, *op. cit.*, p. 87; and DE BUSTAMANTE Y SIRVÉN Antonio S., *op. cit.*, p. 90.

²⁷⁰ DE BUSTAMANTE Y SIRVÉN Antonio S., *op. cit.*, p. 90.

²⁷¹ *Ibid.*, p. 90.

²⁷² Professor Borchard, for instance, was of opinion that the Convention, "viewed objectively", "did not mark any advance" and that it had "failed to solve any practical problem", see BORCHARD Edwin, *State Insolvency*, 1951, p. 272.

²⁷³ SCOTT James Brown, *op. cit.*, p. 15.

²⁷⁴ To explain that the Convention was a failure, Professor Borchard reported, in 1951, that the Convention "has never been invoked" and that instead "several of its signatories have since 1907 denounced their adherence to the convention": *cf.*, BORCHARD Edwin, *State Insolvency*, 1951, pp. 272-273. We nevertheless think that these denunciations were instead the result of a subsequent detection, by such signatories, of a misconception (in the appearance and not in the substance) of the rule prohibiting the use of force in the collection of State debts: the rule was formulated by way of an exception to a more controverted general principle of legality of use of force, which, under international law, was not yet formulated in positive or in negative terms. Thus, the price for the recognition of the prohibition of the use of force in the collection of State debts, as formulated by the Convention, was too high, in the judgment of these signatories.

D. The control of the public finances of debtor States as a means for the recovery of State external debts

Another commonly employed method to recover State debts was the control *in situ* of the public finances of debtor States.²⁷⁵ Foreign financial controls were undertaken by strong States against weak States to ensure the payment of debts, and other pecuniary claims, due to their nationals, and, generally, to secure the protection of their interests. In the main, they were the result of a settlement agreement,²⁷⁶ passed by the controlled State with their private creditors, or with a Power or a group of Powers, fixing the amount, the time, and the mode of payment of the debt.

As a matter of fact, however, foreign financial controls were mostly imposed than agreed; and, from the standpoint of international law, they involved an interference with the sovereignty and independence of debtor States, and a limitation of their financial autonomy. In a world of forcible self-help, nonetheless, they were justified, by many publicists of that time,²⁷⁷ as not purporting a *prima facie* violation of the principles of sovereignty and equality of States insofar as the title to intervention was founded upon conventional international law (a settlement agreement), or customary international law (diplomatic protection), or when the debtor State was a recalcitrant, or a dishonest debtor, unwilling to settle, in which cases, it was said there was a “just cause” for intervention.²⁷⁸ Yet more, in other occasions, the simple perception of a “moral obligation” sufficed to the United States to justify its interventions on the public

²⁷⁵ For works proposing a case-by-case study of foreign financial controls, see DEVILLE, *Les contrôles financiers internationaux et la souveraineté de l'État*, thèse, 1912, 248 p.; ALVARES CORREA H.M., *The International Control of Public Finances, a Treatise of International Law*, Paris, 1926, 192 p.

For a more international law-related perspective, and country-studies, see POLITIS Nicolas E., *op. cit.*, pp. 228-267; IMBERT Henri Marc, *op. cit.*, pp. 60-99; ANDRÉADES André, “Les contrôles financiers internationaux”, *RCADI*, Tome 5, 1924-IV, pp. 13-96; STRUPP Karl, *op. cit.*, pp. 11-31; and BORCHARD Edwin, *State Insolvency*, 1951, pp. 277-299.

²⁷⁶ A “settlement agreement” “malgré la *vis compulsiva* qui a accompagné leur conclusion et qui contiennent des clauses d’ingérence”, see STRUPP Karl, *op. cit.*, p. 9.

²⁷⁷ *Inter alios*: DEVILLE, *op. cit.*, p. 239; POLITIS Nicolas, “Le problème de la limitation et la théorie de l’abus des droits dans les rapports internationaux”, *RCADI*, Tome 6, 1924-V, p. 37; STRUPP Karl, *op. cit.*, pp. 9, 48-49; BORCHARD Edwin, *State Insolvency*, 1951, p. 278. To illustrate this point: “A propos de traités permissifs d’ingérences, [...] même si leur fondement repose sur une violation du droit, [ils] peuvent néanmoins par la suite devenir licites”, see STRUPP Karl, *ibid.*, p. 51.

²⁷⁸ BORCHARD Edwin, *State Insolvency*, 1951, p. 278.

finances in some Central American and Caribbean countries. Professor Borchard maintained, in this regard, that because of the failure and weakness of these debtor States to perform their contractual obligations, the United States “felt a moral obligation to prevent American republics from defaulting on their bonds, thus eliminating a source of legitimate grievances on the part of European bondholders and their governments. The means to achieve this end was the institution of financial controls over certain American debtor nations.”²⁷⁹

According to a classification by Professor Andréades,²⁸⁰ foreign financial controls showed the following characteristics: a) these controls were exercised only by the Great European Powers and the United States; b) they had a permanent character, insofar as they tended to be implemented over a long period of time; and, c) they were exercised on behalf of the bondholders and other private creditors nationals of these Powers.

From the perspective of our subject, *i.e.*, the law relating to the collection of State external debts, the measures instituting foreign financial controls can be viewed, on the one hand, rather as of the type of measures of liquidation, undertaken in corporate bankruptcy proceedings, than, properly speaking, actions or measures tending to assert the right to recover a debt from a State. On the other hand, as to their results, they were rather close to measures instituting a protectorate on weak States.²⁸¹

These measures of interference also varied in degree. Sometimes they took a relatively “mild form”,²⁸² other times, they encroached materially upon the political independence of the debtor. But, for the purposes of our study, it will suffice to state that the control of the public finances of debtor States was a method commonly employed, by private creditors and their States, to recover debts and other pecuniary claims, from debtor States.

279 In reality, the United States felt that “those who profit by the Monroe doctrine must accept certain responsibilities along with the rights it confers.” (President Roosevelt’s message to the U.S. Senate of February 15, 1905), see BORCHARD Edwin, *State Insolvency*, 1951, p. 294.

280 ANDRÉADES André, *op. cit.*, pp. 5-6.

281 “Si nous regardons les choses de plus près, nous voyons, à l’inverse, qu’une immixtion, permise en matière financière, peut donner lieu à une action qui ne se limite point à une surveillance financière, mais qui peut conduire—qu’on pense seulement à ce que nous avons dit relativement au Maroc—à un véritable protectorat”: see STRUPP Karl, *op. cit.*, p. 42.

E. Recourse to international arbitration for the recovery of State external debts

It was not only domestic jurisdictions of creditors' States that discouraged bondholders from suing States for the repayment of their external pecuniary obligations. Arbitral tribunals set up by virtue of peace treaties were also disappointing to bondholders.

– For instance, in the *Florida Bond Cases*,²⁸³ the decision of the Anglo-American Commission was adverse to the British holders of certain bonds issued by the Territory of Florida prior to its admission as a State of the Union. In this case, the English holders of certain bonds brought a claim, for the payment of the principal and interests thereof, against the United States before the Mixed Commission (organized under the treaty between the United States and Great Britain of February 8, 1853, for the settlement of claims of citizens or subjects of the one country against the government of the other). The Commissioners having disagreed, Joshua Bates, the Umpire, a U.S. citizen resident in London and one of the chiefs at Barings & Co., rendered a decision, on September 14, 1854, dismissing the claim on the ground that it was a transaction with the Independent Republic of Florida. He said:²⁸⁴

“[...] The bondholders have the same remedy against the State as they had against the Territory; *they have a just claim. But they are under the well-known disadvantage in both cases—they could not sue the Territory, they cannot sue the State.*

It has been argued that there is no way of getting at a State government except through the Government of the United States; this is a mistake. There is no difficulty in the way of individuals dealing with the separate States in any matters that concern the State alone; nearly all the States have public works and contract loans with individuals. [...]

To show that the Florida bondholders never supposed the United States in any way responsible, attention is called to the prospectus issued by the agents for the sale of the bonds [...]

[...] The bondholders have a just claim on the State of Florida; they have lent their money at a fair rate of interest, and *the State is bound by every principle of honor* to pay interest and principal; and it is to be

282 BORCHARD Edwin, *State Insolvency*, 1951, p. 277.

283 *Florida Bond Cases*, Umpire, September 14, 1854, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, p. 3594. Same under: *Affaire des bons de la Floride*, sentence du 14 septembre 1854, Commission mixte du traité du 8 février 1853 (Etats-Unis, Grande-Bretagne), *Recueil des arbitrages internationaux* (ed. by A.G. de Lapradelle et N. Politis), Tome 1er: 1798-1855, 1905, pp. 758-762.

284 *Florida Bond Cases*, Umpire, September 14, 1854, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, pp. 3609-3610, 3612 [emphasis added].

hoped that sooner or later the people of Florida will discover that honesty is the best policy, and that no State can be called respectable that does not honorably fulfil its engagements.”

– Also in the *Texas Bond Cases*,²⁸⁵ decided on November 29, 1854, the executors of James Holford (claim No. 14, British docket), and Messrs. Dawson (claim No. 15, British docket), English holders of certain Texas bonds, brought a claim before the same Commission, against the United States, for the payment of interests and principal of the bonds issued in 1839. Joshua Bates, the Umpire, in dismissing the claims, held that “this commission can not entertain the claim, it being for transactions with the Independent Republic of Texas prior to its admission as a State of the United States.”²⁸⁶

During the proceedings, the British Commissioner, Mr. Hornby, maintained that the claims should be allowed. The Commissioner of the United States, Mr. Upham, was of opinion that the Commission had no jurisdiction over the subject; the indebtedness of Texas, he said, was “a distinct subject of agreement by the terms of the Union”. The United States and Texas, he explained, as shown by the Act of 1850, by the report of the Secretary of the Treasury, Mr. Corwin, by the opinion of the Attorney-General, Mr. Cushing, and by the pending legislation, were acting in concert to cause the debts to be paid; accordingly, on whether the United States should “be liable for this indebtedness”, he did not feel “called upon to decide”. He said that the tendency of the opinion of Mr. Cushing, so far as his views could be gathered, was to establish such liability in part; it was therefore clear that Texas was not exonerated from that debt, and that the United States had manifested a strong disposition to bring about its payment.²⁸⁷ For these reasons, there was nothing to show that the subject was within the jurisdiction of the Mixed Commission. Moreover, as the claim had not been brought to the notice of either

²⁸⁵ *Texas Bond Cases*, Umpire, November 29, 1854, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, p. 3591. See also: *A Digest of International Law* (ed. by J.B. Moore), Vol. I, 1906, pp. 343-347. Same under: *Affaire des bons du Texas*, sentence du 29 novembre 1854, Commission mixte du traité du 8 février 1853 (Etats-Unis, Grande-Bretagne), *Recueil des arbitrages internationaux* (ed. by A.G. de Lapradelle et N. Politis), Tome 1er: 1798-1855, 1905, pp. 683-685.

²⁸⁶ *Texas Bond Cases*, Umpire, November 29, 1854, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, p. 3594.

²⁸⁷ As announced, by an act of the Congress of the United States, February 28, 1855, it was provided that “the Secretary of the Treasury should pay to the creditors of the late Republic, who held ‘such bonds, or other evidences of debt for which the revenues of that Republic were pledged,’ as were found by Mr. Corwin in the report approved by the President Sept. 13, 1851, or by Mr. Cushing in his opinion of Sept. 26, 1853, to be within the act of 1850, the sum of \$7,750,000, to be apportioned among the holders pro rata, the interest on such debt to be determined by the then existing laws of the State of Texas”: see *A Digest of International Law* (ed. by J.B. Moore), Vol. I, 1906, p. 347.

government, or made a matter of correspondence or difficulty between them, or included in any list of unsettled claims at the date of the treaty, it did not appear to be within the intent of either contracting party as a matter to be acted upon the Commission. The Umpire upheld that “cases of this description were not included among the unsettled claims that had received the cognizance of the governments or were designed to embrace within the provisions of the convention, and were, therefore, not within the jurisdiction of the commission.”²⁸⁸

– Likewise, in 1864, in the *Colombian Bond Cases*,²⁸⁹ the decision of the Mixed Commission organized under the treaty between Colombia and the United States of February 10, 1864, was adverse to the U.S. holders of certain bonds issued by New Granada. The cases were first brought before the Mixed Commission organized under the treaty between New Granada and the United States, of September 10, 1857, but were left undecided. The bondholders claimed for the payment of the principal and interests of certain overdue New Granadian bonds.

Sir Frederick Bruce, the Umpire, dismissed the claims on the following grounds:²⁹⁰

“In these cases the first and most important question for consideration is that of jurisdiction. *Does this class of debts fall within the scope and meaning of the ‘claims’* which the international convention between the two governments was constituted to examine and definitely settle? [...]”

The term ‘claims’ in the convention must be construed so as to confine it to demands which must have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them on presentation to the official support of the government of the complainant.

The claims for the payment of the ‘bonds’ are not in my opinion of such character. The Government of the United States, like that of Great Britain, has not laid down or acted upon the principle that a citizen, who holds an interest in the public debt of a foreign country, and who in common with the other shareholders in that debt is unable to obtain payment of what is due to him, is entitled as of right of the same support in recovering it as he would be in a case where he has suffered from a direct act of injustice or violence. [...] this commission can not assume upon the strength of a general term, and in the absence

²⁸⁸ *Texas Bond Cases*, Umpire, November 29, 1854, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, p. 3593.

²⁸⁹ *Colombian Bond Cases*, Mixed Commission, treaty between Colombia and the United States of February 10, 1864, Sir F. Bruce, Umpire, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, 1898, p. 3512.

²⁹⁰ *Ibid.*, pp. 3614-3615 [emphasis added].

of express language to that effect, that the Government of the United States intended to delegate to it powers which it has not exercised itself in a matter of so much delicacy.

It does not appear to me that the correspondence quoted with the United States legation at Bogotá is sufficient to constitute such an official support on the part of the United States Government to these claims as the circumstances of these cases would require in order to give them a 'locus standi' before the commission. It is of a private or at most of an officious character, and does not transcend the limits of that friendly countenance and which the ministers of foreign powers always give to the holders of shares in public debts. [...] it is easy to see that many reasons of policy may exist which would deter a government from insisting on a preferential payment of a part only of the public creditors of a foreign State.

The letter which has been put in evidence from General Cass, as Secretary of State, confirms these views. He states that *the government has not been in the habit of enforcing such claims against foreign governments.* [...]"

– The *Mexican Coupons Case*²⁹¹ is another failure to recover unpaid coupons of overdue bonds. This was a claim brought by certain U.S. bondholders against the Government of Mexico before the Mixed Commission organized under the convention of July 4, 1868, between Mexico and the United States. Mr. Wadsworth, the United States Commissioner, said, "it appears to me that neither government has with sufficient clearness agreed to refer such claims to this commission, and it is my decision that this case be dismissed without prejudice to the rights of the holders of the bonds and coupons. Mr. Zamacona, the Mexican Commissioner, in agreeing to dismiss the claim, said:²⁹²

"The bonds, and they alone, are the ground of this claim. Proceeding logically, then, the first point which must be considered is whether the commission can admit claims founded upon the bonded debt of Mexico. This question is not only the first in order, but also the first in importance among those involved in this case. In order to decide this question negatively, the undersigned will not have to give his own individual opinion; it will be enough to appeal to the generally accepted views of the subject, founded upon the general propriety and justice. *The disturbance which would ensue in the administration, credit, and relations of modern nations, if the claim on the account of the public debt, such as those involved in this case, were made the matter of international claims, has long been understood.* [...] The defense here maintains that claimants received bonds to the amount of \$33,000. [...] Now instead of £33,000, the claimants present \$47,000 of bonds. It may well be that they may have obtained the difference as they say they did, but it may also be very well be that may have received this additional sum of bonds from some other holder who, perhaps, is not an American citizen. *Accepting this as a diplomatic claim,* when in the

²⁹¹ *Mexican Coupons Case*, Mixed Commission, convention between Mexico and the United States of July 4, 1868, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, 1898, p. 3616.

²⁹² *Ibid.* [emphasis added].

future claims have to be settled between Mexico and the United States, *the whole of the debt of the former would be covered by the flag of the latter, whose citizens would appear as monopolizing Mexican bonds.*"

– The *Venezuelan Bond Cases*,²⁹³ in 1885, however, constituted a clear departure from the old law that regarded the claims originating in "hazardous loan contracts" as not, per right, subject to diplomatic protection or interposition of a government. The decision of the Claims Commission (created under the convention between the United States and Venezuela of December 5, 1885), in this case, confirmed what was already an established practice, namely, that diplomatic protection, by major powers, was not confined solely to claims arising out of violations of "ordinary contracts" but extended to the protection of "hazardous loan contracts".

As regards the jurisdiction of the Commission over the claim submitted, Mr. Little, delivering the opinion of the majority of the Commissioners, held that:²⁹⁴

"To assert that bonds are among the 'questions' reserved by the governments from the operation of the treaty, is merely another form of asserting that they are not 'claims'. It does not advance toward a conclusion. [...]"

In the treaty under which we sit there are but three qualifying elements embraced—ownership, circumstance, and time. The claims must be those of citizens of the United States. The circumstance of their having been presented to the Government of the United States, or to its legation at Caracas, before August 1, 1868, must exist. And, of course, the claims must have existed before that date. The element of character is wholly wanting. [...]"

[...] Had it been the intention thus to limit the claims in *character*, it is difficult to understand why language to that end was not used as has had been done before, as seen, and by the same parties, in conventions with other powers. [...]"

Very true; bonds are not of the character of claims ordinarily diplomatically pressed by one government against another; but since the celebrated circular of Lord Palmerston, in 1848, to British representatives in foreign courts, it would appear to be established English doctrine at least that a State has *the right* authoritatively to interpose in behalf of its subjects or citizens in support and enforcement of claims founded on bonds against other States, if it chooses to do so. [...]"

[...] Where, in words, 'all claims' are submitted, there can not be said to be an 'absence of express language' of submission, nor room for assumption in that regard. [...]"

[...] In fact, to attempt interpretation of the plain words 'all claims' at all, in the connection employed, we should have felt, but for the opinion under review from so able a publicist, would be violative of

293 *Venezuelan Bond Cases*, Claims Commission, convention between the United States and Venezuela of December 5, 1885, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, 1898, p. 3616.

294 *Ibid.*, p. 3619 *et seq.*

Vattel's first rule, above quoted. We should have said what seems even yet to us true, to wit: They need no interpretation. [...]

There seems but one answer: allowance of the claim.”

This decision was directed, on the one hand, to “reverse” the former decision of Sir Frederick Bruce, the Umpire, in the *Colombian Bond Cases*, on the subject of the nature of claims that would be considered as “claims” falling within the jurisdiction of the commissions; and, on the other hand, to allow the rehearing of the claim, because the same claim was already presented to the old Commission and dismissed on the ground that it represented a “consolidated debt”.

Another Commissioner, Mr. Findlay, in delivering his opinion as to the jurisdiction of the Commission, pointed out that the state of the law relating to the recovery of State external debts was as follows:²⁹⁵

“It is the law of the United States and the respective States composing that Union that neither the sovereignty of the federation nor of any of its constituent parts can be brought into court at the suit of a private individual without its consent, and in giving this consent the sovereignty is at liberty to prescribe the conditions under which the suit shall be instituted and conducted. It is also the law of the United States that the sovereign of another country can not be sued in its courts by its citizens nor subjected to judicial process by attachment or other proceeding to enforce appearance. This law was laid down by the Supreme Court in the leading case *Cohens v. Virginia*, in 6 W. p. 264, and has been repeated and reaffirmed since in a multitude of decisions, both State and national. [...] It has been carried so far indeed that no judgment can be rendered against the United States for balance found due a defendant in set off. (*Reeside v. Walker*, 11 H. 272.)

This principle of immunity from suit applies to every sovereign power without regard to the form of the government, as it is held to be essential to the common defence and general welfare, as without its protection government would be disabled from performing the various duties for which it was created. As before observed, it applies to suits against foreign sovereigns and prohibits the seizure of property within the domestic jurisdiction for the purpose of facilitating such procedures. [...]

It is believed that there is no exception to this rule, which is manifestly founded in the very conception of a sovereign power, but the voluntary departures from its enforcement are numerous; and most, if not all, civilized States recognize the necessity for establishing some judicial means by which errors in administration may be corrected and wrongs remedied of which the State has been the cause and the citizen the victim.

²⁹⁵ *Ibid.*, p. 3642 *et seq.* [emphasis added].

Hence, courts of claims of one kind or another, some with a limited and others with a more enlarged jurisdiction, have been established in which the individual may seek redress against the sovereign and obtain relief by the same methods as practised in the ordinary tribunals of justice. [...]

It will be observed, by the express language of the treaty, that all claims without limitation or qualification, are within the terms of the submission, the only proviso being that they shall be the claims of citizens of the United States against the Government of Venezuela, and that they shall have been presented in the mode and by the time prescribed. [...]

[...] we see no way of escape from the conclusion that this claim is one which we are bound to hear and consider.”

– On February 22, 1904, in the *Venezuelan Preferential Case*,²⁹⁶ a tribunal of the Permanent Court of Arbitration, composed of N. V. Mourawieff and F. de Martens of Russia, and H. Lammasch of Austria-Hungary, answered the question as to “whether or not Germany, Great Britain and Italy are entitled to preferential or separate treatment of their claims against Venezuela”,²⁹⁷ by holding that: “1. Germany, Great Britain and Italy have a right to preferential treatment for the payment of their claims against Venezuela;” and, that “2. Venezuela having consented to put aside 30 per cent of the revenues of the Customs of La Guayra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the three above named Powers have a right to preference in the payment of their claims by means of these 30 per cent of the receipts of the two Venezuelan Ports above mentioned; [...].”²⁹⁸

This was a case in which the blockading powers (Germany, Great Britain and Italy) demanded “preferential treatment” in the payment of the 30 per cent of the customs receipts of La Guayra and Puerto Cabello as a reimbursement of the expenses incurred by them during the blockade. They contended that they incurred expenses, as *negotiorum gestores* of the non-belligerent powers, to their profit. The non-belligerent powers, asserted that the acts of the blockading powers were performed with the intention of managing their own affairs and that there was no such implicit procurement for the management of their affairs; that, as a result of the blockading action, they were instead injured in their interests, with the diminution of the financial assets of the

²⁹⁶ *Venezuelan Preferential Case* (Germany, Great Britain, Italy, Venezuela *et al.*), Protocol of Washington of 7 May 1903 and Award of the Arbitral Tribunal of 22 February 1904, *RIAA*, Vol. IX, pp. 99-533.

²⁹⁷ *Ibid.*, Protocol of Washington of 7 May 1903.

²⁹⁸ *Ibid.*, Award of the Arbitral Tribunal of 22 February 1904, p. 110.

common debtor, rather than obtaining profits. Arguing for “equal treatment”, the non-belligerent powers maintained that the legal position of Venezuela was analogous to that of *cessio bonorum*, or bankruptcy, in private law, the principles of which should apply in this case, as, for instance, the principle by which creditors of the debtor enjoy, as a rule, equal rights against his estate. During the proceedings it was also pointed out that there does not exist a uniform law of bankruptcy, that in international law there is no bankruptcy procedure, that seizure of the whole property of a State is inconsistent with its continued existence as an independent State, that Venezuela was not insolvent, and was not compelled to distribute her assets amongst all her creditors. The blockading powers, in turn, invoked certain civil law rules to show that the creditor who first takes action to protect his rights (*vigilantis non dormientibus subvenit lex*), or the one who first obtains possession of the debtor’s goods (*prior in tempore, potior in jure*), is entitled to preference.²⁹⁹

In reaching its conclusion the arbitral tribunal also relied upon the argument of *estoppel*. On February 13, 1903, in the separate protocols signed between Venezuela and the “allied or blockading powers”, Venezuela recognized “in principle the justice of the claims” presented to it by the blockading powers, while this was not so in the protocols signed with the “neutral powers”. Later on, during the diplomatic negotiations, Venezuela always made a formal distinction between “the allied powers” and the “neutral or pacific powers”, and, at the request of these governments, gave special guarantees, to the allied powers alone, for “a sufficient and punctual discharge of the obligations”. The arbitral tribunal said that the neutral powers, “who now claim before the Tribunal of Arbitration equality in the distribution of the Customs receipts of La Guayra and Puerto Cabello, did not protest against the pretensions of the Blockading Powers to a preferential treatment either at the moment of the cessation of the war against Venezuela or immediately after the signature of the Protocols of February 13th 1903; [...]”³⁰⁰

²⁹⁹ See LAUTERPACHT H., *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)*, 1927, pp. 252-253.

³⁰⁰ *Venezuelan Preferential Case* (Germany, Great Britain, Italy, Venezuela *et al.*), Award of the Arbitral Tribunal of 22 February 1904, *RIAA*, Vol. IX, p. 109. See also LAUTERPACHT H., *op. cit.*, pp. 253-255. The overall value of the award was contested notably by Mallarmé who said that it put a premium on the use of force: “[...] il semble bien que la thèse qu’elle contient ne soit pas conforme au principe de la paix internationale. Reconnaître, en effet, à un pays créancier un privilège à l’égard d’autres créanciers, par cela seul qu’il a eu recours à la force pour faire valoir ses revendications, c’est légitimer et encourager l’emploi de cette force”, see MALLARMÉ André, “L’arbitrage vénézuélien

– On November 11, 1912, in the *Russian Indemnity Case*,³⁰¹ a controversy between Russia and Turkey regarding the payment of interest upon the indemnities due and overdue to Russian subjects for losses incurred during the Turko-Russian war of 1877-1878, the Arbitral Tribunal (constituted by virtue of an arbitration agreement signed at Constantinople between Russia and Turkey, July 22/August 4, 1910) held: that (1) Turkey was responsible for interest upon the sums overdue to Russia, as in the case of an ordinary debtor, but that interest would only begin to run from the date of notification of default and the demand for interest; and, that (2) Russia, having accepted subsequent payments, after its demand for interest, on account of the principal without mention of the interest due, was to be regarded by its conduct as having withdrawn or renounced its claim for interest.

The facts of the case, in summary, were as follows: according to Article 5 of the (peace) Treaty of Constantinople concluded on January 27/February 8, 1879, between Russia and Turkey, “[t]he claims of Russian subjects and institutions in Turkey for indemnity on account of damages suffered during the war will be paid as soon as they are examined by the Russian Embassy at Constantinople and transmitted to the Sublime Porte. The total of these claims shall in no case exceed 26,750,000 francs. Claims may be presented to the Sublime Porte beginning one year from the date on which ratifications are exchanged, and no claims will be admitted which are presented after the expiration of two years from that date.” The claims submitted were duly examined by the Russian Embassy and presented by it to the Turkish Government; but the payments were delayed and were made only under constant pressure from the Russian Government. The claims amounted in all to 6,186,543 francs, of which sum 50,000 Turkish pounds were paid in 1884, 50,000 in 1889, 75,000 in 1893, 50,000 in 1894, and 42,438 in 1902, leaving a balance of 1,539 Turkish pounds, which the Turkish Government deposited in the Ottoman Bank to the credit of Russia, which refused to

devant la Cour de La Haye (1903-1904), *RGDIP*, Tome XIII, 1906, pp. 496-497. Other writers noted that the award dealt in a rather equivocal manner with the question of the legality of the blockade: it asserted not only the right of diplomatic protection but also of armed intervention, see SILAGI Michael, “Preferential Claims Against Venezuela Arbitration”, *Ency. PIL* (dir. by R. Bernhardt), Vol. 2, 1981, pp. 234-235.

³⁰¹ *Russian Indemnity Case* (Russia v. Turkey), Award of the Arbitral Tribunal of November 11, 1912, *AJIL*, Vol. 7, No.1, January 1913, pp. 178-201; *Compromis*, *ibid.*, Supplement, pp. 62-67. Same in French: *Affaire de l'indemnité russe* (Russie, Turquie), *Compromis du 22 juillet/4 août 1910 et Sentence du 11 novembre 1912*, *RIAA*, Vol. XI, pp. 421-447; and *Jdip et jc (Clunet)*, Tome 40, 1913, pp. 322-347.

receive on the ground that the interest which it claimed, for the delayed payments, had not been made.³⁰²

To recover the interest (claimed by Russia, and denied by Turkey “owing to the high Turkish interest rate of twelve or nine per cent” which amounted to triple the principal debt),³⁰³ a *compromis* was signed at Constantinople July 22/August 4, 1910, the third article of which stated the Questions to be arbitrated:³⁰⁴

I. Whether or not the Imperial Ottoman Government must pay the Russian claimants interest-damages by reason of the dates on which the said government made payment of the indemnities determined in pursuance of Article 5 of the Treaty of January 27/February 8, 1879, as well as of the Protocol of the same date?

II. In case the first question is decided in the affirmative, what would be the amount of these interest-damages?”

During the proceedings, the Turkish Government presented a preliminary request, namely, that the Russian claim “be declared inadmissible without examining the principal question”, because of the fact that “the direct creditors for the principal sums adjudged to them were the Russian subjects individually, benefiting by a stipulation made in their names,” and not the Russian Government, and that therefore Russia as such had no right to stand before the Tribunal. The Arbitral Tribunal, in deciding to set aside the preliminary request, stated:³⁰⁵

“Considering that the origin of the claim goes back to a war, an international fact in the first degree; *that the source of the indemnity is not only an international treaty but a treaty of peace and the agreements made with a view to the execution of this treaty of peace; that this treaty and these agreements were between Russia and Turkey, settling between themselves, state to state, as public and sovereign Powers, a question of international law; that the preliminaries of peace included in the indemnities ‘which His Majesty the Emperor of Russia claims that the Sublime Porte bound itself to pay to him’ the ten million roubles allowed as damages and interest to Russian subjects who were victims of the war in Turkey; that*

³⁰² See “The Case of Russia Against Turkey at The Hague Court of Arbitration” (editorial comment), *AJIL*, Vol. 7, No.1, January 1913, pp. 146-149.

³⁰³ *Russian Indemnity Case* (Russia v. Turkey), Award of the Arbitral Tribunal of November 11, 1912, *AJIL*, Vol. 7, No.1, January 1913, p. 178.

³⁰⁴ SEIDL-HOHENVELDERN Ignaz, “Russian Indemnity Arbitration (1912)”, *Ency. PIL* (dir. by R. Bernhardt), Vol. 2, 1981, p. 246.

³⁰⁵ *Russian Indemnity Case* (Russia v. Turkey), Award of the Arbitral Tribunal of November 11, 1912, *AJIL*, Vol. 7, No.1, January 1913, p. 181 [emphasis added].

this condition of debt from state to state has been confirmed by the fact that the claims were to be examined by a purely Russian commission; that the Imperial Russian Government has full authority in the matter of conferring, collecting and distributing the indemnities, in its capacity as sole creditor; that whether, in theory, Russia has acted by virtue of his right to protect its nationals or by some other right is a matter of little moment, since it is with the Imperial Russian Government alone that the Sublime Porte entered into or undertook the engagement the fulfilment of which is demanded; [...].”

The Tribunal next took up the question as to whether Turkey was responsible for interest upon delay in the payment of the sums due. After careful examination of the facts and principles of law, the Tribunal held that (1) Turkey was responsible, “as a private debtor,” for the payment of interest (“moratory indemnities”) to Russia, but that it was liable only after an “explicit and regular” demand for the payment of the principal, and interest upon such principal. The Tribunal found that Russia had made this demand in December 31, 1890/January 12, 1891, and that therefore Turkey was responsible to Russia for interest upon the sums overdue from that date.

But the Tribunal also held that (2) the benefit to Russia of this legal demand had ceased as a result of the subsequent relinquishment by its Embassy, at Constantinople, which explicitly and repeatedly agreed, without discussion or reservation, to accept the balance as stated by Turkey, in which no interest was included. The Tribunal found that the correspondence of the last few years established the fact that the two parties interpreted the acts of 1879 as implying that the payment of the balance of the principal was identical with the payment of the balance to which the claimants had a right (which implied the relinquishment of interest or moratory interest-damages). The result, in law, of these facts was that Russia could not, after the principal has been paid in its entirety or placed at its disposal, validly bring up again a claim that has already been accepted and practised, in its name, by its Embassy. Indeed, the judgment would have been in favour of Russia had not been for the inconsistent behaviour of its Embassy at Constantinople; the Tribunal considered this to be a renunciation by Russia of its claim for interest put forward on December 31, 1890/January 12, 1891, and, therefore, rejected the claim for interest.

In reaching its conclusion the Tribunal examined not merely general principles of law, maxims of equity, statements of accredited publicists, decisions of arbitral tribunals that

were in point and were properly regarded as precedents, but analogies with principles and rules of private law. On the last point the Arbitral Tribunal said:³⁰⁶

“When the Tribunal recognized that, according to the general principles and custom of public international law, there was a similarity between a condition of a state and that of an individual, which are debtors for a clear and exigible conventional sum, *it is equitable and juridical to apply also by analogy the principles of private law common to cases where the demand for payment must be considered as removed and the benefit to be derived therefrom as eliminated*. In private law, the effects of demand for payment are eliminated when the creditor, after having made legal demand for payment upon the debtor, grants one or more extensions for the fulfilment of the principal obligation, without reserving the rights acquired by the legal demand (Touiller-Duvergier, *Droit français*, vol. III, p. 159, No. 256), or again when “the creditor does not follow up the summons to the debtor to pay,” and “these principles apply to interest-damages as well as to interest due for the non-fulfilment of the obligation * * * or for delay in its fulfilment.” (Duranton, *Droit français*, X, p. 470; Aubry et Rau, *Droit civil*, 1871, IV, p. 99; Berney, *De la demeure*, etc., Lausanne, 1886, p. 62; Windscheid, *Lehrbuch des Pandektenrechts*, 1879, p. 99; Demolombe X, p. 49; Larombière I, art. 1139, No. 22, etc.).”

The Arbitral Tribunal therefore held that “a negative reply is made to Question No. 1 in Article 3 of the *compromis*”.

Summary of recourse to international arbitration. In the field of the recovery of State external debts, a number of decisions by arbitral tribunals set up by virtue of peace treaties were disappointing to bondholders.

In the *Florida Bond Cases*,³⁰⁷ the decision of the Anglo-American Commission was adverse to the British holders of certain bonds issued by the Territory of Florida prior to its admission as a State of the Union; in the *Texas Bond Cases*,³⁰⁸ the Umpire, in dismissing the claims, held that “this commission can not entertain the claim, it being for transactions with the Independent Republic of Texas prior to its admission as a State

³⁰⁶ *Ibid.*, p. 199. On the analogies adopted by the tribunal, see LAUTERPACHT H., *op. cit.*, p. 257 [emphasis added].

³⁰⁷ *Florida Bond Cases*, Umpire, September 14, 1854, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, p. 3594. Same under: *Affaire des bons de la Floride*, sentence du 14 septembre 1854, Commission mixte du traité du 8 février 1853 (Etats-Unis, Grande-Bretagne), *Recueil des arbitrages internationaux* (ed. by A.G. de Lapradelle et N. Politis), Tome 1er: 1798-1855, 1905, pp. 758-762.

³⁰⁸ *Texas Bond Cases*, Umpire, November 29, 1854, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, p. 3591. See also: *A Digest of International Law* (ed. by J.B. Moore), Vol. I, 1906, pp. 343-347. Same under: *Affaire des bons du Texas*, sentence du 29 novembre 1854, Commission mixte du traité du 8 février 1853 (Etats-Unis, Grande-Bretagne), *Recueil des arbitrages internationaux* (ed. by A.G. de Lapradelle et N. Politis), Tome 1er: 1798-1855, 1905, pp. 683-685.

of the United States”; in the *Colombian Bond Cases*,³⁰⁹ the decision of the Mixed Commission was adverse to the U.S. holders of certain bonds issued by New Granada; and, in the *Mexican Coupons Case*³¹⁰ a claim to recover unpaid coupons of overdue bonds, brought by certain U.S. bondholders against the Government of Mexico, before the Mixed Commission, failed.

In the *Venezuelan Bond Cases*,³¹¹ however, the majority of the Commissioners allowed the claim and held that diplomatic protection, by major powers, was not confined solely to claims arising out of violations of “ordinary contracts”, but was extended to the protection of “hazardous loan contracts”. This decision constituted a clear departure from the old law, as established in the *Colombian Bond Cases*, that regarded the claims originating in “hazardous loan contracts” as not *per se* deserving the interposition of a government or subject to diplomatic protection.

A claim decided *a priori* was the *Venezuelan Preferential Case*³¹². It related essentially to the question of “whether or not Germany, Great Britain and Italy are entitled to preferential or separate treatment of their claims against Venezuela”. The tribunal of the Permanent Court of Arbitration held that the blockading powers have a right to preferential treatment in the payment of the 30 per cent of the customs receipts of La Guayra and Puerto Cabello as a reimbursement of the expenses incurred by them during the blockade.

Another claim allowed *a priori* was in the *Russian Indemnity Case*³¹³ between Russia and Turkey, where the Arbitral Tribunal held that Turkey was responsible for interest (“moratory indemnities”) upon the sums overdue to Russia, as in the case of an ordinary

309 *Colombian Bond Cases*, Mixed Commission, treaty between Colombia and the United States of February 10, 1864, Sir F. Bruce, Umpire, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, 1898, p. 3512.

310 *Mexican Coupons Case*, Mixed Commission, convention between Mexico and the United States of July 4, 1868, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, 1898, p. 3616.

311 *Venezuelan Bond Cases*, Claims Commission, convention between the United States and Venezuela of December 5, 1885, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, 1898, p. 3616.

312 *Venezuelan Preferential Case* (Germany, Great Britain, Italy, Venezuela *et al.*), Protocol of Washington of 7 May 1903 and Award of the Arbitral Tribunal of 22 February 1904, *RIAA*, Vol. IX, pp. 99-533.

313 *Russian Indemnity Case* (Russia v. Turkey), Award of the Arbitral Tribunal of November 11, 1912, *AJIL*, Vol. 7, No.1, January 1913, pp. 178-201; *Compromis, ibid.*, Supplement, pp. 62-67. Same in

debtor, but that interest would only begin to run from the date of notification of default and the demand for interest. However, the Arbitral Tribunal also held that Russia, having accepted subsequent payments, after its demand for interest, on account of the principal without mention of the interest due, was to be regarded by its conduct as having withdrawn or renounced its claim for interest.

Chapter 2. International Practice on the Recovery of State External Debts in the Period between the two World Wars (the League of Nations's Period)

In the period between the two World Wars, the methods studied in the preceding section employed to recover State debts continued to evolve: diplomatic interventions, foreign financial controls, and recovery by arbitral and judicial means continued to be resorted to on a regular basis, except the threat or the use of force for the compulsory recovery of State debts, which apparently was brought to an end with the conclusion of The Hague Convention (II) of 1907 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.³¹⁴

Besides, during this period, various relevant efforts of “collective action” on State loans and their repayment took place: certain State loan operations came about under the auspices of the League of Nations, and, some initiatives of interdisciplinary significance in the context of dispute resolution of international economic disputes, including disputes arising from State loans, were launched under the auspices of the League of Nations. At a regional level, another effort in the search for legal certainty took place: the codification of a number of questions relating to the execution of obligations in contracts, and, especially, the payment of debts or pecuniary obligations arising from contracts concluded between a State and private subscribers or bondholders of another State, adopted by the Sixth International Conference of American States, at Havana, in 1928.

³¹⁴ This development was reflected in a number of important formulations of the principle of non-intervention: in article 8 of the Convention of Rights and Duties of States (Montevideo, 1933); in article 15 of the Charter of the Organization of American States; as well as in paragraph 4 of Article 2 of the Charter of the United Nations; see INTERNATIONAL LAW COMMISSION, *International Responsibility*, Report by F.V. García Amador, Special Rapporteur, *YBILC*, 1956, U.N. Doc. A/CN.4/56, January 20, 1956, pp. 217-218.

In this chapter, we will see that the new trends in the practice on the recovery of State debts are more or less as follows: (1) thanks to the participation of the League of Nations, the issue and repayment of certain State loans became a matter of “collective and organised action” for the first time in history; (2) as a result, some new legal principles and schemes afforded guidance with regard to the control of the public finances of the defaulted countries; (3) recourse to judicial settlement by arbitral tribunals, municipal and international courts become more frequent in the private law sphere, owing to public law interference with the introduction in loan contracts of the so-called gold clauses; and (4) the inability to levy execution continued to deter private creditors from suing governments.

A. The principles and methods of financial reconstruction undertaken under the auspices of the League of Nations

Following World War I, the serious economic and financial difficulties led some State members to request the financial assistance of the League of Nations,³¹⁵ whose Council and its technical advisory body, the Financial Committee,³¹⁶ put at their disposal a number of experts of the highest authority who were ready to intervene by elaborating and implementing a programme of financial reconstruction which included, in a number

³¹⁵ For a “legal” view of these economic and financial difficulties and the organizational problems that confronted States after World War I, see WILLIAMS Sir John Fischer, “L’entraide financière internationale”, *RCADI*, Tome 5, 1924-IV, pp. 113-155; see also RIST Charles, “L’oeuvre du Comité financier de la Société des Nations et le relèvement de l’Europe”, *Conférence à la nouvelle école de la Paix*, 1931, 17 p.

³¹⁶ The Financial Committee was set up on the recommendation of the Brussels International Financial Conference of 1920. It was the Council’s advisory body on all financial questions capable of international solution. “Son caractère se retrouve dans sa composition : il comprend une douzaine de personnes, choisies comme experts, parmi les milieux financiers de différents pays qui, en fait, mais non en droit, les désignent. Les membres du Comité financier sont donc orientés par les directives de leur Etat, mais peuvent travailler plus librement que s’ils étaient les représentants officiels. En somme, le Comité financier est l’organe chargé de préparer le travail du Conseil, ses séances, qui sont privées, précèdent donc en général celles de ce dernier, chaque trimestre. Mais il peut tenir des réunions extraordinaires, ce qui est parfois utile si le Conseil lui a confié la surveillance de l’exécution de ses décisions. Le rôle du Comité financier a été très important pour l’organisation financière et monétaire des Etats secourus”: see SAINT-GERMES J., *La Société des Nations et les emprunts internationaux*, 1931, p. 3.

For a more detailed explanation of the origins, development and functions of the Financial Committee, see COSOIU Corina, *Le rôle de la Société des Nations en matière d’emprunts d’État*, 1924, pp. 50-61.

For an overall view of the work of the League of Nations, including its economic and financial activities, see: LEAGUE OF NATIONS, *The Aims, Methods and Activity of the League of Nations*, 1935, 220 p; POORTENAAR Ada Albertine, *L’oeuvre de la restauration financière sous les auspices de la*

of cases, the issue of a loan with the guarantee of the Council and a number of interested powers, and, which, in the specific cases of Austria, Hungary, Greece, Bulgaria, Danzig, and Estonia, were done with some success.³¹⁷

During this period, a new form of foreign financial intervention thus came out in order to protect not only the interests of the bondholders, and other investors, but to ensure most important and higher goals: the financial rehabilitation of the war-impooverished countries, the reorganization of their economic life, and the stabilization of their currencies.³¹⁸ This differed, in substance, from the classical European and United States types of financial interventions imposed against weak States, insofar as this new type of foreign financial control was pursued (1) at the request of the country to be assisted; that (2) the States to be assisted were themselves members of the organisation in whose name and under whose authority the control was exercised and that, in that capacity, participated in the elaboration of their program of financial reconstruction;³¹⁹ that (3) the control was not exercised by the creditors and/or their governments but by collective organs representing the interest of the bondholders as well as those of the international community; and, that (4) the independence of the assisted States was guaranteed by the assisting powers through the different international instruments signed, under the auspices of the League, by them and the member States whose nationals contributed to the floatation of the loan.³²⁰

To the extent that the League of Nations became a credible intermediary between debtor States and their creditors (bondholders and their governments), in a number of other cases the League's principles and methods of financial reconstruction afforded guidance

Société des Nations, 1933, pp. 136-166; and VAN WOERDEN F.A., *La Société des Nations et le rapprochement économique international*, 1932, 298 p.

317 SOCIÉTÉ DES NATIONS, *Société des Nations, dix ans de coopération internationale*, 1930, p. 265.

318 This type of foreign financial control, the League of Nations-type, "présente un caractère essentiellement altruiste. Il s'agit d'une entr'aide internationale, comme l'a très bien remarqué M. Andréades": cf. ANDRÉADES André, *op. cit.*, p. 7; see STRUPP Karl, *op. cit.*, p. 12.

319 "The League system excluded the possibility of the control's being used as an instrument for the political purposes of a single power or a group of powers. The League's control was therefore essentially financial rather than political in character": see BORCHARD Edwin, *State Insolvency*, 1951, pp. 296-297.

320 For instance, in the case of Austria, the protocols provided that the signatories will respect its "political independence, territorial integrity, and sovereignty", see SOCIÉTÉ DES NATIONS, *op. cit.*, p. 262. See also VAN WOERDEN F.A., *op. cit.*, pp. 17, 28; and RIST Charles, *op. cit.*, p. 7.

in some subsequent economic and financial restorations,³²¹ and, provided the leverage for the codification and regulation of a number of important international economic and financial topics,³²² which included a number of conventions which had not entered into force such as, *inter alia*, the Convention on Financial Assistance; the Council's Rules of Procedure for the Friendly Settlement of International Economic Disputes Between States; the proposal for the creation of an International Loans Tribunal; and, a number of important studies in international economic, financial and monetary relations;³²³ all of which, despite their intrinsic value, have not been taken into account by subsequent multilateral organizational arrangements.

a) The League loans. Among the technical activities conducted by the League of Nations the floatation of international loans deserve special attention because they served to promote the post-war reconstruction of Europe as their purpose was to provide the means for ensuring economic and financial stability for the countries seriously affected by the consequences of the War (in two cases the stability of a large refugee population was involved).

The loans that were issued under the auspices of the League of Nations were the following:³²⁴ Austrian 6 per cent, guaranteed loan;³²⁵ Bulgarian 7 per cent, refugee loan; Bulgarian 7^{1/2} per cent, stabilisation loan; Danzig (Free City) 6^{1/2} per cent, loan; Danzig

³²¹ BORCHARD Edwin, *State Insolvency*, 1951, p. 299.

³²² A number of conventions, which entered into force, containing rules for the settlement of economic questions were also concluded under the auspices of the League, and covered the following subject-matters: Freedom of Transit (Barcelona, April 20, 1921), Regime of Navigable Waterways of International Concern (Barcelona, April 20, 1921), Simplification of Customs Formalities (Geneva, November 3, 1923), International Regime of Railways (Geneva, December 9, 1923), International Regime of Maritime Ports (Geneva, December 9, 1923), Transmission in Transit of Electric Power (Geneva, December 9, 1923), Development of Hydraulic Power—affecting more than one State (Geneva, December 9, 1923), Second Opium Conference of the League of Nations (Geneva, February 19, 1925), Suppression of Counterfeiting Currency (Geneva, April 20, 1925), Suppression of the Falsification of Documents of Value (share and bond certificates, bills of exchange), Abolition of Import and Export Prohibitions and Restrictions (Geneva, November 8, 1927), Creation of an International Agricultural Mortgage Credit Company (Geneva, May 22, 1931).

³²³ See, *inter alia*, LEAGUE OF NATIONS, *International Currency Experience: Lessons of the Inter-War Period*, 1944, 249 p.

³²⁴ See the reports of the LEAGUE LOANS COMMITTEE (London), *Annual Reports (1st-5th)*, May 1933-1937, 81 p.; and the LEAGUE LOANS COMMITTEE (London), *Annual Reports (6th-10th)*, 1937-1950, 41 p.

³²⁵ LEAGUE OF NATIONS, *The Financial Reconstruction of Austria – General Survey and Principal Documents*, November 1926, 312 p. See also PIROTTE Simon, "Le régime de l'emprunt garanti 1923-1943 du Gouvernement Autrichien", *Bull. Inst. Jur. Int.*, Tome XXXIV:1, janvier 1936, pp.

(Municipality) 7 per cent, loan; Estonian 7 per cent, loan; Greek 7 per cent, refugee loan; Greek 6 per cent, stabilisation loan; and Hungarian Government 7^{1/2} per cent, loan.³²⁶ Although the procedure and forms of control were formally different in each case, it was nonetheless possible to distinguish three phases.³²⁷

The first phase started with the official request of the country to be assisted, which constituted the legal basis for the League's intervention; this was followed by a decision of the Council to proceed to the study of a plan of financial reorganization; previously, the country concerned had to ensure that its request was to receive the consideration and support of the other members of the Council.³²⁸

The second phase consisted of the elaboration of the scheme for the financial rehabilitation of the controlled State, which was one of the main tasks of the Financial Committee as it had to investigate *in situ* the financial needs of the country, define the loan conditions, and supervise the execution of the scheme; this was followed by a series of diplomatic instruments, containing the rules governing the organization and functions of the control authorities, which were signed under the auspices of the League by the assisted State and those member States whose nationals contributed to the floatation of the loan; the organization of the control authority consisted of two organs: a (i) Commissioner-General,³²⁹ a Trustee, or an International Financial Commission, appointed by and responsible to the Council of the League, who was to intervene between the assisted governments and their creditors, and a (ii) Committee of Control composed of the governments of the States where the money was actually raised, who also undertook to guarantee the service and redemption of the loan, and who had no right to communicate directly with the assisted governments except via the Commissioner-General; the first "League loan" and the first League-type of control was

7-24 and PIETRI Nicole, *La Société des Nations et la reconstruction financière de l'Autriche 1921-1926*, 1970, 203 p.

326 LEAGUE OF NATIONS, *The Financial Reconstruction of Hungary – General Survey and Principal Documents*, December 1926, 248 p.

327 SAINT-GERMES J., *op. cit.*, pp. 4-9.

328 The literature on this subject mentions that the Austrian Chancellor himself, when he first appeared before the Council of the League, offered to accept control as a condition of assistance; he became afterwards a member of the so-called Austrian Committee to whom part of the preparatory work had been entrusted; see BORCHARD Edwin, *State Insolvency*, 1951, p. 297.

329 "Il ne devait être un national d'aucun des pays garants, ni d'un pays voisin": see WILLIAMS Sir John Fischer, "L'entraide financière internationale", *RCADI*, Tome 5, 1924-IV, p. 133.

established over Austria by the so-called Geneva protocols signed on October 4, 1922, between the Governments of Austria, Great Britain, France, Italy and Czechoslovakia.

The third phase consisted in the execution of the scheme, which was determined by the Council of the League, which was vested with special arbitral functions so that in the event of any difference as to the interpretation of the protocols, and in case of abuse of the loan proceeds, the parties to the protocols could appeal to the Council, whose opinion and decisions they agreed to accept in advance.

Despite its technical rather than political character, the League loans were not exempted from political pressure from creditors. In the spring of 1932, the British Government, owing to the fact that a large proportion of those loans was issued on the London market, took the initiative of proposing to create a committee which might take any action “to secure the maintenance of the status of any particular League Loan, or to protect the interest of bondholders in any particular loan, would be for the benefit of the bondholders of that loan generally, without distinction of nationality of the bondholder or the place of issue of any tranche.”³³⁰ This committee was to be known as the League Loans Committee, which, from the very start, made it clear that its function was not that of a “debt collector” that wishes to extort debtor governments more than they can reasonably be asked to pay, nor to obtain for the League loan bondholders unfair advantages at the expense of other creditors, but only to get recognition that the League’s bondholders are entitled to special consideration and the highest security in view of the very special status of these loans and the purposes for which they were issued.³³¹

b) The Convention on Financial Assistance. This convention, signed by twenty-eight States on October 2, 1930, aimed at providing a collective mechanism for affording financial assistance “in the form of guarantees for loans” to States victims of aggression, or to States likely to be victims of aggression. By reinforcing their power of resistance, through this means, “in the event of international disputes likely to lead to a rupture or in case of war”, many of the smaller countries, it was assumed, would have a defence

330 LEAGUE LOANS COMMITTEE (London), *First Annual Report*, May 1933, p. 7.

331 LEAGUE LOANS COMMITTEE (London), *Sixth Annual Report*, June 1938, p. 19.

against aggression.³³² As the financial methods and principles proposed in this convention were similar to those employed in the schemes of the League loans, Sir John Fischer Williams emphasized that “[c]ette Convention est en effet une tentative de mettre la puissance de l’argent au service du droit. [...] il s’agit d’atteler la puissance de l’argent au char du droit et de faire conduire ce char par la communauté internationale.”³³³

In order to give an idea of the scope of this convention, we will briefly summarise below its main provisions: a State requiring assistance could appeal to the Council and receive the assistance provided for in the convention unless the Council decided otherwise (paragraph 1, Article 1); by virtue of the financial assistance granted, then, the assisted State was bound to submit the dispute in question “to judicial or arbitral settlement, or to any other pacific procedure which the Council may deem suitable” (paragraph 2, Article 1); the Council could also grant financial assistance before the commission of aggression if one party to a dispute refused or neglected to conform to methods of pacific settlement, provided that it considered that peace cannot be safeguarded otherwise (paragraph 1, Article 2); ordinary and special guarantees covering the service of loans, including short-term credits, could be undertaken in advance by the countries associated with the schemes (Article 3); it was stipulated that the service of the loans comprised the sums payable in each year for interest and amortisation, under the terms of the loan contracts (Article 4); no loan could exceed the period of thirty years, and the governments contracting a loan could repay it before the end of its full period of maturity (Article 5); in the event of a default by the borrowing government, liability of an ordinary guarantor was limited to a maximum whereas a special guarantor was liable to the full (Articles 7 and 9); the amount of the service of the loan was to be fixed by the Council in gold francs (the monetary value equivalent to 0.322581 gramme or 4.97818 grains of gold nine-tenth fine), and for the purposes of

³³² LEAGUE OF NATIONS, *Convention on Financial Assistance*, October 2, 1930, p. 2 (*cf.* the preamble of the convention).

³³³ WILLIAMS Sir John Fischer, “La convention pour l’assistance financière aux États victimes d’agression”, *RCADI*, Tome 34, 1930-IV, p. 85. He added that: “On n’est plus à l’époque où un Etat créancier se croyait en droit d’entreprendre des mesures portant atteinte à l’indépendance politique ou à l’intégrité territoriale d’un Etat débiteur et se sentait, ainsi, en rapports plutôt hostiles avec ce dernier. [...] Le créancier n’assassine pas son débiteur, mais, au contraire, dans le droit et la pratique anglaise, au moins, le créancier assure la vie du débiteur chez une bonne compagnie d’assurances ; [...] Et, ce débiteur, c’est un Etat; et puisque ce n’est que l’Etat lui-même qui est le débiteur, on n’a pas le droit de

determining the value of the other currencies in which the loan was contracted, it was assumed to be the value of their legal weight in pure gold at the moment of signature of the loan contract (paragraph 2 (a), Article 14); if the borrowing government defaulted, the amount of each default in meeting a guaranteed payment due on a loan constituted a debt of that government to the Trustees, bearing compound interest (one per cent higher), as from the date at which the government was due to provide the Trustees with the funds necessary for the service of the loan (paragraph 1, Article 20); thus, in the event of default, bondholders could claim only against the Trustees appointed by the Council (5 Swiss nationals) and not against the guarantor States; by this means the League prevented State guarantors to claim, should they had paid directly the debt, to stand in the shoes of the creditors, to be subrogated to their rights, and to have an assignment of their securities; and, about the disputes concerning the interpretation or as to the method of application of the convention it was provided that they will be settled by a decision of the Council of the League of nations (Article 27).

At the doctrinal level, despite that the Convention did not attempt to define aggression, nor to link its operation automatically with an article of the Covenant of the League of Nations, it was nevertheless criticized for being inconsistent with the rules of neutrality: “a State which guarantees a loan is not impartial between the belligerents. It definitely takes side.”³³⁴

c) The Council’s Rules of Procedure for the Friendly Settlement of International Economic Disputes Between States. This is another significant contribution of the League of Nations to the judicial settlement of international economic disputes generally. Following a proposal made, in March 1930, by the French delegation of a memorandum relating to, *inter alia*, the establishment of a Permanent Organ of Conciliation and Arbitration,³³⁵ the Council of the League of Nations adopted, by

saisir les biens de ses ressortissants. La doctrine de Grotius à ce sujet est maintenant périmée [...]”: *ibid.*, pp. 97-98.

³³⁴ WILLIAMS Sir John Fischer, “The Convention on Financial Assistance”, *BYBIL*, 1931, Vol. XXIX, p. 152.

³³⁵ The French proposal envisaged that this permanent organ would be attached to the Council and “competent to examine and settle all difficulties submitted to it by the participating States concerning the interpretation and application” of certain measures of an economic nature and of “bilateral or multilateral conventions”, see the LEAGUE OF NATIONS, *Protocol Regarding the Programme of Future Negotiations Referred to in the Resolution of the Tenth Assembly of the League of Nations*, janvier-juin 1930, p. 435 [hereinafter: LoN, *Protocol Regarding the Programme of Future Negotiations*, 1930]. See

resolution of January 28, 1932, the Rules of Procedure for the Friendly Settlement of Economic Disputes Between States.³³⁶

Previously, at the Preliminary Conference with a View to Concerted Economic Action, held in Geneva from February 17 to March 24, 1930, a Protocol Regarding the Programme of Future Negotiations³³⁷ was signed on March 24, 1930, which provided for an “[e]xamination by the Economic Organisation of the League of Nations of the various points contained in the memorandum submitted by the French delegation”, one of which was “the establishment of a permanent body for arbitration and conciliation and a periodical convening of a conference of Governments”.³³⁸

In its report, the Economic Committee mentioned that it was inconvenient to create any new permanent organ for the following reasons:³³⁹ (a) the “slow and laborious procedure” of permanent or *ad hoc* organizations created for the solution of disputes, which are poorly adapted to the continually changing economic conditions; it happened that the circumstances which gave rise to conflict had evolved when the final decision was issued; (b) the bodies composed of judges unacquainted with all the details of economic life lead them to rely on purely legal criteria that do not always operate in a satisfactory manner for the parties (the Economic Committee mentioned that in an Order of December 6, 1930, of the PCIJ, relating to the *Free Zones of Gex and Upper Savoy* case, the Court expressed its opinion that judicial settlement was not the appropriate means for solving conflicts of an economic nature); and, (c) considerations for the choice of arbiters and conciliators often give raise to so difficult and laborious negotiations that the parties in conflict are discouraged to have recourse to this means of conflict solution. The Economic Committee also concluded that a “network of contractual inter-State undertakings which might be applied for the settlement of economic disputes” already existed, and that more confusion might result from the

also HUDSON Manley Ottmer, “The Friendly Settlement of Economic Disputes between States”, *AJIL*, Vol. 26, No. 2, April 1932, p. 354.

336 SOCIÉTÉ DES NATIONS, *Procédure pour le règlement amiable entre Etats des différends d'ordre économique*, janvier 1932, 5 p. [hereinafter: SdN, *Procédure pour le règlement des différends d'ordre économique*, 1932].

337 Paragraph 2 of Article 2 of the Protocol, see LoN, *Protocol Regarding the Programme of Future Negotiations*, 1930, p. 419.

338 *Ibid.* See also SdN, *Procédure pour le règlement des différends d'ordre économique*, 1932, pp. 1, 2.

339 SdN, *ibid.*, pp. 4-5.

creation of a new body “being likely to complicate what was already a sufficiently confused situation owing to the multiplicity of such undertakings”.³⁴⁰ It nevertheless proposed the creation of “a group of experts to whom the interested parties might apply for the peaceful settlement of economic disputes” between States, in view that the existing situation was unsatisfactory.³⁴¹

The Economic Committee therefore submitted a set of draft rules, not intended to become an international convention, but intended to be brought into force by a decision of the Council. In January 28, 1932, the Council adopted the following rules:³⁴²

“RULES OF PROCEDURE INSTITUTED BY THE COUNCIL TO FACILITATE THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES OF AN ECONOMIC NATURE BETWEEN STATES

Chapter I.—Jurisdiction

Article 1. Only members of the League and States non-members may apply to the Experts for the peaceful settlement of an economic dispute arising between them.

Article 2. A dispute can only be validly brought before the Experts by a joint application from the Parties to the case.

Article 3. The jurisdiction of the Experts shall extend to all disputes concerned with matters of an economic nature.

Chapter II.—Appointment of Experts

Article 4. The Experts, to the number of fourteen, shall be appointed by the Council on the proposal of the Economic Committee of the League.

The Experts must:

- (a) Be of different nationalities;
- (b) Be persons enjoying the highest esteem;
- (c) Be of recognised competence in economic questions in the widest sense of the term;
- (d) Be familiar with the problems involved in the regulation of economic relations between countries, and in particular with matters usually forming the subject of commercial treaties and other economic agreements.

³⁴⁰ LEAGUE OF NATIONS, *Procedure for the Friendly Settlement of Economic Disputes Between States* (Note by the Secretariat), May 3, 1933, p. 2. The Committee based its conclusions on a separate previous study carried out by the Secretariat of all the provisions of the various treaties concluded between two or more States, principally in Europe, with the object of settling, by means of conciliation, arbitration or judicial settlement, disputes referring inter alia to economic questions, see LEAGUE OF NATIONS, *Memorandum Relating to the Pacific Settlement of International Disputes Concerning Economic Questions in General and Commercial and Customs Questions in Particular*, January 15, 1931, 74 p.

³⁴¹ SdN, *Procédure pour le règlement des différends d'ordre économique*, 1932, p. 5.

³⁴² *Ibid.*, pp. 2-3. See also HUDSON Manley O., “The Friendly Settlement of Economic Disputes between States”, *AJIL*, Vol. 26, No. 2, April 1932, pp. 354-355.

Article 5. The Experts shall be appointed for a period of five years. Their appointment may be renewed. They shall personally perform their duties.

If an expert dies or resigns, he shall be replaced for the remainder of his term of office by a person appointed in accordance with the provisions of Article 4.

On the expiry of their term of office, the Experts shall continue to deal with any cases that may previously have been submitted to them and are not concluded.

Chapter III.—Procedure

Article 6. The application provided for in Article 2 above shall be addressed to the Secretary-general of the League of Nations.

It shall be drawn up by common agreement between the Parties to the case, and must bear their signatures.

The application shall state:

- (a) The subject of the dispute and the Parties to the case;
- (b) The number of Experts to be selected;
- (c) The nature of the decision the Expert or Experts are requested to give (advisory opinion, conciliation or arbitration);
- (d) The names of the Experts chosen or the request to apply Articles 7 and 8.

Article 7. If the Parties have chosen the Experts themselves, the Experts shall in turn themselves appoint their President.

Article 8. If the Parties themselves have not chosen the Experts in their application, the choice shall be made by the Chairman of the Economic Committee. For this purpose the Secretary-General shall send him a copy of the application.

Article 9. Should the Chairman of the Economic Committee be prevented from making a choice, or be a national of one of the Parties, the choice shall be made by his predecessor, provided the latter is still a member of the Committee.

Should the predecessor of the Chairman also be unable, for one of the above reasons, to make a choice, the choice shall be made by the oldest member who is not a national of any Party to the case. [...]

Article 11. Any recourse to the Experts shall imply that the Parties accept the provisions of the present Rules.

If the Parties have requested an arbitral award, that fact shall involve the obligation on their part to submit to the award to be given and carry it out in good faith.

Article 12. The Experts shall be entirely free to follow the procedure they deem best in each particular case.

Article 13. The Parties shall be informed without delay of the result of the Expert's work.

These results shall be published by the Secretary-General of the League of Nations, if the Parties consent. [...].”

Progress for an easy settlement of economic disputes was thus laid down with the Council's Resolution of January 28, 1932, setting up the Rules of Procedure for the Friendly Settlement of Economic Disputes Between States, without interfering in any

way with existing treaty obligations, and without binding any State to employ the method devised by the Council.

Later on, by Resolution of September 23, 1932, the Council appointed as experts the following persons: Sir John Baldwin K.C.M.G., C.B. (British), Mr. Roger Fighiera (French), Mr. Ludovico Luciolli (Italian), Mr. Oesten Uden (Swedish), Mr. Henri Strassburger (Polish), Mr. Hendrikus Colijn (Dutch), Mr. Jan Dvoracek (Czech), Mr. Agustin Vinuales (Spanish), Mr. Silas H. Strawn (United States), Mr. Shinjiro Matsuyama (Japanese), Mr. Emilio Coni (Argentine), Mr. Richard Köning (Swiss), Mr. Hans E. Posse (German), and Sir Atul Chandra Chatterjee, K.C.I.E., K.C.S.I. (Indou).

However, on May 24, 1937, at the occasion of the establishment of a new list of experts, the Director of the Economic Relations Section of the League of Nations, Mr. Stoppani, reported to the Secretary-General that “this procedure has never been used and it is probably that most Governments simply ignore its existence”. As one of the impediments for the renewal of the list of experts, he mentioned that the replacement of the German and Italian experts, “in the present circumstances, would give raise to certain difficulties,” and that “the procedure would be very complicated.”³⁴³

d) The proposed International Loans Tribunal. Later, with a view to make the rules in the particular field of State loans, and their recovery, more clear and coherent, the League of Nations created, in September 1935, a Committee for the Study of International Loan Contracts,³⁴⁴ by means of a resolution adopted by the Assembly of the League of Nations which provided as follows:³⁴⁵

“The Assembly invites the Council to arrange for the designation of a committee of legal experts to examine the means for improving contracts relating to international loans issued by Governments or other public authorities, and, in particular, to prepare model provisions—if necessary, with a system of arbitration—which could, if the parties so desired, be inserted in such contracts.”

³⁴³ Letter of May 24, 1937, of Mr. Pietro Angelo Stoppani, Director of the Economic Relations Section, to the Secretary-General of the League of Nations.

³⁴⁴ LEAGUE OF NATIONS, *Report of the Committee for the Study of International Loan Contracts*, May 12, 1939, 41 p. [hereinafter: LoN, *Report for the Study of International Loan Contracts*, 1939].

³⁴⁵ *Ibid.*, p. 5.

Prior to this, in 1933, at the London Monetary and Financial Conference, the Rumanian delegation proposed the establishment of a “standard procedure with reference to State loans”, but the committee reporting on it considered the proposal unfavourably. It was only at the instance of the Dutch delegation that, in 1935, the Assembly of the League of Nations proposed the designation of a committee of legal experts to study the means for improving State loan contracts, and for preparing model provisions, including provisions for arbitration, which might be inserted in such contracts.³⁴⁶ In its proposal, the Dutch Government pointed out that numerous disputes had arisen on this subject that “an unfavourable effect on the international capital market” has been produced among lenders, because of “uncertainty as to the competence of the courts to which they had access”, and, that, obstacles had thus been created to a resumption of the international loan operations necessary to world economic recovery.³⁴⁷

The Committee’s report was issued in May 1939, and dealt only with “international obligations susceptible of being placed in the market on behalf of Governments or other public authorities, in which class may also be included, where their situation is analogous, loans guaranteed by such authorities”.³⁴⁸ Thus, inter-governmental loans and loans issued in the borrower’s own country were excluded from consideration.

³⁴⁶ In accordance with the resolution of the Assembly, the Council of the League of Nations appointed, on January 23, 1936, the following Committee: Mr. L. Baranski (Poland), Director-General of the Bank of Poland; Mr. J. Basdevant (France), Legal Adviser to the Ministry of Foreign Affairs; Mr. R. Clark (United States), Chairman of the Foreign Bondholders Protective Council, Inc.; Mr. A. Fachiri (United Kingdom), Barrister-at-Law; Mr. M. Golay (Switzerland), General Manager of the Swiss Banking Corporation; Mr. A. Janssen (Belgium), President of the Société belge de banque, former Minister of Finance; Mr. C.E. ter Meulen (Netherlands), of Messrs. Hope & Co., replaced after his death by Mr. H.A. van Nierop (Netherlands), Managing Director of the Amsterdamsche Bank; Mr. O. Moreau-Néret (France), Managing Director of the Credit Lyonnais, Honorary Director at the Ministry of Finance; Sir Otto Niemeyer (United Kingdom), of the Bank of England, Chairman of the Board of Directors of the Bank of International Settlements; Dr. V. Pospisil (Czecho-Slovakia), former Governor of the National Bank of Czecho-Slovakia; and, Mr. C. Tumedei (Italy), Barrister-at-Law, former Under Secretary at the Ministry of Justice. The Committee held five sessions (April 1936, May and December 1937, June 1938, and May 1939), and elected as its Chairman Mr. Ter Meulen, and, after his death Mr. O. Moreau-Néret, *ibid.*, pp. 5-6.

³⁴⁷ See HUDSON Manley Ottmer, *International Tribunals: Past and Future*, 1944, p. 210. Former proposals of this kind include that of Professor Hans Wehberg, who in 1911, proposed the establishment of “an international tribunal for private matters empowered to deal with: 1. Private claims against debtor States and claims by creditor States against private persons. 2. Disputes relating to questions of private international law (on appeal from national courts). 3. Private claims based on international treaties establishing uniform laws (on appeal from national courts). 4. Private claims based on an allegation that a decision of a national court constituted a violation of international law. [cited: Hans Wehberg, *Ein internationaler Gerichtshof für Privatklagen* (Berlin, 1911), p. 23]”: see SOHN Louis B., “Proposals for the Establishment of a System of International Tribunals”, *International Trade Arbitration: A Road to World-Wide Cooperation* (ed. by M. Domke), 1958, p. 66.

³⁴⁸ LoN, *Report for the Study of International Loan Contracts*, 1939, pp. 6-7.

The Committee focused mainly on the following questions:³⁴⁹ (1) the means of avoiding ambiguous phrases in the drafting of international loan contracts; (2) currency clauses and the gold clause; (3) functions for the service of loans; and (4) the settlement of legal disputes. It made various suggestions as to provisions concerning the law to be applied, but concluded that a final solution of the problem would require an international convention embodying a code of rules which would remove such loans from the field of municipal law into that of international law; thus, the Committee said:³⁵⁰

“83. The Committee is not able to find a theoretically complete answer to the questions raised in the last few paragraphs. It may be that, in practice, the indications which it has given above will suffice, but, if the difficulties are felt to be serious as to require a final solution, *it appears to the Committee that the only way of dealing with them would be to embody into an international convention a code of rules applicable to international loans, thus removing the subject from the field of municipal law into that of international law. [...]*”

The Committee found that “[m]ost of the legal disputes actually encountered could, no doubt, have been easily settled, if it had been possible to lay them before a tribunal previously accepted by the parties.” It therefore strongly recommended that “loan contracts should in all cases include at least a clause providing for arbitration on matters of interpretation of the contract.”³⁵¹

Consequently, the Committee proposed a more elaborated, “draft arbitration clause”,³⁵² which could, if the parties concerned so desired, be inserted in such contracts. This

349 *Ibid.*, pp. 9-27.

350 *Ibid.*, p. 24 [emphasis added].

351 *Ibid.*, p. 25.

352 “89. (a) Any dispute concerning the rights and obligations arising out of the loan contract shall be submitted to the Arbitral Tribunal constituted as provided hereunder. The Tribunal’s decision shall be final and binding.

(b) The following parties may seize the Tribunal—namely, the debtor Government; any bondholder or bondholders in possession of securities not less than 10 % of the amount outstanding; any official representative of the bondholders; any officially recognised authority concerned with the protection of bondholders; the supervisor.

(c) Failing agreement between the parties for the submission of the case, any party may seize the Tribunal directly by means of unilateral application. The Tribunal may give judgment, by default if necessary, in any dispute so brought before it.

(d) The Tribunal shall decide all questions relating to its competence.

(e) The Tribunal shall consist of three persons nominated at the request of one or more of the parties mentioned above, by the President of the Permanent Court of International Justice, from a standing panel of nine persons chosen by the Court.

provision envisaged the creation of arbitral tribunals to deal with disputes as to the rights and obligations under loan contracts, and whose decisions shall be binding and final; each tribunal was to consist of three members appointed by the President of the PCIJ from a standing panel of nine to be set up by the Court for five-year periods; in the selection of the members of the tribunals for the various loans, the President of the PCIJ will have recourse, as far as possible, to the same persons, so as to facilitate the establishment of a uniform jurisprudence; the tribunal was to be accessible to the debtor government, to a bondholder or bondholders possessing 10 per cent of the outstanding part of a loan, to official representatives of bondholders, to any officially recognized authority concerned with the protection of bondholders, and to the trustee or supervisor of an issue; the tribunal was to be seized by special agreement between the parties to a dispute, or failing such an agreement by application by any party.

The Committee then recalled that it was “sensible of the fact that *a complete solution of the legal difficulties could only be achieved if these questions were taken out from the field of national law by international convention*. Under such a convention, States would undertake to set up an International Loans Tribunal, which would be a single Tribunal with competence extending to all loans.”³⁵³

However, it felt compelled to admit that the then existing circumstances did not offer prospect for the success of such a convention, and, that, for that reason, it refrained from examining in detail a draft convention which was annexed to the report, and which we reproduced, however, given its significance and usefulness for any future approach to the general problem of dispute resolution of State loans and other pecuniary debts.³⁵⁴

“INTERNATIONAL LOANS TRIBUNAL: DRAFT INTERNATIONAL CONVENTION PRESENTED TO THE COMMITTEE

The persons chosen for this panel shall remain in office for five years and shall be re-eligible.

(f) The Court shall fix the remuneration of each day’s sitting of the persons appointed by it and settle the method of payment. The cost of such remuneration shall be borne by the borrower, but the Tribunal may, if it thinks an action frivolous, order those bringing the action to pay the whole or part of such remuneration.

(g) The Tribunal shall fix where it shall sit in any particular case.

(h) The Tribunal shall decide its own procedure, having regard to any agreement on the subject between the parties: similarly, it shall lay down rules as to the right of intervention”: *ibid.*, p. 26.

353 LoN, *Report for the Study of International Loan Contracts*, 1939, p. 27 [emphasis added].

354 *Ibid.*, pp. 40-41 [emphasis added].

The States and Members of the League of Nations acceding to the present Act recognise the following provisions as international obligations binding upon them in their relations with any State or Member of the League of Nations that invokes them in the interest of their nationals, and agree to the application of the said provisions in the following terms:

(i) Any disputes which may arise in respect of any loan to which the present Act has been declared to be applicable in the documents by which it is governed shall be finally settled by the International Loans Tribunal. Where the national courts of a State acceding to the present Act are competent to hear disputes in respect of a previously issued loan, the legislation of such State may substitute for such courts the International Loans Tribunal.

(ii) The International Loans Tribunal shall consist of three judges appointed by the Permanent Court of International Justice. The Court may also appoint three deputy judges who would be called upon to sit, in the order laid down in the Rules of Procedure of the Tribunal, should one or more judges be prevented from sitting. The judges and deputy judges shall be chosen among judges or former judges of the highest national courts, or jurists of recognised competence in the matter of international loans. The judges and deputy judges shall be appointed for ten years and shall be re-eligible. Every two years, the Court shall proceed to elect one judge and one deputy judge and shall fill any vacancies; such vacancies may, however, be filled before that date, should the Court think fit.

(iii) The Registrar of the Permanent Court of International Justice shall be requested to provide for the functioning of the Registry of the Tribunal.

(iv) The Permanent Court of International Justice shall be requested to draw up the Rules of Procedure and the Financial Regulations of the Tribunal, which, together with any revision thereof by the Court, shall have the same force as if they have been inserted in the present Act.

(v) The Permanent Court of International Justice shall be requested in each case to fix the remuneration of the judges, which shall be borne by the debtor State.

Other administrative expenses (if any) of the Tribunal, not being costs of litigation, shall be borne in equal shares by the State and members of the League of Nations acceding to the present Act.

(vi) A dispute may be brought before the Tribunal by any bondholder or bondholders in possession of securities of a nominal value of not less than 10 % of the amount outstanding, any official representative of the bondholders, any officially recognised authority concerned with the protection of bondholders, the supervisor, any issuing house of the loan, under the conditions laid down either in the Rules of Procedure of the Tribunal or in the documents by which the loan is governed. A dispute may also be brought before the Tribunal by the debtor State or other debtor body. The loan contract and the law by which it is governed may determine what other persons shall have the right to bring a dispute before the Tribunal.

The conditions relating to intervention or citation of third parties shall be laid down in the Rules of Procedure of the Tribunal, which shall also specify the circumstances in which the decision of the Tribunal shall be binding on all the persons concerned.

(vii) *The Tribunal shall adjudicate on the basis of the contracts concluded and of the laws which are applicable, provided these are not contrary to international law, as well as on the basis of the general principles of law.* It shall also pronounce upon its own competence, should this be disputed.

(viii) The decision of the Tribunal shall be final. In each of the States and Members of the League of Nations that have acceded to the present Act, the decision shall have the same force as if it had been rendered by a national court of last instance.

The Rules of Procedure of the Tribunal shall specify the conditions under which a revision of its decision may be requested on the basis of the discovery of a fact unknown to the Tribunal and to the party bringing forward that fact before the decision was pronounced.

(ix) The present Act may be revised with the consent of the States and Members of the League of Nations that have acceded thereto. In the absence of their unanimous agreement, the new provisions may come into force six months after they have been ratified by two-thirds of such States and Members of the League. The present Act shall thereupon cease to be binding on those States and Members that have failed to ratify the new provisions.”

The Committee’s report and its draft convention annexed to it constituted an invaluable contribution of the League of Nations to the subject of State loans and their recovery. In its limited field, the project of setting up an International Loans Tribunal to which both borrowers and lenders (*i.e.*, not only States) could have had access could not but serve their mutual interests, including the interests of the world’s capital markets, and the more general and superior interests of the international community as a whole. In this respect, the League of Nations’ proposal was far in advance of the current schemes submitted to the international community by the International Monetary Fund (*infra*, Chapter 3, section D, sub-section b), on the IMF’s proposed sovereign debt restructuring mechanism (SDRM)).

Thus, at public international law and international organization levels, the League’s action laid down, for the first time in history, a general principle of international economic cooperation and solidarity amongst nations as a means for restoring the financial stability of countries in distress.³⁵⁵ As to the issue of State loans and their collection, they were considered for the first time a subject matter of “collective action” insofar as they were not acted upon solely from the one-sided perspective of the protection of interest of the bondholders.

³⁵⁵ Generally, authors agreed that it was “un phénomène nouveau, dans l’histoire du monde, qu’un Etat croie avoir, nous ne dirons pas une obligation, mais du moins un intérêt, à empêcher un autre Etat de tomber dans la détresse”: see WILLIAMS Sir John Fischer, “L’entraide financière internationale”, *RCADI*, Tome 5, 1924-IV, p. 114. Similarly, others wrote that “[c]ette doctrine financière du Comité financier de Genève est certainement dans l’histoire des doctrines financières, l’une des créations les plus intéressantes, les plus originales qu’il soit”: see RIST Charles, *op. cit.*, p. 13.

B. The Latin American doctrine of international law on private debts and their recovery: the Bustamante Code

In 1928, the Sixth International Conference of American States adopted, at Havana, a Convention on Private International Law (officially called the “Bustamante Code”)³⁵⁶ which codified a number of rules and subjects of private international law, especially those applicable to questions relating to contract and its execution, and the performance of obligations in general, including the payment of debts or pecuniary obligations arising from contracts concluded between a State and private subscribers or bondholders of another State.

Generally, as to obligations in contracts, the Bustamante Code consecrated existing rules of private international law such as the paramount character of the will of the Parties, which was contained in Article 166 under these terms: “Those obligations arising from contracts have force of law as between the contracting parties and should be discharged in accordance with the terms thereof with the exception of the limitations established by this Code.”

Concerning debts, in general, the Bustamante Code consecrated the law of the place of its execution (*lex loci executionis*) as the law to be applied. In this regard, Article 107 provided as follows: “The situation of debts is determined by the place in which they should be paid, and, if that is not fixed, by the domicile of the debtor.” Thus, only where the Parties were silent as to it, the law to be applied was that of the borrower.

Regarding the law that should govern the effects (performance) of contracts in general, the Code adopted the law of the “place of contracting” (*lex loci contractus*) as the law that should govern the effects of contracts. In this regard, Article 169 of the Code provided that: “The nature and effect of the various classes of obligations, as well as the extinction thereof, are governed by the law of the obligation in question.” In 1952, at the occasion of the consideration of the revision of the Code, the Inter-American Juridical Committee of the Organisation of American States reported that “for a practical reason as well, namely, the fact that the trend of American law clearly favours such a system,

we recommend that the system of the Code be kept in this field. Proof of this trend is the fact that none of the 15 countries that signed the Code has made a reservation on this point, which is not the case with other questions.”³⁵⁷

However, as regards specific questions of the form and method of payment, and the currency in which payment was to be made, Article 170 stipulated that it was “the local law [which] regulates the conditions of payment and the money in which payment shall be made.” The reason for the preference of the Code for the *lex loci executionis* (the law of the place where the contract is to be executed) seemed justified in that it was almost unanimously accepted, in theory and in practice, that the execution of monetary obligations are matters falling outside the will of the Parties and that they require the application of imperative and territorial legal provisions of the country where payment was to be made.

Other provisions of the Code, relating to commercial deposits and loans, and to endorsement, also contained similar “territorial” reasoning:³⁵⁸

“ARTICLE 256. The noncivil liabilities of a depositary are governed by the law of the place where the deposit is made.

ARTICLE 257. The rate or freedom of commercial interest is of an international public order.

ARTICLE 258. Provisions relating to loans upon collateral of quotable securities made in the exchange, through the intervention of a duly authorized functionary, are territorial.

[...]

ARTICLE 266. [...] the legal effects produced by endorsement between endorser and endorsee depends upon the law of the place where the bill has been endorsed. ”

With regard to concurrence and preference of debts following two or more actions of recovery, the Bustamante Code provided: “When the question is simultaneously presented in more than one court of different States, it shall be determined in accordance with the law of that one which actually has under its jurisdiction the property or money which is to render the preference effective.” (Article 226).

³⁵⁶ See *The International Conferences of American States (1889 - 1928)* (ed. by J.B. Scott), 1931, pp. 325-348, 443.

³⁵⁷ INTER-AMERICAN JURIDICAL COMMITTEE, *Comparative Study of the Bustamante Code, the Montevideo Treaties, and the Restatement of the Conflict of Laws*, September 1954, p. 99.

³⁵⁸ *Ibid.*, p. 122.

Additionally, the Bustamante Code consecrated the principle of equality between foreigners and nationals in the enjoyment of civil and commercial rights, as well as public rights, although on a reciprocal condition basis, under the following terms:³⁵⁹

“ARTICLE 1. Foreigners belonging to any of the contracting States, enjoy in the territory of the others, the same civil rights as are granted to nationals.

Each contracting State may, for reasons of public order, refuse or subordinate to special conditions, the exercise of certain civil rights by the nationals of the remaining States and any of the latter States may in such cases refuse or subordinate to special conditions the same exercise to the nationals of the former.

ARTICLE 2. Foreigners belonging to any of the contracting parties shall also enjoy in the territory of the others identical individual guarantees with those of nationals, except as limited in each of them by the Constitution and the laws.

Identical individual guarantees do not include, unless especially provided in the domestic legislation, the exercise of public functions, the right of suffrage, and other political rights.

[...].”

Despite that their drafters’ primary purpose was merely the codification of various subjects of private international law in the context of the Pan American efforts for the codification of private and public international law,³⁶⁰ its potential in subjecting the performance and execution of monetary obligations in general to the rule of law (thereby limiting possible abuses of diplomatic interposition in the field of contractual debts)³⁶¹ did not pass unnoticed: in the opinion of a learned author, the Bustamante

359 See *The International Conferences of American States (1889 - 1928)* (ed. by J.B. Scott), 1931, p. 327.

360 For an account of the Bustamante Code and the codificatory efforts inside the American continent, see PARRA ARANGUREN Gonzalo, *Codificación del Derecho Internacional Privado en América*, 1982, 610 p. For an account of the Pan-American efforts in the financial and monetary fields, see MOORE John Bassett, “The Pan-American Financial Conferences and the Inter-American High Commission”, *AJIL*, Vol. 14, 1920, pp. 343-355; and the Resolution on “Fluctuations in Exchange” of the Third International Conference of American States, *The International Conferences of American States (1889 - 1928)* (ed. by J.B. Scott), 1931, pp. 147-148.

361 The difference between the European and the United States’ practice of diplomatic protection during the inter-War period was described, by the president of the United States’ Protective Council of Foreign Bondholders, in these terms: “since the War the European countries have abandoned the international principle of conduct obtained among nations before the War—namely, that governments, would not normally interpose, even their good offices, in behalf of their nationals holding foreign government bonds, so that, in violation of that principle, they now not only make representations upon behalf of such interests, but even impose coercive measures—such as compulsory clearings—against debtor governments to compel the adequate service by these debtors of their long-term obligations held by the nationals of the coercing State.” See CLARK Jr. Reuben, “Foreign Bondholders in the United States”, *AJIL*, Vol. 32, 1938, p. 443.

Code conveyed implicitly “a ‘committed’ Latin American doctrine of international law on public and private debts and their recovery”.³⁶²

However, the Bustamante Code’s success as such was only partial. It was ratified without reservations only by Cuba, Guatemala, Honduras, Nicaragua, Panama, and Peru. Brazil, Haiti, Dominican Republic, and Venezuela ratified but made some reservations; Bolivia, Chile, Costa Rica, Ecuador, and El Salvador made general reservations; and, Argentina, Colombia, Mexico, Paraguay, and Uruguay never ratified.³⁶³ The United States did not adhere to the Convention by reason that under its Constitution each State of the Union had recognised the power to make its own laws as regards matters that were codified by the Convention on Private International, and that it was difficult for the Executive and Congress to enter into international conventions on civil and commercial matters regulated exclusively by these States. The United States also mentioned the difficulties of having different legal systems, one based on the common law, and the others founded in the *corpus iuris civilis*.³⁶⁴

C. Recourse to municipal courts for the recovery of State external debts

During this period, as in the period before World War I, it was still recognized that States could not be sued nor executed except by their consent, which meant that no effective judicial remedies were available to creditors in the event of default or non-performance of the obligation to pay by debtor States. In this period, however, a part from the usual problems of jurisdiction over States, municipal courts dealt with a number of questions relating to the value or substance of the debt and the currency of payment in “gold clauses”. For their most part they related to financial operations in the private law sphere, and, consequently, involved private international litigation.

In this period, the world economy was characterized by acute problems of financial and monetary instability, which made it necessary to use of safeguards like the “gold

³⁶² *Committed*, “in suitable chosen technical terms”, as observed by SCHWARZENBERGER Georg, “State Bankruptcy and International Law”, *International Law and its Sources, Liber Amicorum Maarten Bos* (ed. by W.P. Heere), 1989, pp. 144-145.

³⁶³ PARRA ARANGUREN Gonzalo, *op. cit.*, pp. 174-176.

clause”, in credit and financial contracts, in order to protect creditors against (i) the depreciation of their own currency, and (ii) the discharge of the obligation by payment of a lesser value than that prescribed in contract.

It is to be noted that, in this period of international economic instability, while creditors still faced limitations arising from public international law doctrines in various domestic jurisdictions (*e.g.*, reciprocal independence, equality, and sovereignty of States, and its corollary, the rule of immunity), they also faced interference from public domestic law as, for instance, the Joint Resolution of 1933, in the United States, which suspended the gold clauses in loan contracts and made it difficult to sue debtors in general, including foreign States.

a) England. As mentioned above, most of these cases related to financial operations in the private law sphere and, consequently, involved private or corporate international litigation (as opposed to sovereign litigation). However, among the many judgments concerned with international loans and gold clauses, in England there is one which is of general interest not only because of its reasoning and influence on the judicial development of our subject, but because of the position of the debtor involved: the British Government.

– *R. v. International Trustee for the Protection of Bondholders Akt*,³⁶⁵ is a case brought to the House of Lords, by the Government of the United Kingdom of Great Britain and Ireland, as appellant, to argue for the application of the American law to a loan contract having its origins in 1917, when the British Treasury, under the powers granted by the War Loan Act of 1916, arranged to borrow the sum of \$250,000,000 in the United States upon treasury notes guaranteed, by the deposit, with the Bankers Trust Co. of New York, of certain securities, on the terms and conditions contained in a pledge agreement dated February 1, 1917.

The suppliants were the holders of certain bonds for \$1,000 each issued by that Government, dated 1 February 1917, and styled a 20-year 5 ½ per cent Coupon Gold

364 *Ibid.*, pp. 115-119; see also INTER-AMERICAN JURIDICAL COMMITTEE, *op. cit.*, pp. 9-10.

Bond. The bonds provided that the British Government promised to pay to bearer, or if the bond be registered then to the registered holder the sum of \$1,000 on the 1st February, 1937, and to pay interest thereof. The bonds were “gold bonds”, insofar as they, according to the then usual commercial terminology, contained the following clause: “Such principal sum and the interest thereon will be paid at the option of the holder, either in the city of New York, state of New York, United States of America, at the office or agency which will be maintained in the said city by the obligor for the service of the bonds of this issue in gold coin of the United States of America of the standard of weight and fineness existing Feb., 1917, or in the city of London, England, in sterling money at the fixed rate of \$4.86 ½ to the pound.” There was a similar provision on the interest coupons.

The suppliants prayed for, by petition of right, payment of as much in legal tender as was equivalent to the weight and fineness of the gold dollar existing on 1st February 1917. They said that the contract was governed by English law, and that “upon its true construction the effect of the gold clause in the contract is to fix a measure of value and not to define a mode of payment, whereby the obligor contracted not for payment in actual gold coin but for money payments increasing in amount correspondingly with any decrease in the value of the currency in terms of gold from the standard of value established on Feb. 1, 1917.”³⁶⁶ The Attorney-General, while consenting to the application to have the rights of the suppliants declared, contended that the contract was governed by the law of the United States and that the Crown was prevented by the Joint Resolution of the United States Congress, dated June 5, 1933, from redeeming the bonds or from paying interest in another manner than in paper dollars. He argued that it is the intention of the parties which determines the proper law of the contract, and that it was wrong to assume that every contract to which a sovereign government is a party must be construed in accordance with the law of that sovereign.

Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Maugham, and Lord Roche, after great consideration, delivered their opinions *seriatim* reversing the

365 *R. v. International Trustee for the Protection of Bondholders Akt*, [1937] 2 All E.R. House of Lords 164. Same under: *The King v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500.

366 *Ibid.*, p. 165.

judgment of the Court of Appeal,³⁶⁷ which had held: that the bond given by the British Government was governed by English law; that the effect of the gold clause was not that the sums payable under the bonds were payable in gold coin alone, but that they were also payable in the currency in use at the date of payment of an equivalent value to the sum named in the bond at the gold value therein mentioned; that the effect of the American legislation was to make it unlawful for the creditor to sue for the gold value of the bond, but it did not prevent the debtor paying that value; that the suppliants have the right to require the exercise of the option to be paid such an amount in dollars, if the New York option is exercised, as is equivalent to the value in currency at the time of payment of the 1,000 gold dollars specified in the bond, and in sterling, if the London option is exercised, calculated at the rate of \$4.86 ½ to the pound in sterling money of England; that the words as to gold coin of the United States of America were inapplicable to the London option and the gold clause was not imported into the London option.³⁶⁸

Regarding the question whether the bondholders are entitled to be paid in New York or in England, Lord Atkin considered that it was necessary first to determine the proper law of the contract. As to this, he stated that:³⁶⁹

“[...] The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. *It is the law which the parties intended to apply.* Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion, the court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law, e.g., the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables the country where they are situate, the country under whose flag the ship sails in which goods are contracted to be carried. But all these rules only serve to give *prima facie* indications of intention: they are all capable of being overcome by counter indications, however difficult may be in some cases to find such. *The principle of law so stated applies equally to contracts to which a sovereign is a party as to other contracts.*”

³⁶⁷ *International Trustee for the Protection of Bondholders Aktiengesellschaft v. R.*, [1936] 3 All E.R. 407.

³⁶⁸ *Ibid.*, pp. 407-408.

³⁶⁹ *R. v. International Trustee for the Protection of Bondholders Akt*, [1937] 2 All E.R., p. 166 [emphasis added].

With regard to the long standing authority holding that where a sovereign State negotiates a loan in a foreign country (cited: *Smith v. Weguelin*, and *Goodwin v. Robarts*), the law of that country is necessarily the law of the contract, Lord Atkin said:³⁷⁰

"I cannot think that Lord Romilly, M.R., was intending to lay down a rule applicable in all circumstances, as, for instance, if the contract expressly made the foreign law applicable. His remarks are in fact obiter, but in any event they do not, I think, purport to lay down a rule of universal application. [...] It would appear, therefore, that these cases afford little authority for the proposition. In principle it must be ill-founded. It cannot be disputed that a government may expressly agree to be bound by a foreign law. It seems to me equally indisputable that, without any expressed intention, the inference that a government so intended may be necessarily inferred from the circumstances, as where a government enters into a contract in a foreign country for the purchase of land situate in that country in the terms appropriate only to the law of that country, or enters into a contract of affreightment with the owners of a foreign ship on the terms expressed in a foreign bill of lading, or employs in a foreign country foreign labour, in circumstances to which foreign labour laws would apply. It appears, therefore, that in every case, whether a government be a party or not, the general principle which determines the proper law of the contract is the same: it depends upon the intention of the parties either expressed in the contract or to be inferred from the terms of the contract and the surrounding circumstances, and, in the latter case, the inference may be drawn that the parties intended a foreign law to apply. The circumstance that a government is a party is entitled to great weight in drawing the appropriate inference, but it is not conclusive, and is only one factor in the problem."

After careful examination of the documents which in sequence led to the creation of the obligation of the British Government, Lord Atkin concluded that the proper law of this contract was American and not English law. This led him to answer the question by saying that the bondholders were entitled to be paid in New York and not in England. Lord Atkin said:³⁷¹

"It is admitted that the effect of the Joint Resolution of Congress, dated June 5, 1933, had the statutory effect in New York State as well as in all the other States of the United States of requiring a bond expressed in the present form to be discharged upon payment dollar for dollar of the nominal amount. As this is so the suppliants who only found their petition of right upon their claim to be paid in America a larger sum than the nominal amount of the bond must fail: [...]"

³⁷⁰ *Ibid.*, pp. 167-168 [emphasis added].

Lord Russell of Killoven agreed with Lord Atkin in that the proper law of the contract was “the law which prevails in the City of New York”, and not English law. He explained that both Branson, J., and the Court of Appeal were led to conclude that the proper law of the contract was English, and not American law, because one of the contracting parties was the Crown. He explained that:³⁷²

“Their judgment on this point both proceed upon the view that, because of a contract cannot be enforced against a sovereign unless he submit himself to the jurisdiction of some court, and because a sovereign will presumably not submit himself to the jurisdiction of a foreign court, therefore the matter stands as if the parties had agreed to be bound by the jurisdiction and decision of the courts of a particular country, viz., the country of the sovereign. They both rely also upon certain *dicta* of Lord Romilly, M.R., in *Smith v. Weguelin* (1), at p. 212, and Lord Selborne in *Goodwin v. Robarts* (2), at p. 494.

The phrase ‘the proper law of a contract’ is a phrase which I conceive bears the meaning attributed to it in Professor Dicey’s r. 155, viz.:

the law or laws by which the parties to a contract intended ... the contract to be governed; or (in other words) the law or laws to which the parties intended ... to submit themselves.

The intention must be the intention of both, not of one party alone. For this reason, *I feel great difficulty in assenting to the ‘dicta’ referred to, or to the view that the fact of a sovereign being a party to a contract establishes conclusively that the law of that sovereign’s country is the law which is to apply. It is an element of weight to be considered, but it is no more than that;* and, appraising its weight, it must be borne in mind that to ascertain what rights and obligations arise under a contract is a matter quite distinct from the enforcement of this rights and obligations when ascertained. The fact (if it be the fact) that the rights and obligations under a contract can be enforced against a sovereign only in the courts of his own country, seems to me a fallacious basis for ascertaining the law by which those rights and obligations are to be ascertained. There is no inconsistency in the view that rights and obligations defined by the law of one country are capable of enforcement only in the courts of another.”

In ascertaining the intention of the parties to that contract, he found that:³⁷³

“[...] The offer was made in New York and accepted in New York. The loan was a dollar loan. The bonds were registrable only in New York, and, if registered, were transferable only by registration there. The performance of the contract by the lender was complete when the bond was issued: the performance by the borrower (viz., payment of interest and repayment of capital) might, if the lender wished, take place in England, but *prima facie* the *locus solutionis* is where the contract was made: and I agree with the view of Branson, J., and the Court of Appeal (which are borne out by the frame of the interest coupons) that in this case the primary place of performance was New York, with an option in the lender

371 *Ibid.*, p. 179.

372 *Ibid.*, p. 180 [emphasis added].

373 *Ibid.*, pp. 181-182.

to require performance in England. But, if any doubt existed as to the proper law of the dollar bonds contract standing alone, it would, in my opinion, be removed by a consideration of the fact that they were issued in replacement of the secured notes.”

Having found that the proper law of the contract was the law of New York, and that in New York the Joint Resolution was in force, Lord Russell said that “[i]n the face of this legislation, in force in the city of New York, it is, in my opinion, impossible to declare that the suppliant is ‘entitled to receive in the city of New York’ the larger payment. No such right could be enforced there.”³⁷⁴ He inferred then that “[t]he gold clause, designed as a protection against depreciation of the currency, has in this case been defeated in its object by the special legislative provisions of the joint resolution.”³⁷⁵

Lord Maugham, in his speech, admitted that the proper law of the contract was the law of New York, that then the joint resolution must apply, and the petition of right must be dismissed. He also explained that both Branson, J., and the Court of Appeal were led to conclude that the proper law of the contract was English law, “for the reason that the loan was one contracted by a sovereign, and that the ordinary criteria were inapplicable.” He explained that as follows:³⁷⁶

“My Lords, it should be noted in the first place that in 1869, when *Smith v. Woguelin* (1) was decided, the rule that the interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined by the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves (Dicey, rr. 155, 161), had not been authoritatively settled.

[...]

In *Goodwin v. Roberts* (2), [...] Nothing was said in the argument or in the speeches as to the now accepted general rule for ascertaining the proper law of the contract.

My Lords, I think we are bound to come to the conclusion that, in the case of a government loan, as in the case of any other contract, the law of the contract must depend upon the intention of the parties, to be drawn from all the circumstances of the case. The reasons given by my noble and learned friend Lord Atkin show, I think, beyond doubt, that the mere fact that a government is a party to a contract is not decisive as to the proper law of the contract. I will add only that there have been system of law according to which contracts for payment of interest were illegal, and perhaps there are still such systems. It would be indeed strange if the proper law of the contract, involved in an issue of bonds by a sovereign government where such a law prevails, were the law of that country. Moreover, there are sovereign

³⁷⁴ *Ibid.*, p. 182.

³⁷⁵ *Ibid.*, p. 183.

³⁷⁶ *Ibid.*, pp. 186, 187 [emphasis added].

powers where in substance there is no systematised law whatsoever. In such a case there would be strong reasons for holding that both parties to the contract intended to submit themselves to the law of the country where the money lent was to be repaid. On the other hand, I accede to the view that, where a foreign loan is being negotiated by a highly civilised government, considerable weight should be given to the circumstance that the sovereign state is the borrower, and some, but not great, weight to the fact that such a borrower cannot be sued in any foreign court without its consent. To my mind, this fact is not decisive, because usually a government cannot be sued in its own domestic courts without its consent. It is true that such consent cannot infrequently be obtained, but, except by consent, there is generally no means of enforcing the judgment. The truth, I think, is that the lender does not contemplate any such proceedings, and lends in reliance on the credit of the foreign government.”

Having reached the opinion that the question was one of presumed intention (in light of the documents themselves and the surrounding circumstances), Lord Maugham concluded, “first, that the intention of all parties to the contract of loan effected by the offer and acceptance of the secured notes was that it should be governed by the law of New York, and, secondly, that it is impossible to come to the conclusion that the proper law of the contract embodied in the bonds was not the same law as that which governed the issue and acceptance of the notes. It follows, therefore, that the law of New York State applies to the bonds, and that, if the New York option is exercised, the obligation of the government is simply to pay that which in New York it is liable to pay in respect of the bonds, that is dollar for dollar, pursuant to the joint resolution.”³⁷⁷

Lord Roche felt that there was little to add and expressed his concurrence with the reasoning of the other Lord Justices. However, as to the proper law of the contract, he expressed:³⁷⁸

“I confess that I have serious doubts, during the course of the argument, as to the true construction to be reached. The principles stated by LORD ROMILLY, M.R., and LORD SELBORNE, though of course they do not constitute any absolute rules of law, are based upon considerations of very great weight, and have stood unchallenged for so long a time that I have hesitated before differing from the Court of Appeal and BRANSON, J., as to their effect upon the present case. But, though I regard them as still generally applicable to most transactions of the character of the transaction now in question, yet this transaction was of a very exceptional character. At the time the notes were issued [...] it was natural that His Majesty’s government in making resort to a great, and still neutral, financial market in the United States

³⁷⁷ *Ibid.*, p. 191.

³⁷⁸ *Ibid.*, p. 192 [emphasis added].

of America, should have clothed the transaction with both the appearance and the reality of a transaction domiciled, so as to speak, in New York. [...].”

Lord Roche admitted that in this transaction the law of New York was intended to apply but exceptionally, and that the Joint Resolution of Congress operates to defeat the suppliants’ claims. Lord Macmillan concurred with the opinions delivered.

Summary of English practice. At stake in *R. v. International Trustee for the Protection of Bondholders Akt* was not only whether American or English law governed the issue and acceptance of the notes. Here it is also important to note that there is a clear departure from the old law, as contrued in *Smith v. Weguelin*³⁷⁹ and in *Goodwin v. Robarts*³⁸⁰, which assumes that in every loan contract to which a sovereign government is a party the law of the contract is necessarily the law of that sovereign. As explained by Lord Russell of Killoven, the Court of Appeal was led to conclude that the proper law of the contract was English, and not American law, because one of the contracting parties was the Crown. The Court of Appeal’s judgment, he stated, proceed upon the view that, because of a contract cannot be enforced against a sovereign unless he submit himself to the jurisdiction of some court, and because a sovereign will presumably not submit himself to the jurisdiction of a foreign court, therefore the matter stands as if the parties had agreed to be bound by the jurisdiction and decision of the courts of a particular country, viz., the country of the sovereign. In general, for the House of Lords, the fact that the rights and obligations under a contract can be enforced against a sovereign only in the courts of his own country, seemed a fallacious basis for ascertaining the law by which those rights and obligations are to be ascertained. Therefore, the proper law of the contract must be the intention of both, to be drawn from all the circumstances of the case, and not of one party alone. For this reason the majority of the Lords found that the proper law of the contract was “the law which prevails in the City of New York”.

b) France. The case law dealing with our subject in this period confirmed that French courts, while still adhering to the theory of absolute immunity of States, started to

379 *Smith v. Weguelin*, [1869] L.R. 8 Equity Cases 198. See also: [1861-73] All E.R. 717; *BIL Cases*, Vol. 3, 1965, pp. 486-496; and *Jdip et jc (Clunet)*, Tome 3, 1876, pp. 125-127.

380 *Goodwin v. Robarts*, [1876] I A.C. House of Lords 476.

distinguish between the States' sovereign and civil capacities, and considered that jurisdiction could be assumed in the second case without violation of the principles of reciprocal independence and sovereignty of States. In this period, as in England, many judgments in France concerned the gold clause but relating mostly to financial operations in the private or corporate law sphere. The cases that follow are the most representative of that tendency.

– On July 25, 1916, in *Wiercinski c. Seyyid Ali Ben Hamond, prince Bashid*,³⁸¹ a suit brought by one Wiercinski against the former Sultan of Zanzibar for the payment of damages for the amount of Fr.500 for breach of contract, the First Chamber of the Civil Tribunal of the Seine held that if, by the principle of the reciprocal independence of States, foreign sovereigns are exempted from the jurisdiction of French courts, this was an exemption restricted to cases in which a sovereign acts in its official capacity as a head of its government, but not when the sovereign acts as a private person, and for his personal interest. The Court stated:³⁸²

“[...] Que l'incompétence, suivant lui [l'ancien sultan de Zanzibar], résultant en premier lieu de ce qu'en sa qualité d'ancien sultan il devait être considéré comme prince régnant ;

Attendu qu'il appartient tout d'abord d'établir qu'il a la qualité de prince régnant, ce dont il ne justifie pas ;

Mais que même cette justification fût-elle produite, ce moyen ne saurait être accueillie ; qu'en effet *si le principe de l'indépendance réciproque des Etats exclut la juridiction des tribunaux français à l'égard des souverains étrangers malgré la généralité des termes de l'article 14 du Code civil, cette exception doit être restreinte au cas où le souverain est assigné à raison d'engagements contractés en qualité de chef du gouvernement, les motifs qui la justifient n'existant pas en dehors de ce cas, mais elle ne peut être étendue à ceux où le souverain agit ainsi que dans l'espèce comme personne privée et dans un intérêt personnel* ; [...]

Que les éléments de la cause permettent au tribunal d'évaluer à 200 francs les dommages-intérêts résultant de ce préjudice ;

[...]

Condamne l'ancien sultan Seeyid Ali Ben Hamond, à payer audit Wiercinski 200 francs à titre de dommages-intérêts. [...].”

381 *Wiercinski c. Seyyid Ali Ben Hamond, prince Bashid*, Trib. civ. de la Seine, July 25, 1916, *JDI (Clunet)*, Tome 44, 1917, p. 1465.

382 *Ibid.*, pp. 1465-1467 [emphasis added].

— On December 30, 1929, in *Gouvernement impérial du Maroc et Maspero c. Laurans et Société marseillaise de Crédit*,³⁸³ the Court of Appeal of Aix held: that by virtue of the principle of the reciprocal independence of States, which is universally admitted in the law of nations, foreign governments were exempted from the jurisdiction of French courts; that the right to adjudicate on differences arising from their own acts belongs exclusively to them; that this immunity was absolute when the acts which give ground for complaint were acts of the State itself carried out in the political exercise of its functions (*de puissance publique*); that the loans floated by them in France were political acts, and acts of sovereignty for which the bondholders could not cite them before French courts, neither they could sue their head of governments nor their agents or bankers that participated in these operations, except for their personal liability or for contracts entered into for their personal benefit; that the Moroccan loan of 1904 fell into this category because it was raised by the Sultan to meet public needs and for the public service in virtue of his political power and in exercise of his governmental function. The Court stated:³⁸⁴

“I. — Sur l’exception d’incompétence tirée de l’immunité de juridiction:

Attendu que *l’indépendance réciproque des Etats qui est l’un des principes les plus universellement admis du droit des gens, s’oppose à ce que les tribunaux d’un pays puissent apprécier les engagements contractés par un Etat étranger*, le droit de juger le différend né de ses propres actes étant un droit exclusif et inhérent à l’autorité souveraine de chaque gouvernement; que cette immunité de juridiction est absolue lorsque les actes qui donnent lieu à une instance judiciaire sont des actes de puissance publique, ayant été faits par le gouvernement étranger comme pouvoir politique dans l’exercice de ses fonctions gouvernementales;

Attendu que les Etats, mi-souverains ou protégés qui sont en possession de la souveraineté interne, du droit de se gouverner, de s’administrer, de légiférer et auxquels la souveraineté externe fait défaut pour l’avoir abdiquée entre les mains de la puissance souveraine ou protectrice, sont assimilés aux Etats pleinement souverains et la même immunité de juridiction leur est reconnue par la jurisprudence, même dans leurs rapports avec celle-ci; [...]

Attendu, en conséquence, qu’il est en droit d’invoquer le bénéfice de l’immunité de juridiction;

Attendu que, *par application de ces principes, il est admis que les emprunts nationaux émis en France par un gouvernement étranger, étant des actes politiques, des actes de souveraineté, les souscripteurs ne peuvent actionner en responsabilité devant les tribunaux français, ni le chef de ce gouvernement, ni les agents financiers et les banquiers, qui ont participé à l’émission et à l’exécution de l’emprunt*, en vertu

³⁸³ *Gouvernement impérial du Maroc et Maspero c. Laurans et Société marseillaise de Crédit*, C.A. d’Aix, December 30, 1929, *Gazette du Palais*, 1930, 1er semestre, p. 245.

³⁸⁴ *Ibid.*, pp. 246-247 [emphasis added].

de la délégation et d'après les ordres de ce pouvoir étranger, à moins de fautes par eux commises ou d'engagements personnels contractés par eux envers les souscripteurs;

Attendu que tel est bien le cas de l'emprunt de 1904, qui fait l'objet du litige, cet emprunt ayant été contracté par le Sultan du Maroc pour faire face à des nécessités publiques et au fonctionnement de l'ensemble des services publics, et par conséquent, en vertu de son pouvoir politique et dans l'exercice de sa fonction gouvernementale; [...]"

The facts of this case were as follows: in June 1904, the Sultan of Morocco, Abdul Aziz, obtained a loan from 11 French banks, including the respondent *Société Marseillaise de Crédit*. The loan, for the sum of Fr.50,000,000, was charged on the Moroccan customs, and was made repayable over 35 years. After World War I there arose the question of payment in devalued French francs. Laurans, a bondholder, claimed payment of coupons due in gold francs, or their equivalent, and sued the *Société Marseillaise de Crédit* for such payment and obtained a preliminary judgment. He then proceeded against the Imperial Government of Morocco asking for the appointment of a receiver for the bondholders of the annual customs receipts of the whole Empire, and to hold these in guaranteed gold francs for their benefit, and applied for an account from Maspero, delegate of the bondholders, who was in charge of controlling the service of the loan.

In the proceedings before the Civil Tribunal of Marseille,³⁸⁵ the Moroccan Government pleaded its immunity from the jurisdiction of the tribunal, but the Tribunal concluded: that there was a presumption of a renunciation of immunity given the anarchy and disorder of the public services and the desperate state of the Moroccan finances at the time of the issue of the loan; that, in these circumstances, the French banks could not have intended to accept the competence of the Moroccan courts in case of litigation; that, as per the contract, the obligations created by the loan were to be executed in France, and that the loan was raised in France and was to be paid in France; that, the institution by Morocco of a guarantee fund for the service of the loan was in the nature of a waiver of jurisdiction, as it resulted from the contract that the guarantee fund was expressly destined to safeguard the rights of the bondholders; accordingly, the Tribunal declared itself competent.

³⁸⁵ *Laurans c. Gouvernement impérial du Maroc, Maspero et Société marseillaise de Crédit*, Trib. civ. de Marseille, December 6, 1928, *Gazette du Palais*, 1929, 1er semestre, p. 214.

However, on appeal, the Court of Aix stated that the renunciation of immunity could not be presumed, that such a derogation from the essential principle of State independence must be unequivocally expressed and must result from an act showing deliberate intention, and that the circumstances mentioned by the lower court were irrelevant. The Court of Appeal observed:³⁸⁶

“Mais attendu qu’une renonciation à une immunité de juridiction ne se présume pas; qu’une telle dérogation au principe essentiel de l’indépendance des Etats, ne doit laisser aucun doute, être claire et certaine, résulter d’un acte manifestant à cet égard une intention formelle et être recherchée, non point dans l’intention probable des parties contractantes, comme en cas de conflit relatif à l’exécution d’un contrat commercial conclu hors de France entre étrangers et devant recevoir son exécution en France, mais s’induire uniquement d’un fait précis, positif et personnel au chef de l’Etat chérifien, en sa qualité de partie contractante à l’emprunt de 1904, impliquant d’une manière certaine sa volonté de renoncer au bénéfice de son immunité de juridiction ; que par suite les circonstances susindiquées sont inopérantes ;”

As to the guarantee fund, the Court held that, judging from the terms of the contract, the guarantee fund was not expressly destined to safeguard the rights of the bondholders since the trustee banks were not in possession of a fund reserved for the service of the loan, but merely of a fund of treasury destined to facilitate the service of the loan by the trustee banks, that the guarantee consisted exclusively of the Sherifian customs, and that execution could not be levied on such a fund of treasury.

Consequently, on the question of immunity, the Court of Appeal of Aix held that this was established as regards the Moroccan Government, and that the *Société Marseillaise de Crédit* and Maspero shared the immunity. It declared that the Civil Tribunal of Marseille was incompetent as regards the action, nor could it enter judgment as regards the request of attachment.

Summary of French practice. In France, during the inter-War period, the case law confirmed that French courts, still adhered to the theory of absolute immunity of States (*Wiercinski c. Seyyid Ali Ben Hamond, prince Bashid*³⁸⁷), but started to distinguish between the States’ sovereign and civil capacities, and considered that jurisdiction could

³⁸⁶ *Gouvernement impérial du Maroc et Maspero c. Laurans et Société marseillaise de Crédit*, C.A. d’Aix, December 30, 1929, *Gazette du Palais*, 1930, 1er semestre, p. 247.

³⁸⁷ *Wiercinski c. Seyyid Ali Ben Hamond, prince Bashid*, Trib. civ. de la Seine, July 25, 1916, *JDI (Clunet)*, Tome 44, 1917, p. 1465.

be assumed in the second case without violation of the principles of reciprocal independence and sovereignty of States (*Gouvernement impérial du Maroc et Maspero c. Laurans et Société marseillaise de Crédit*³⁸⁸).

c) **United States.** In this period, as in the past, the courts of the United States maintained that neither the States of the Union nor the foreign States could be sued or executed in the United States without their consent. However, in *Virginia v. West Virginia*,³⁸⁹ an important change took place. The Supreme Court of that country, when it was faced with the question of its inability to enforce a judgment debt rendered against a State, asserted that its authority to enforce it “is the essence of the judicial power” and that it may enforce it by using the appropriate remedial processes. *Virginia v. West Virginia* is a group of cases of collection of a public debt which shows how a State, West Virginia, repudiated the duty imposed upon it to satisfy a debt decreed to be paid, despite that it was proved that it was a very prosperous State, able to liquidate, by taxation, all its indebtedness. But West Virginia had no funds that could be seized and all her property was in public use for governmental purposes (thus not seizable). This case raised the very important question of the ability of the courts to enforce a judgment debt rendered against a State (in this case, a State of the Union), because, until then, it was settled that a judgment was not susceptible to being enforced against a State (whether a foreign State or a State of the Union). After that case only foreign States remained immune from execution, as it will be shown in *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*.

Another group of cases in the United States dealt with the gold clause and involved primarily private or corporate international litigation. We have selected the leading cases involving sovereign litigation. It is to be noted that, in this period, the United States was already rated as a very important capital exporting country.

— On June 14, 1915, in a suit brought by the Commonwealth of Virginia against the State of West Virginia (*Virginia v. West Virginia*)³⁹⁰ for the final adjustment and

388 *Gouvernement impérial du Maroc et Maspero c. Laurans et Société marseillaise de Crédit*, C.A. d'Aix, December 30, 1929, *Gazette du Palais*, 1930, 1er semestre, p. 245.

389 *Virginia v. West Virginia*, 238 U.S. 202; 241 U.S. 532; 246 U.S. 565.

390 *Virginia v. West Virginia*, 238 U.S. 202.

determination of the equitable proportion of the public debt of West Virginia, and payment of principal and interest thereof, the Supreme Court of the United States held that Virginia was entitled to enforce an agreement entered between them at the time of their separation (June 20, 1863), which provided that West Virginia should assume her equitable proportion of the public debt (consisting of unmatured bonds with still many years to run), and rendered a decree in favour of Virginia against West Virginia for the payment of her share of debt of \$12,393,929.50 with interest thereon at the rate of 5 % from July 1st, 1915, until paid. The Court also held that liability for interest existed since both parties unquestionably contemplated that interest would accrue upon these bonds (which were interest-bearing obligations).

Later, on June 5, 1916, the State of Virginia petitioned for a writ of execution against West Virginia on the ground that such a relief was necessary as the latter has taken no steps whatever to provide for the payment of the decree. However, on June 12, 1916, the Supreme Court upheld West Virginia's contention that she "has no power to pay the judgment in question, except through the legislative department of her government, and [that] she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; [...]",³⁹¹ and, it denied the prayer of Virginia for the issue of a writ of execution until the legislature of West Virginia had met and had a reasonable opportunity to provide for the payment of the judgment.

Subsequently, on April 22, 1918, under a new petition filed by Virginia for a writ of *mandamus* (a proceeding ancillary to the judgment that, when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same) against West Virginia, Mr. Chief Justice White, delivering the opinion of the Supreme Court,³⁹² on the contention by West Virginia that the Court cannot bring about a payment of its decree by the issuance of writ of *mandamus* or any other process, held, that the "original jurisdiction" conferred upon it by the Constitution over controversies between States includes the power to enforce its judgment by appropriate remedial processes, operating where necessary upon the governmental powers and agencies of that State; and, that the authority to enforce its judgments is the essence of judicial

³⁹¹ *Virginia v. West Virginia*, 241 U.S. 532.

power. However, in consideration of the character of the parties, and in the belief that West Virginia will discharge its duty without compulsion, the Court abstained from determining what judicial remedies were available under the existing legislation and restored the case to the docket for further argument at the next term on the following three questions:³⁹³ 1) whether *mandamus* compelling the legislature of West Virginia to levy a tax to pay the judgment is an appropriate remedy; 2) whether the power and duty exist to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of State agencies; 3) whether, if necessary, the judgment may be executed through some other equitable remedy, dealing with such funds or taxable property of West Virginia, or rights of that State, as may be available. The Court reserved its right to “appoint a master for examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the State legislature or direct action, to secure the full execution of the judgment, as well as concerning the means otherwise existing in the State of West Virginia, if any, which, by the exercise of the equitable powers in the discharge of the duty to enforce payment, may be made available for that purpose.”³⁹⁴

– Among the cases disposed of without consideration by the Supreme Court of the United States was the *Republic of Cuba v. North Carolina*, which was submitted on November 6, 1916, by the Republic of Cuba, as plaintiff, against the State of North Carolina, to recover some repudiated bonds issued by that State.³⁹⁵ The suit was withdrawn by Cuba on January 8, 1917, following a long plea by the Attorney-General of North Carolina, Mr. Raleigh, on the ground that the parties and the subject matter objected to the assumption of jurisdiction by the Supreme Court. This was one of the various attempts of bondholders to avoid the common law rule that a State could not be sued without its consent by private individuals, as provided for in the Eleventh Amendment and by constant jurisprudence by State and federal courts denying relief to the individual bondholders. Thus, despite the adverse situation, the bondholders did not dismay in their attempts to find a foreign State that could sue the repudiating Southern States. In this regard, Professor Borchard described that “a plan was devised in Europe

392 *Virginia v. West Virginia*, 246 U.S. 565.

393 *Ibid.*, p. 605.

394 *Ibid.*, pp. 605-606.

to give or sell some of the repudiated bonds to a *bona fide* sovereign who might be persuaded to sue the defaulting State, invoking the original jurisdiction of the United States. It is understood that the King of Spain was first selected to test the case but, when he lost his crown throne in 1931, the honor fell to the Prince of Monaco.”³⁹⁶

– On January 11, 1918, in *Kingdom of Roumania v. Guaranty Trust Co.*,³⁹⁷ an action at law by Roumania, as plaintiff in error (a writ of error is taken principally upon the ground that the court has no jurisdiction to make orders, for instance, as in this case, because Roumania is a sovereign State and immune from suits in the courts), against the Guaranty Trust Company of New York, to recover the sum of \$73,433.55 with interests from May 12, 1917, being the balance of a deposit account opened with it on that day, the Circuit Judge Ward, of the Circuit Court of Appeals for the Second Circuit, delivering the judgment of the Court, held that:³⁹⁸

“It is the long-accepted view that *a foreign sovereign cannot be sued nor his property attached* in the courts of a foreign friendly country without his consent. [...] *Nor can the defendant when sued by a foreign sovereign avail himself of any counterclaim or set-off* except perhaps a set-off arising out of the same transaction. *Under no circumstances can he obtain an affirmative judgment.* [...]”

This case began with an action brought, on May 12, 1916, by one Morris Arditti against the Guaranty Trust Co. and the Kingdom of Roumania, before the Supreme Court of the State of New York, claiming to recover damages against Roumania for the sum of \$101,200 for breach of contract, and a lien upon funds of the said State in possession of the trust company for the sum of \$56,500, in addition. He alleged that Roumania had breached a contract entered into with him for the delivery of 200,000 pairs of shoes for its army, and that it had failed to establish the necessary credits to its damage in the sum of the said amounts of money. Subsequently, on July 11, 1917, Roumania, which had not been served with process in the action at law in the State Court, brought the present suit in the District Court for the Southern District of New York. The District Judge,

³⁹⁵ *Republic of Cuba v. North Carolina*, 242 U.S. 665. See also, RANDOLPH Bessie C., *op. cit.*, p. 77.

³⁹⁶ BORCHARD Edwin, *State Insolvency*, 1951, p. 159 [see *Monaco v. Mississippi*, 292 U.S. 313, *supra* at p. 159].

³⁹⁷ *Kingdom of Roumania v. Guaranty Trust Co.*, 250 Fed. 341 (2d Cir. 1918): see *AIL Cases*, Vol. 5, 1973, pp. 453-456.

³⁹⁸ *Ibid.*, p. 455 [emphasis added].

while admitting Roumania's immunity, proceeded, however, on the theory that it had waived its privilege by bringing suit against the trust company to recover the balance of the deposit account, and entered an order granting the motion upon payment by the trust company into court of the said sum with 2 per cent interest.

On appeal, the Circuit Judge Ward decided, 1) regarding the issue of sovereign immunity, that the relation between the trust company and the Kingdom of Roumania, being the usual one existing between banks and depositors (*i.e.*, between debtors and creditors), revealed that the action by Roumania was not a waiver of its sovereign immunity to be sued by other parties; and, 2) with regard to the opinion of the District Judge that found that Roumania engaged in business in the United States and that, thereby, had taken on the character of a private individual, the Circuit Judge held:³⁹⁹

“[...] that the Kingdom of Roumania in contracting for shoes and other equipment for its army was not engaged in business, but was exercising the highest function of protecting itself against its enemies. [...] The District Court was without jurisdiction to make the order, and it is therefore reversed.”

– On March 7, 1918, in *Hewitt v. Speyer*,⁴⁰⁰ an action in equity was brought by E. Hewitt against J. Speyer, H. Ruhlender, R. Schuster, and E. Beit von Speyer, individually and as copartners composing the firm Speyer & Co., and the United States Mortgage & Trust Co., as trustee under the mortgage of the Guayaquil & Quito Railway Co. The action was directed to impress a lien on a fund paid to the defendants by the Republic of Ecuador out of the customs duties collected by that Republic upon which a prior lien had been created in favour of the holders of certain bonds (some of which were held by the complainant).

The complainant also alleged that the funds so received by the defendants amounted to \$1,500,000 and that they had received it with full knowledge of the prior lien (the theory of the bondholders was that the custom house revenues, including export as well as import duties, were especially assigned to them prior to the Speyer contract); that the contracts and the mortgage upon which his rights rested constitute a special law of Ecuador, and that such a law takes precedence over the Civil Code, and creates a

399 *Ibid.*, p. 456.

400 *Hewitt v. Speyer*, 250 Fed. 367 (2d Cir. 1918); see *AIL Cases*, Vol. 5, 1973, pp. 206-211.

definite lien or charge upon the customs revenues, which is enforceable against third parties, who take with notice of the existence of such a lien, and that Speyer & Co. had such notice. The defendants asserted that no lien upon the customs revenues were created in favour of the bondholders or their trustee.

The District Court dismissed the bill of complaint upon the merits, and vacated the injunction *pendente lite* obtained by the complainant. On appeal, the Circuit Judge Rogers, of the Court of Appeals for the Second Circuit, held that:⁴⁰¹

“[...] our courts, not only will not adjudicate upon the validity of the acts of a foreign nation performed in its sovereign capacity, but also that persons involved with such government in the performance of such acts cannot be subjected to a civil liability therefore. [...]”

In arriving at the conclusion we have reached, that the courts of this country are unable to adjudicate upon the complainant’s claim, it is hardly necessary to say that this does not leave the complainant remediless, if his rights have in fact been violated. *If the government of Ecuador has violated his rights, it is within the province of another department of the government of the United States to bring the matter, if it deems justice so requires, to the attention of the government of Ecuador.*

Judgment affirmed.”

– On December 15, 1924, in *Oliver American Trading Co. v. Mexico*,⁴⁰² an action for damages arising out of an alleged breach of contract brought against Mexico and the National Railways of Mexico, in which Mexico appeared to claim that it is “an independent sovereign nation” and as such “immune from process of the courts except upon its consent,” Circuit Judge Rogers, of the Circuit Court of Appeals for the Second Circuit, held that:⁴⁰³

“The District Court, in our opinion, was without jurisdiction, as the property involved was that of the government of Mexico, and was used by it in the performance of what it considers a governmental function. The property sought to be reached in this country is *the public property of Mexico*, and is movable property, which that government holds for public purposes, and, being such, it *is entitled to the same immunity as a sovereign, or an ambassador, or a ship of war, and for the same reason. The exercise of such jurisdiction by the courts of this country is inconsistent with the independence and sovereignty of Mexico.*”

401 *Ibid.*, pp. 210-211 [emphasis added].

402 *Oliver American Trading Co. v. Mexico*, 5 F. 2d 659 (2d Cir. 1924); see *AIL Cases*, Vol. 5, 1973, pp. 478-484.

403 *Ibid.*, p. 484 [emphasis added].

This action was commenced by attachment and the service of a summons by the sheriff of the county of New York for \$1,164,348.90, upon the defendant, Mexico, since the National Railways of Mexico was “merely a name” for a system of railroads in the possession of the Government of Mexico and under its control since 1914. The plaintiff claimed that the defendant had wrongfully repudiated its contract with it, and had forced the plaintiff to discontinue the profitable business, which it had theretofore conducted in Mexico, with a resulting loss of clientele, credit and good will.

At the time the suit was commenced the Government of Mexico was a *de facto* government, but in the meantime it got the complete and unconditional recognition of the Government of the United States, with which afterwards it had entered a convention which provided for the amicable settlement and adjustment of claims by the citizens of each country against the other. The circuit judges then found that the claim involved appeared to be within the competence of the commission created for the purposes of adjudicating such claims, whose decisions were to be final and conclusive. However, as they also found that “the treaty does not deprive the plaintiff of any right or remedy, but it provides a remedy which the courts of the United States cannot afford”,⁴⁰⁴ they decided upon the sole question of jurisdiction, for it was also contended that its jurisdiction was not divested by the occurrence of the recognition of Mexico insofar as the suit was commenced and the court fully attached prior to that event. The circuit judges thus affirmed the lower court’s order vacating the attachment and dismissing the suit.

– On *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*,⁴⁰⁵ a complaint was filed before the District Court for the Southern District of New York by the Royal Administration of the Swedish State Railways (*Kunglig Jarnvagsstyrelsen*), which described itself as a corporation under the laws of Sweden, against Dexter & Carpenter to recover \$125,000 for damages arising out of the defendant’s failure to secure proper insurance for certain lots of coal lost at sea. The defendants answered the complaint, and

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 300 Fed. 891: see *ILR*, Vol. 5, 1929-1930, pp. 125-126. For a prior decision of the District Court on the plea by demurrer (*i.e.*, allegation that the pleadings showed no good cause of action) by the defendant, see *ibid.*, 299 Fed. 991.

filed a counterclaim in which it sought affirmative relief by way of money damages for breach of contract for the purchase of the coal.

In reply to the counterclaim, the Swedish State Railways filed a replication and a motion to dismiss the counterclaim upon the grounds that it was “an agency” of the Swedish Government, that the counterclaim was “in substance and effect” an action against Sweden, and that it was not maintainable against it without its consent. The trial of this action resulted in a judgment dismissing the complaint, and in a verdict rendered by the jury for the defendants (plaintiffs on the counterclaim) for a large sum. On appeal, the judgment in favour of the plaintiffs on the counterclaim was reversed and the dismissal of the complaint affirmed. Various proceedings followed and, finally, a judgment was rendered by the Circuit Court of Appeals for the Second Circuit, in which the Court affirmed the judgment on the counterclaim, in favour of Dexter & Carpenter, amounting to \$411,203.72.

Subsequently, in the proceedings instituted to enforce the judgment obtained on the counterclaim, by writ of execution and order of attachment against the funds of the Swedish Government in an American bank, a judgment was rendered, on appeal, on July 14, 1930, in *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*,⁴⁰⁶ by the Circuit Court of Appeals for the Second Circuit, in which the Court affirmed its previous judgment in favour of the former plaintiff on the counterclaim (now appellant) for \$411,203.72. The Court denied an application for reargument made by the Swedish Minister, who certified that the railways were not a corporation but an “integral part” of the Swedish Government, and asserted officially its claim of sovereign immunity.

However, on the question of immunity of execution, Mr. Manton, Circuit Judge, delivering the judgment of the Court of Appeals, held:⁴⁰⁷

“[...] *consenting to be sued does not give consent to a seizure or attachment of a sovereign government. The clear weight of authority in this country, as well as that of England and Continental Europe, is against all seizures, even though a valid judgment has been entered. To so hold is not depriving our own courts of any attribute of jurisdiction. It is but recognizing the general international understanding,*

⁴⁰⁶ *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930): see *AIL Cases*, Vol. 5, 1973, pp. 492-496.

⁴⁰⁷ *Ibid.*, p. 494 [emphasis added].

recognized by civilized nations, that a sovereign's person and property ought to be held free from seizure or molestation at all peaceful times and under all circumstances. Nor is this in derogation of the dignity owed to our courts."

After citing the relevant case law with regard to the plea of immunity, the Circuit Judge added:⁴⁰⁸

"It is regrettable that Sweden may thus escape payment of a valid judgment against it. Appellant has been misled in the belief that this plaintiff was a separate entity—apart from the government—and now, when a sufficient number of years has passed making possible a plea of limitation or laches against suing in Sweden [...] appellee appears and pleads its sovereign immunity. Whatever may be appellant's remedy to collect its valid judgment, it should not be necessary to resort to further litigation. It is hoped that the judgment of our courts will be respected and payment made by the Swedish government. But we are required to affirm the order appealed from. Order affirmed."

No execution could be issued on the judgment on the counterclaim, but payment was finally settled through diplomatic channels, between the United States and Sweden, for \$150,000.⁴⁰⁹

– On May 21, 1934, in *Monaco v. Mississippi*,⁴¹⁰ the Principality of Monaco filed an application for leave to bring an action before the Supreme Court of the United States against the State of Mississippi to recover the principal and interest of certain bonds issued by that State. The Principality argued that the Supreme Court was vested with jurisdiction to entertain the action and render judgment by virtue of the provisions of Art. III, § 2 of the Federal Constitution, and that the Eleventh Amendment did not affect its jurisdiction; it further argued that it was indisputable that one State of the Union may be sued in the Supreme Court by a foreign State (as it was expressly laid down in *Cherokee Nation v. Georgia*, 5 Pet. 1); that while it was true that those who deal with bonds and obligations of a sovereign State must rely altogether on the sense of justice and good faith of the State, it was also true that those who deal with States of the United States have the further assurance granted by the Constitution and enforceable by the Supreme court that this State will not pass legislation impairing the obligation of contracts made by it.

⁴⁰⁸ *Ibid.*, p. 496 [emphasis added].

⁴⁰⁹ BORCHARD Edwin, *State Insolvency*, 1951, p. 168 (at footnote 38).

The State of Mississippi raised the following objections, *inter alia*: that the Principality of Monaco is not a “foreign State”; that Mississippi had not consented and does not consent that she be sued by the Principality and that without consent the State cannot be sued; that the proposed litigation is an attempt by the Principality to evade the prohibitions of the Eleventh Amendment of the Constitution of the United States. Mr. Justice Hughes delivering the opinion of the Court held that “the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State. The foreign State enjoys a similar sovereign immunity and without her consent may not be sued by a State of the Union.” The Court stated:⁴¹¹

“[...] neither the literal sweep of the words of Clause one of § 2 of Article II, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that [...] a State may be sued without her consent.

The question of that immunity, in light of the provisions of Clause one of § 2 of Article III of the Constitution, is thus presented in several distinct classes of cases [...] Each of these classes has its characteristic aspect, from the standpoint of the effect, upon sovereign immunity from suits, which has been produced by the constitutional scheme.

1. The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union. [...]
2. Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. [...]
3. To suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, the Eleventh Amendment erected an absolute bar. Superseding the decision in *Chisholm v. Georgia*, the Amendment established in effective operation the principle asserted by Madison, Hamilton, and Marshall [...]
4. *Protected by the same fundamental principle, the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations*, although such suits are not within the explicit prohibitions of the Eleventh Amendment. [...]
5. *We are of the opinion that the same principle applies to suits against a State by a foreign State*. The decision in *Cherokee Nation v. Georgia*, 5 Pet. 1, is not opposed, as it rested upon the determination that the Cherokee nation was not a “foreign State” in the sense in which the term is used in the Constitution. [...] *We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favour of a foreign State*. As to suits brought by a foreign State, *we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the*

410 *Monaco v. Mississippi*, 292 U.S. 313.

411 *Ibid.*, pp. 321, 328-332 [emphasis added].

United States or citizens or subjects of a foreign State. The foreign State enjoys a similar sovereign immunity and without her consent may not be sued by a State of the Union.

The question of the right of suit by a foreign State against a State of the Union is not limited to cases of alleged debts or of obligations issued by a State and claimed to have been acquired by transfer. Controversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative. [...]

We conclude that *the Principality of Monaco, with respect to the right to maintain te proposed suit, is in no better case than the donors of the bonds, and that the application for leave to sue must be denied.*"

– On February 18, 1935, a group of cases, generally referred as the “Gold Clause Cases” were disposed by the Supreme Court of the United States. Gold clauses were, at that time, contained in nearly all important obligations of the nature of bonds and mortgages in the United States since the year 1879, or thereabout. The result of which was that, paper money, commonly called greenbacks, although legal tender for the payment of ordinary debts, did not apply to obligations containing a gold clause (thus, there was in existence a dual monetary system—that is, two kinds of money). At that date, gold coin, and what was treated as its equivalent, gold certificates (which entitled the holder to gold coin), were in circulation.

By reason of the difficulties brought by the latest monetary and financial crisis (the Great Depression of 1929), and, the subsequent changes in the financial legislation of the United States (for instance: the declaration of a “bank holiday”, by the President, on March 6, 1933, due to “heavy and unwarranted withdrawals of gold and currency from the banking institutions for the purpose of hoarding”, and “extensive speculative activity abroad in foreign exchange”; the ensuing Emergency Banking Act of March 9, 1933, which authorized the President to “investigate, regulate or prohibit”, “any transactions in foreign exchange, transfers of credit between or payments by banking institutions” as defined by the President, with respect to any person within the jurisdiction of the United States; the Executive Order of April 5, 1933, forbidding hoarding, by which all persons were required to deliver “all gold coin, gold bullion and gold certificates”; and the Executive Order of April 20, 1933, containing further requirements with respect to the acquisition and export of gold and to transactions in foreign exchange), the currency position of the dollar was radically altered by the Joint Resolution of Congress, passed on June 5, 1933, which had the force of law. The Joint Resolution suspended the gold

clause in all contracts, including federal loans, rendering its judgment difficult and its execution impossible. It declared that:

“JOINT RESOLUTION

To assure uniform value of the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

That (a) *every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, 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. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.*

(b) As used in this resolution, the term ‘obligation’ means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term ‘coin or currency’ means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

[...]

All coin and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.

Approved, June 5, 1933, 4:40 p.m.”

– In *Norman v. Baltimore & Ohio Railroad Co.*,⁴¹² a “gold clause” case, in which the validity of the Joint Resolution was challenged with respect to the gold clauses in private contracts, or in contracts involving States or municipalities, for the payment of money, the Supreme Court of the United States found that the Joint Resolution was constitutional, and that the bondholder, notwithstanding the gold clause, was entitled to no more than payment in money constituting legal tender “dollar for dollar” of the principal of each bond.

With relation to the interpretation of the “gold clauses” in suit, the Supreme Court held:⁴¹³

“We are of opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of one thousand dollars. We also think that, fairly construed, these clauses were *intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by payment of lesser value than that prescribed.* [...]”

Concerning the power of Congress to establish a monetary system, the Supreme Court, citing *Knox v. Lee*, [12 Wall. 457], held that:⁴¹⁴

“[...] *contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a contract ‘can extend to the defeat’ of that authority.*

[...] The harshness of such legislation, or the hardship it may cause, afforded no reason for considering it to be unconstitutional.”

As to the power of Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority, the Supreme Court held that:⁴¹⁵

“[...] *Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have congenital infirmity. Parties cannot remove their transaction from the reach of dominant constitutional power by making contracts about them.*

412 *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240.

413 *Ibid.*, p. 302 [emphasis added].

414 *Ibid.*, p. 306 [emphasis added].

This principle has familiar illustration in the exercise of the power to regulate commerce. [...] [...] If the gold clauses now before us interfere with the policy of the Congress in the exercise of that authority they cannot stand.”

As regards the effect of the gold clauses in suit, in relation to the monetary policy adopted by the Congress, the Supreme Court asked itself whether these clauses do constitute an actual interference with the monetary policy of the Congress. The Court said that answering this question depends upon an appraisal of economic conditions and upon determinations of questions of fact. “With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of necessity for the adoption of that means, is final.”⁴¹⁶ The Court went on in reviewing the economic conditions and facts (*e.g.*, that “virtually all obligations, almost as a matter of routine, contain the gold clause”; the internal tendency to hoard gold, and the tendency for capital to leave the country; the devaluation of the dollar; the dislocation of the domestic economy which would be caused if debtors under gold clauses should be required to pay), and, then, it held:⁴¹⁷

“[...] We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, with respect to obligations, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority.

Dismissing that untenable assumption, the facts must be faced. We think that *it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed.*

The judgment and decree, severally under review, are affirmed.”

415 *Ibid.*, pp. 307-308 [emphasis added].

416 *Ibid.*, p. 311.

417 *Ibid.*, p. 316 [emphasis added].

– In the same day, February 18, 1935, in *Perry v. United States*,⁴¹⁸ another “gold clause” case, the validity of the Joint Resolution was challenged again with respect to the right of the plaintiff as the owner of a bond issued by the United States Government containing a gold clause, the bond being one of the Liberty Loans issued by that Government in 1918, the Supreme Court held that the United States had breached its contract to pay in gold of the “present standard of weight and fineness” and that the Joint Resolution went beyond the power of Congress in so far as it attempted to override the obligations of the Government of the United States.

With regard to the import of the obligation in question, after observing that the “bond in suit differs from an obligation of private parties, or of States or municipalities, whose contracts are necessarily made in subjection to the dominant power of Congress. [...] The bond now before us is an obligation of the United States”, the Court stated:⁴¹⁹

“This obligation must be fairly construed. The ‘*present standard of value*’ stood in contradiction to a *lower standard of value*. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the Government’s obligation. *We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bonds that he would not suffer loss though depreciation in the medium of payment.*”

Upon the question of the binding quality of the Government’s obligations, the Court, after recalling that there was “no question as to the power of the Congress to regulate the value of money, that is, to establish a monetary system and thus to determine the currency of the country”, asked itself whether Congress can use that power to invalidate “the terms of the obligations which the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States” (*i.e.*, if the terms of the bonds as to the standard of payment and the amount to be paid can be repudiated). The Court said:⁴²⁰

“[...] There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the

418 *Perry v. United States*, 294 U.S. 330.

419 *Ibid.*, pp. 348-349 [emphasis added].

420 *Ibid.*, pp. 350-351, 354 [emphasis added].

Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. [...]

To say that Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledge. This Court has given no sanction to such a conception of the obligations of our Government.

[...]

The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign. [...]

[...] We regard [the Fourteenth Amendment as to the ‘validity’ of the public debt of the United States] as confirmatory of a fundamental principle, which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the Amendment was adopted. Nor can we perceive any reason for not considering the expression ‘the validity of the public debt’ as embracing whatever concerns the integrity of the public obligations.

We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.”

The Court then went on to deal with the question of damages suffered by the refusal of that government to pay more than dollar for dollar. In delivering the judgment of the Court, Mr. Chief Justice Hughes clarified that this was a “distinct question”; that, despite that the government is not at liberty to alter or repudiate its obligations, it does not follow that the claim for damages should be sustained. In an action for breach of contract, as “a remedy for breach, [the] plaintiff can recover no more than the loss he has suffered and of which he might rightfully complain. He is not entitled to be riched.”⁴²¹ Then he sustained the position of the Court, as to the inadmissibility of the plaintiff’s allegation that he had sustained damages by reason of the alleged breach of a gold bond, as follows:⁴²²

“[...] Plaintiff seeks judgment for \$16,931.25, in present legal tender currency, on his bond for \$10,000. The question is whether he has shown damage to that extent, or any actual damage, as the Court of Claims has no authority to entertain an action for nominal damages. [...] But the change in the weight of the gold dollar did not necessarily cause loss to the plaintiff of the amount claimed. The question of actual loss cannot fairly be determined without considering the economic situation at the time the Government offered to pay him the \$10,000, the face of his bond, in legal tender currency. The case is not the same as if gold coin had remained in circulation. [...]

421 *Ibid.*, pp. 354-355.

422 *Ibid.*, pp. 355, 357-358 [emphasis added].

In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, *it is hence inadmissible to assume that he was entitled to obtain gold for recourse to foreign markets, or for dealings in foreign exchange, or for other purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation.* [...]

The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which 'all forms of money' of the United States were to be 'maintained at a parity,' had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was non-existent.

[...] And in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, *in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.*"

In view of these facts (in brief, that the cost of living did not rise), the Supreme Court held by a majority that a holder of a Liberty Loan bond had not proved that he had suffered any loss whatever by the refusal to comply with the terms of the gold clause, that the plaintiff had therefore failed to show a cause of action for actual damages, and, since the Court of Claims from which the appeal had come had no authority to entertain an action for nominal damages, the Supreme Court decided that the bondholder was not entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond.

Likewise, given that, after *Perry v. United States*, a Swiss or Dutch holder of Liberty bonds, who, until then, had failed to sue, could have sustained a definite loss; for they were coming from a gold standard country, the fear of such a suit caused Congress to pass the Resolution of August 27, 1935, which denied the right of suit after January 1, 1936.⁴²³

Summary of the U.S. practice. At the beginning of inter-War period, the accepted law in the United States still was that neither the States of the Union nor the foreign States

could be sued or executed in the United States without their consent (*Kingdom of Roumania v. Guaranty Trust Co.*⁴²⁴, *Hewitt v. Speyer*⁴²⁵, *Oliver American Trading Co. v. Mexico*⁴²⁶, *Monaco v. Mississippi*⁴²⁷). But, in *Hewitt v. Speyer*, the Court of Appeals for the Second Circuit directed that if the rights of the complainant have in fact been violated by the government of Ecuador “it is within the province of another department of the government of the United States to bring the matter, if it deems justice so requires, to the attention of the government of Ecuador”, thus recognizing that non-judicial means for the settlement of State debts could be used.

In *Virginia v. West Virginia*⁴²⁸, another important change took place. The Supreme Court of the United States for the first time asserted its authority to enforce a debt judgment rendered against a State of the Union. It held that the power of enforcing a judgment “is the essence of the judicial power” and that it may enforce it by using the appropriate remedial processes. Before this case, it was a settled law that a judgment was not susceptible to being enforced against a State of the Union or a foreign State. After this case, only foreign States remained immune from execution (*Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*⁴²⁹).

With regard to private contracts in general, including loan contracts, a significant development took place in *Norman v. Baltimore & Ohio Railroad Co.*⁴³⁰, a case for the payment of money, in which the validity of the Joint Resolution of June 5, 1933, was challenged with respect to the “gold clauses” stipulated in private contracts and in contracts involving States or municipalities. The Supreme Court of the United States held that private “contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a

423 49 Stat. 938, 74th Cong., 1st Sess., as quoted by BORCHARD Edwin, *State Insolvency*, 1951, p. 158.

424 *Kingdom of Roumania v. Guaranty Trust Co.*, 250 Fed. 341 (2d Cir. 1918): see *AIL Cases*, Vol. 5, 1973, pp. 453-456.

425 *Hewitt v. Speyer*, 250 Fed. 367 (2d Cir. 1918): see *AIL Cases*, Vol. 5, 1973, pp. 206-211.

426 *Oliver American Trading Co. v. Mexico*, 5 F. 2d 659 (2d Cir. 1924): see *AIL Cases*, Vol. 5, 1973, pp. 478-484.

427 *Monaco v. Mississippi*, 292 U.S. 313.

428 *Virginia v. West Virginia*, 238 U.S. 202; 241 U.S. 532; 246 U.S. 565.

429 *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930): see *AIL Cases*, Vol. 5, 1973, pp. 492-496.

430 *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240.

contract ‘can extend to the defeat’ of that authority. [...] The harshness of such legislation, or the hardship it may cause, afforded no reason for considering it to be unconstitutional”. The Supreme Court added that “contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have congenital infirmity. Parties cannot remove their transaction from the reach of dominant constitutional power by making contracts about them”. Therefore, the Court found that the Joint Resolution was constitutional, and that the bondholder, notwithstanding the “gold clause”, was entitled to no more than payment in money constituting legal tender “dollar for dollar” of the principal of each bond.

In another “gold clause” case, *Perry v. United States*⁴³¹, the validity of the same Joint Resolution was challenged with respect to the right of the plaintiff as the owner of a bond issued by the United States Government containing a gold clause. The Supreme Court first ruled that the United States had breached its contract to pay in gold and that the Joint Resolution went beyond the power of Congress in so far as it attempted to override the obligations of the Government of the United States. However, when the Court dealt with the question of damages suffered by the refusal of the government to pay more than dollar for dollar, held, that despite that the government is not at liberty to alter or repudiate its obligations, it does not necessarily follow that the claim for damages should be sustained. The Supreme Court stated that the plaintiff was not entitled to be riched and that the change in the weight of the gold dollar did not necessarily cause loss to the plaintiff of the amount claimed. Based on facts, the Court showed that the cost of living did not rise, and held, by a majority, that the bondholder had not proved that he had suffered any loss whatever caused by the refusal to comply with the terms of the gold clause. This was also a significant judicial development.

D. Recourse to international courts and tribunals for the recovery of State external debts

a) Arbitral jurisdictions. In this period, recourse to arbitral jurisdictions was for pecuniary claims against States arising primarily from tortious governmental acts or

⁴³¹ *Perry v. United States*, 294 U.S. 330.

liability of a successor State. The following are two representative cases dealing with our subject.

— On October 11, 1921, an Arbitral Tribunal of the Permanent Court of Arbitration rendered a decision on certain *French Claims Against Peru*,⁴³² in which the French Government espoused the claims of its nationals based upon loans to the Peruvian Government.

The principal claim was that of Dreyfus Brothers & Cie. In 1869, this French company consented to make a loan and to serve the interest on a previous loan, while Peru agreed to sell them a quantity of guano and to grant them monopoly rights to export guano to Europe and its colonies. After some years, the accounts of these transactions became disputed. As a result of the war of Peru with Chile, on November 1879, Nicolás de Piérola became President of Peru, as dictator, assuming executive, legislative and judicial powers. Dreyfus asked him to fix the sum due by Peru to them, which Piérola did fixing the balance due to the company on June 30, 1880, at 16,908,564.62 Peruvian soles (about £3,200,000). Piérola retired in 1881, and some years later a constitutional régime was re-established. The Peruvian Congress then enacted a law in October 26, 1886, nullifying Piérola's and Iglesias', his successor in power, acts upon the grounds that Article 10 of the Constitution of 1860 stated that acts of usurpers were null and void.⁴³³

The case was referred to the Permanent Court of Arbitration by a *compromis* concluded between the two Governments on February 2, 1914, in pursuance of a law enacted by the Peruvian Congress, which consented to be bound to make a disbursement not exceeding 25,000,000 francs in this connection.

On October 11, 1921, the Tribunal ruled that, "the credit of Dreyfus Brothers & Co. has been legally and finally fixed" by the decision of the Peruvian President in 1880, and

432 *French Claims Against Peru*, October 11, 1921, *The Hague Court Reports* (dir. by J.B. Scott), 1916, pp. 31-38. See also, *French Claims Against Peru*, Award rendered October 11, 1921, by the Arbitral Tribunal at The Hague, *AJIL*, Vol. 16, No.2, April 1922, pp. 480-484. Same in French: *Affaire des réclamations françaises contre le Pérou* (France v. Peru), La Haye, 11 octobre 1921, *RIAA*, Vol. I, pp. 215-221.

433 For the facts of the case, see, *inter alios*, MÜNCH Fritz, "French-Peruvian Claims Arbitration", *Ency. PIL* (dir. by R. Bernhardt), Vol. 2, 1981, pp. 106-107.

that, “since this credit is liquid and payable, interest at 5 per cent is due from the date of payability of each of the sums composing it”; however, the Tribunal denied the payment of compound interest saying that “the capitalization of the interest can result only from a stipulation or from circumstances of fact making clear the consent of the debtor to assume such an onerous obligation; whereas, the consent of the Government of Peru has not been given; whereas, moreover, if the capitalization of the interest, which would increase the debt considerably, had been provided for, the French Government would not have demanded only a sum of 25,000,000 francs, as appears from the second paragraph of the Protocol.”

Thus, the award discarded the plea of the nullity of Piérola’s judgment on all the points in dispute, holding that the dictator had effective control over Peru with popular consent, and that his régime had been recognized by a number of powers. The nullity law of October 26, 1886, enacted by the Peruvian Congress could not apply to foreigners who had contracted *bona fide* with an effective government.

The award also favoured other three French creditors whose claims were included in the maximum lump sum of 25 million French francs. Other five minor claims included in the arbitration were rejected.

— On April 18, 1925, an arbitral decision concerning the proper apportionment of the external debt of Turkey was rendered in the *Ottoman Public Debt Arbitration*⁴³⁴ pursuant to Article 47, Part Two (Financial Clauses), of the Treaty (of Peace) of Lausanne of July 24, 1923, which stipulated:⁴³⁵

“Article 47

The Council of the Ottoman Public Debt shall, within three months from the coming into force of the present treaty, determine, on the basis laid down by Article 50 and 51, the amounts of the annuities for the loans referred to in Part A of the table annexed to the present section which are payable by each of the states concerned, and shall notify to them this amount.

These states shall be granted an opportunity to send to Constantinople delegates to check the calculations made for this purpose by the Council of the Ottoman Public Debt.

[...]

434 *Ottoman Public Debt Arbitration*, April 18, 1925, *RIAA*, Vol. I, pp. 529-614.

435 Treaty of Lausanne (with Turkey), July 24, 1923, *AJIL*, Vol. 18, Supplement, 1924, p. 17.

Any disputes which may arise between the parties concerned as to the application of the principles laid down in the present article shall be referred, not more than one month after the notification referred to in the first paragraph, to an arbitrator whom the Council of the League of Nations will be asked to appoint; this arbitrator shall give his decision within a period of not more than three months. [...] The decisions of the arbitrator shall be final. The payment of the annuities shall not be suspended by the reference to any disputes of the above-mentioned arbitrator.”

The facts of this case were as follows:⁴³⁶ the Treaty of Peace of Lausanne provided that “the amount of the share in the annual charges of the Ottoman Public Debt for which each state concerned [*i.e.*, a State formerly belonging to the Turkish Empire] is liable” in consequence of the distribution of the annual charges for the loans and of the nominal capital of the Ottoman Public Debt, shall be determined by the proportion of the total revenue of each of the ceded territories in the financial years 1910-1912 to the average total revenue of the Ottoman Empire in those years (the financial years of 1910/1911 and 1911/1912 were thus used as the standard for apportionment). In other words, according to the Treaty of Peace, the share of the debt to be assumed by the individual States was to be determined by applying this ratio to the total debt.

In fixing the respective shares of Turkish debt, the Council of the Ottoman Public Debt (a council of creditor representatives, set up in 1885, to which Turkey delegated certain public funds for the withdrawal and execution of the debt redemption service) excluded the revenue from certain detached territories, mainly from those which have since 1912 ceased to be a part of the Ottoman Empire; also a share of the debt which fell to Turkey was added to the debt arising from the loans issued between October 17, 1912, and November 1, 1914, and apportioned among Turkey, and some others, including Greece.

Greece, Turkey, France (on behalf of Syria and The Lebanon), Bulgaria, Great Britain (on behalf of Iraq, Palestine and Transjordan), and Italy appealed against this decision for being contrary to the wording of the Treaty, which referred to the revenue of the whole Ottoman Empire. Bulgaria contended *inter alia* that it never benefited from the loans composing the Ottoman Public Debt and that for this reason alone it should be freed from payment of the annuities of the loans. In general, they contended that the

436 *Ibid.*, pp. 17-19. See also BROWN Philip Marshall, “Ottoman Public Debt Arbitration”, *AJIL*, Vol. 20, No. 1, January 1926, pp. 135-139; GÖTZ Volkmar, “Ottoman Debt Arbitration”, *Ency. PIL* (dir. by R. Bernhardt), Vol. 2, 1981, pp. 220-221; and *ILR*, Vol. 3, 1925-1926, pp. 78-79.

principle of proportionate distribution of the debt, on which the Council's decision was based, was not explicitly adopted in the Treaty; that the Turkish Republic, as the successor of the Ottoman Empire, was burdened with such part of the debt as remained after the contributions clearly laid down in the Treaty have been paid; and that, apart from the Treaty, there was no principle of international law according to which a State acquiring a part of the territory of another State ought to be charged with a corresponding portion of the public debt of the ceding State.

The Arbitrator, Professor Eugène Borel, defined at the outset his task as one "consisting to find and apply the common intention of the Powers signatory to the Treaty", and that in so doing "he must abide by the Treaty itself, within the limits of which he finds his mission, his law, and his powers"; that the "resources which law in general, and international law in particular, afford him are only means used by him, so far as they are necessary, for the purpose of understanding the common intention of the Parties and to give it the effect it implies."⁴³⁷

The arbitral decision, in short, held *inter alia*: with regard to the money of payment, that the Treaty itself was silent as to leaving this question open for settlement, according to the applicable law, between the bondholders of the Ottoman Public Debt and the debtor States; as to the contention by which the principle of proportionate distribution of the debt was not explicitly adopted in the Treaty, that this principle was in fact adopted by the Treaty, which took as the most expeditious and reliable criterion the superficial area of the territory in question as the basis for apportioning the proper share of revenues and of the corresponding annuities to be borne by the respective States; concerning the Bulgarian contention that it never benefited from the loans composing the Ottoman Public Debt and that it should be freed from payment of the annuities of the loans, it failed; that, notwithstanding the existing precedents, it was impossible to say that the State which acquires territory by cession is in strict law bound to take over a corresponding part of the public debt of the ceding State; that in international law the Turkish Republic was deemed to continue the international personality of the former Ottoman Empire; and that the fact that it was deemed necessary, in Article 99 of the Treaty of Lausanne, to revive certain treaties concluded with the former Turkish

437 *Ottoman Public Debt Arbitration*, April 18, 1925, *RIAA*, Vol. I, p. 548.

Empire, was not an argument in favour of the view that the Turkish Republic was a new State. As to the distribution of the annuities subject matter of the controversy, the Arbiter ordered the Council of the Ottoman Public Debt to apportion according to his findings, which included various corrections and emendations.

Summary of recourse to international arbitration. Recourse to arbitral jurisdictions for the recovery of State external debts, in the inter-War period, was very limited. The arbitral decision on certain *French Claims Against Peru*⁴³⁸ confirmed a previous decision by the Peruvian President allowing the claim, which included the payment of interest at 5 per cent, but denied the payment of compound interest stating that “the capitalization of the interest can result only from a stipulation or from circumstances of fact making clear the consent of the debtor to assume such an onerous obligation; whereas, the consent of the Government of Peru has not been given”.

More interesting was, in terms of number of issues raised during the procedure, the decision concerning the proper apportionment of the external debt of Turkey and distribution of annuities rendered in the *Ottoman Public Debt Arbitration*.⁴³⁹ The Arbiter ordered the Council of the Ottoman Public Debt to apportion according to his findings, *inter alia*: the question of the money of payment was left open for settlement between the bondholders of the Ottoman Public Debt and the debtor States; that the principle of proportionate distribution of the debt was in fact adopted by the Treaty, which took as the most expeditious and reliable criterion the superficial area of the territory in question as the basis for apportioning the proper share of revenues and of the corresponding annuities to be borne by the respective States; that it was impossible to say that the State which acquires territory by cession is in strict law bound to take over a corresponding part of the public debt of the ceding State; and, that in international law the Turkish Republic was deemed to continue the international personality of the former Ottoman Empire, therefore it was not new State, as argued.

⁴³⁸ *French Claims Against Peru*, October 11, 1921, *The Hague Court Reports* (dir. by J.B. Scott), 1916, pp. 31-38. See also, *French Claims Against Peru*, Award rendered October 11, 1921, by the Arbitral Tribunal at The Hague, *AJIL*, Vol. 16, No.2, April 1922, pp. 480-484. Same in French: *Affaire des réclamations françaises contre le Pérou* (France v. Peru), La Haye, 11 octobre 1921, *RIAA*, Vol. I, pp. 215-221.

⁴³⁹ *Ottoman Public Debt Arbitration*, April 18, 1925, *RIAA*, Vol. I, pp. 529-614.

b) **Permanent Court of International Justice (PCIJ).** The PCIJ exercised its jurisdiction on the subject of the recovery of State loans, in 1929, in two cases brought under special agreements concluded by the French Government, who espoused the claims of French bondholders, with the Serbian and Brazilian Governments respectively.⁴⁴⁰

Both disputes concerned the question upon what monetary basis payment of the principal and interest of certain loans should be effected by the debtor governments (whether they should be effected on the basis of the gold franc or of the paper franc). As a matter of course, the Court dealt with these cases as disputes between governments, and did not hesitate to exercise its jurisdiction despite that these disputes related to a choice of the national law to be applied and to the dispositions of the national law selected. As it will be seen, in both cases, the law of the borrowing State (Serbia and Brazil, respectively) was held to be applicable to the creation of the debtor's obligations, but as to the currency in which the payment were to be effected, it held that it depended upon French law and therefore required payment to be in gold francs.

Likewise, the PCIJ exercised its jurisdiction in another case concerning governments and private interests under clauses in loan contracts. In 1936, the Belgian Government, who took up the claim of the *Société Commerciale de Belgique*, brought a case for the execution of two arbitral awards given in 1925, in Paris, solving disputes between the Greek Government and the company relating to the Greek Government's default on certain bond issued as "part of its external debt"; Belgium invoked the compulsory jurisdiction of the PCIJ, which in 1939 pronounced the arbitral awards to be "definitive and obligatory".

– The *Serbian Loans Case*⁴⁴¹ concerned a dispute between the French Government and the Kingdom of the Serbs, Croats, and Slovenes "with regard to the question upon

⁴⁴⁰ These cases made it clear that "there is nothing to prevent governments from submitting to the Court by special agreement a difference of opinion on a question which is purely one of municipal law between a state exercising its right to tend diplomatic protection to its nationals and another state": see JENKS Wilfred, "The Interpretation and Application of Municipal Law by the Permanent Court of International Justice", *BYBIL*, Vol. XIX, 1938, p. 77.

⁴⁴¹ *Serbian Loans Case*, Judgment No. 14, July 12, 1929, *PCIJ Series A*, Nos. 20/21, pp. 1-89.

what monetary bases payment of the principal and interest of [certain] loans should be effected”⁴⁴² by Serbia.

The facts in this case were as follows:⁴⁴³ between 1895 and 1913, the Serbian Government issued several loans in France containing different gold clauses (“francs-or”, “payable en or”, “emprunt 4 ½ or”). By these clauses Serbia undertook to pay the principal and interest of these loans in gold francs. The payment of these loans, which in all amounted to nearly 1000 million French francs, was always made in banknotes, until 1924 or 1925, in which the bearers of the bonds began to refuse payment of their coupons in French legal tender (paper francs), contending that the loan-service should be on a gold basis. Prior to that date, as in the pre-war years, when the parity of the French currency in relation to gold made compatible this form of payment with their expectations to be paid in gold, or, as during the war, in which the difference between the French currency and gold was small, or, as after the war, when the French currency depreciated considerably in relation to its previous gold value, the service of these loans did not pose any problems. It was only from the date when the value of the French franc sank to about a fifth of its pre-war value level that the service became problematic. The bondholders requested their government to intervene on their behalf and the French Government took up their claims.

After failed diplomatic negotiations between the two Governments, a special agreement (*compromis*) was signed at Paris on April 19, 1928, which asked the Court to determine whether the Serb-Croat-Slovene Government was entitled to service these loans in paper francs, as it had previously done, or whether, as the bondholders claimed, it was bound to pay in gold. The special agreement did not authorized the Court to settle conclusively the manner in which the service of the loans were to be effected, for Article II of the special agreement provided that the judgment of the Court would be followed by

442 *Ibid.*, p. 6.

443 See MAREK Krystina, “Affaire concernant le paiement de divers emprunts Serbes émis en France”, *Précis de la jurisprudence de la Cour internationale/A Digest of the Decisions of the International Court* (éd. par K. Marek), Vol. I, 1974, pp. 454-455; GÖTZ Volkmar, “Serbian Loan Case”, *Ency. PIL* (dir. by R. Bernhardt), Vol. 2, 1981, pp. 256-258; GENET Raoul, “L’affaire des emprunts Serbes et Brésiliens devant la Cour permanente de Justice internationale et les principes du droit international”, *RGDIP*, Tome 36, 1924, pp. 669-694; PRUDHOMME André, “Les emprunts des États Brésilien et Serbe devant la Cour permanente de Justice internationale de La Haye”, *JDI*, Tome 56, 1929, pp. 837-895; and DE LAPRADELLE Albert Geouffre, *Causes célèbres du droit des gens, la question des emprunts Serbes devant la justice internationale*, 1929, 558 p.

diplomatic negotiations between the Parties for the purpose of arriving at an equitable arrangement which (1) should make the bondholders certain concessions, in case the Court's award is in accordance with the views of the Serbian Government, or (2) will make to the Serbian Government certain concessions, having regard to its economic and financial conditions, and capacity for payment, in case the Court's award is in accordance with the claims of the bondholders. In case "the question of the concessions" and of "the method of giving effect to them" not succeed, they will be decided by a special Arbitral Tribunal, to which the question may be referred by "either of the two Parties."⁴⁴⁴

During the proceedings, the Serbian Government argued that the promise to pay gold francs was without legal significance. It contended that there was no international gold franc; that the reference was to French money and not to gold as a merchandise; that the French monetary unit was silver and that there was no "gold franc" as a monetary unit; that despite the terms of the engagement, the promise must be construed as one to pay in French currency.⁴⁴⁵

The Court, as to the interpretation of the provisions of the loan contract relating to payment (that is, whether gold francs or merely French francs were promised, and, if gold francs were promised, the significance of the expression "gold franc"), after an examination of the bonds, found that "the bonds show that in each case there was a promise to pay in gold or gold francs."⁴⁴⁶ The Court added "the mention of francs generally cannot be considered as detracting from the force of the specific provision for gold francs. The special words, according to the elementary principles of interpretation, control the general expressions. The bond must be taken as a whole, and it cannot be so taken if the stipulation as to gold francs is disregarded."⁴⁴⁷

With regard to the significance of the expression "gold francs", the Court, observing that it was fundamental that the terms of a contract qualifying the promise were not to

444 *Serbian Loans Case*, Judgment No. 14, July 12, 1929, *PCIJ Series A*, Nos. 20/21, pp. 15-16.

445 See FACHIRI Alexander P., "Judgment No. 14. Delivered July 12, 1929. The Serbian Loans Case", *BYBIL*, Vol. XI, 1930, p. 205.

446 *Ibid.*, p. 29.

447 *Ibid.*, p. 30.

be rejected as superfluous, and, that the definitive use of the word “gold” could not be ignored, said that the question which followed was:⁴⁴⁸

“What must be deemed the significance of that expression? It is conceded that it was the intention of the Parties to guard against the fluctuation of the Serb dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But, in so contracting, the Parties were not content to use simply the word “franc”, or to contract for payment in French francs, but stipulated for “gold francs”. It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe but to destroy it. [...]

[as] there were no gold coins for such amounts. It is manifest that the Parties, in providing for gold payments, were referring, not to payment in gold coins, but to gold as standard of value.”

The “gold franc” was thus a well-known standard of value, internationally accepted, but its definition was to be found in national laws. Then, according to French law, later adopted by Belgium and Switzerland, by the Convention of the Latin Union, the Treaty of Versailles, and the Treaty of St. Germain, the “gold franc”, at the time of the bond issues, was the twentieth part of a piece of gold weighing 6.45161 grammes with a fineness of nine-tenths. Having regard to this, the Court concluded that “this was the gold standard of value to which the loan contract referred.”⁴⁴⁹

Having determined what was the gold standard adopted by the Parties, the Court found inadmissible the Serbian contention “that it should not govern the payments because the depreciation in French currency was not foreseen,” or, could not be foreseen when the contracts were made. To this point the Court answered that “the question is not what the Parties actually foresaw, or could foresee, but what means they selected for their protection. To safeguard the payment of the loans, they provided for payment in gold value having reference to a recognized standard, [...]”⁴⁵⁰ The Court added that it did matter that the value (the gold parity) was not quoted in the market, as was the case when the loans were issued, the value “can always be fixed either by comparison with the exchange rates of currency of a country in which gold coin is actually in circulation, or, should this not be possible, by comparison with the price of gold bullion. Once the

448 *Ibid.*, pp. 32, 33.

449 *Ibid.*, p. 34.

value is fixed, it is its equivalent in money in circulation which constitutes the amount which is payable at Belgrade, Paris, Brussels and Geneva and the other places enumerated in the bonds in the local currency at the sight rate of exchange on Paris.”⁴⁵¹

On the contention, by Serbia, that the acceptance by the bondholders of depreciated paper franc, after 1919, operated as an *estoppel* against them, the Court held that “[i]f the subsequent conduct of the Parties is to be considered, it must be not to ascertain the terms of the loans, but whether the Parties by their conduct have altered or impaired their rights”.⁴⁵² In examining the circumstances of the case, the Court found that there was no sufficient basis to apply that principle, as there had been “no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied.” In rejecting this contention the Court also said that there was no ground for concluding that the bondholders deliberately surrendered their rights.

On the plea of *force majeure* the Court stated: “It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations and—if resorted to—the arbitral determination for which Article II of the Special Agreement provides.”⁴⁵³

Having thus established the meaning which was to be attached to the terms of the bonds, the Court proceeded to consider a Serbian contention by which, to the extent that the obligations entered into were subject to French law (insofar as payment was to be effected in French money and in France), French law rendered the clause for payment in gold null and void at all events. As regards the question whether it was French law the one which governed the contractual obligations in this case, the Court made some observations:⁴⁵⁴

450 *Ibid.*

451 *Ibid.*, p. 36.

452 *Ibid.*, p. 38.

453 *Ibid.*, pp. 39-40.

“Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law.”

In determining the proper law governing the contractual obligation at issue the Court said that it can be determined only by reference to (1) the actual nature of these obligations, and to (2) the circumstances attendant upon their creation, though it may also take into account (3) the expressed or presumed intention of the Parties, as it “would seem to be in accord with the practice of municipal courts in the absence of rules of municipal law concerning the settlement of conflicts of law.”⁴⁵⁵ The Court observed that, in determining which is this law, “it may happen that the law which may be held by the Court to be applicable to the obligation in the case, may in a particular territory be rendered inoperative by a municipal law of this territory—that is to say, by legislation enacting a public policy the application of which is unavoidable even though the contract has been concluded under the auspices of some foreign law.” The Court further observed that, even if abstraction is made from rules of public policy, “it is quite possible that the same law may not govern all aspects of the obligation. The distinction which seems indicated for the purposes of this case is more particularly that between the substance of the debt and certain methods for the payment thereof.”⁴⁵⁶

For the above-mentioned observations, the Court held that the law governing the obligations at the time at which they were entered into was, at all events, Serbian law and not French law, insofar as it concerned the substance of the debt and the validity of the clause defining it. The Court explained this as follows:⁴⁵⁷

“The loans in question are loans contracted by the State of Serbia under special laws which lay down the conditions relating to them. These laws are cited in the bonds; and it appears that the validity of the obligations set out in the said bonds is indisputable in Serbian law. The bonds are bearer bonds signed at

454 *Ibid.*, p. 41.

455 *Ibid.*

456 *Ibid.*

457 *Ibid.*, p. 42 [emphasis added].

Belgrade by representatives of the Serbian Government. *It follows from the very nature of bearer bonds that, in respect of all holders, the substance of the debt is necessarily the same, and that the identity of the holder and the place where he obtained it are without relevancy. Only the individuality of the borrower is fixed: in this case it is a sovereign State which cannot be presumed to have made the substance of its debt and the validity of the obligations accepted by it in respect thereof, subject to any law other than its own.*"

But, as the judgment points out, the fact that French law was not applicable as regards the substance of the debt and the validity of the provisions relating thereto, did not prevent the currency in which payment was to be made in France from being governed by French law. The Court declared: "It is indeed a generally accepted principle that a State is entitled to regulate its own currency."⁴⁵⁸

The Serbian Government cited a number of provisions of the French Penal Code and other legislation whereby gold payments were suspended in France and paper currency made the only legal tender. Upon these provisions it was argued that the law of France compelled every creditor to accept as due payment of a debt in French francs inconvertible banknotes, at their face value, and rendered null and void any provision involving a distinction between these notes and metal currency. For its part, the French Government maintained that this construction was unsound and contrary to the law as stated by the Court of Cassation since 1920, which established that although a gold stipulation is null and void when it relates to a domestic transaction, this does not hold good in the case of international contracts, even when payment is to be effected in France.

The Court, thus, being confronted with the task of deciding as to the meaning and scope of a municipal law, made the following observations:⁴⁵⁹

"For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning *public policy*—a conception the definition of which in any particular

⁴⁵⁸ *Ibid.*, p. 44.

country is largely dependent on the opinion prevailing at any given time in such country itself—and in cases where no relevant provisions directly relate to the question at issue. It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfilment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant.

In these circumstances, the Court will confine itself to observing that, according to the information furnished by the Parties, the doctrine of French Courts, after some oscillation, has now been established in the manner indicated by the French Government, and that *consequently there is nothing to prevent the creditor from claiming in France, in the present case, the gold value stipulated for.*"

For these reasons, by a majority of 9 to 3, Judges de Bustamante and Pessôa, and Mr. M. Novacovitch, the Serbian national Judge, dissenting, the Court, in its judgment dated July 12, 1929, held that the debtor government was bound to discharge its obligation on the gold value basis. The Court so decided: "If payment is to be made in gold francs, this is to be understood in accordance with the interpretation given above, that is to say that if the franc which is legal tender at the place fixed for payment does not possess the value of the gold franc as defined by this judgment, payment must be effected by the remittance of a number of francs, the value of which corresponds to the value of the gold francs due."⁴⁶⁰

— The *Brazilian Loans Case*⁴⁶¹ concerned a dispute between the French and the Brazilian Federal Governments with regard to the question "whether the service of [certain] loans should be effected on the basis of the gold franc or of the paper franc."⁴⁶²

The facts in this case were as follows:⁴⁶³ in the years 1909, 1910 and 1911, with a view to financing certain works for the improvement of its ports and railways, Brazil received three loans in the form of bearer bonds. The bonds all contained gold clauses and were mainly offered for subscription in France. By these clauses Brazil undertook to pay the

459 *Ibid.*, pp. 46-47 [emphasis added].

460 *Ibid.*, p. 48.

461 *Brazilian Loans Case*, Judgment No. 15, July 12, 1929, *PCIJ Series A*, Nos. 20/21, pp. 90-155.

462 *Ibid.*, p. 94.

463 See MAREK Krystina, "Affaire relative au paiement, en or, des emprunts fédéraux brésiliens émis en France", *Précis de la jurisprudence de la Cour internationale / A Digest of the Decisions of the International Court* (éd. par K. Marek), Vol. I, 1974, pp. 476-483; VON KATTE Christoph, "Brazilian Loans Case", *Ency. PIL* (dir. by R. Bernhardt), Vol. 2, 1981, pp. 39-40; and FACHIRI Alexander P., "Judgment No. 15. Delivered July 12, 1929. The Brazilian Loans Case", *BYBIL*, Vol. XI, 1930, pp. 208-209.

principal and interest of these loans in gold francs. In the case of the 1909 issue the term “payable in gold” occurred only in connection with interest, whereas in the case of the two later issues “francs gold” were to be paid both as interest and upon redemption of the principal. In fact, the payment of the matured coupons and the redemption of drawn bonds was always effected in banknotes, but the increase in the depreciation of the French franc obliged the bearers of these bonds to refuse payment of their coupons in French legal tender (paper francs), contending that the loan-service should be on a gold basis. In 1924, the French Government intervened on behalf of the bondholders and requested the Brazilian Government to repay the capital of the loans and the interest due thereon on the basis of the value of the French franc in terms of gold at the time of the bond issue. As discussion on the diplomatic level did not succeed in settling the controversy, a special agreement (*compromis*) was concluded on August 27, 1927, between these Governments which requested the PCIJ to give a judgment on the question whether the service of the loans should be effected “as hitherto in paper francs, that is to say, in the French currency which is compulsory legal tender” or according to the value of the former gold franc.

With regard to the interpretation of the provisions relating to payment, in the case of the bonds of 1909 nothing was said in the coupons about the promise to pay the principal in gold, something that occurred only in connection with interest. After careful examination, the Court found, however, that these “bonds are to be construed as providing for the payment of principal and interest in gold.”⁴⁶⁴ The Court applied a “familiar rule for the construction of instruments that, where they are found to be ambiguous, they should be taken *contra-proferentem*.”⁴⁶⁵ In this case, the Brazilian Government, having assumed responsibility for the prospectus through its representative, who “had seen and approved”, and had signed the bonds, it seems appropriate to construe them, in case of doubt, *contra-proferentem*, and to ascribe to them the meaning that they would naturally carry for those taking the bonds by reason of the prospectus. In the case of the bonds of 1910 and 1911, there were explicit provisions in the bonds for the payment of principal and interest in gold francs.

464 *Brazilian Loans Case*, Judgment No. 15, July 12, 1929, *PCIJ Series A*, Nos. 20/21, p. 115.

465 *Ibid.*, p. 114.

Concerning the significance of the gold clauses, the Court found it inadmissible to treat these clauses as eliminating the word “gold” from the bonds; it said: “When the Brazilian Government promised to pay ‘gold francs’, the reference to a well-known standard of value cannot be considered as inserted merely for literary effect, or as a routine expression without significance. The Court is called upon to construe the promise, not to ignore it.”⁴⁶⁶ In so doing, it found that the Brazilian Government did not issue bonds simply for “French francs” but for “gold francs”, and if the latter denote a standard of value, “that standard must be deemed to be the subject of the reference.” It stated further that it was not at liberty to disregard the promise of “gold”, and that the question whether gold specie (gold coin), or, gold value was intended must be answered in the same manner as in the *Serbian Loans Case*.

Having determined that gold standard was the one adopted by the Parties, the Court found untenable the Brazilian argument “that the depreciation in French francs was unforeseeable and that the sole object was to safeguard against the depreciation of Brazilian currency”. To this point the Court answered that the “devalorisation of the French franc could not in fact increase the obligations of the latter: the gold clause merely prevents the borrower from availing itself of a possibility of discharge of the debt in depreciated currency.”⁴⁶⁷ The Court clarified that “[i]t was depreciation in value that was the object of the safeguard, not in this or that particular currency, and it was evidently for this reason that the reference was made to the well-known stability of gold value.”⁴⁶⁸

Moreover, since “gold franc” (as defined by French law, which later was adopted by other countries and by the Convention of the Latin Union) was the standard adopted by the Parties when the loans were issued, the Court inferred that this “was one well adapted for selection by other Government as a standard of value for its external loans.” For that reason it concluded, “the bonds should be construed as providing for payment in gold francs at the value fixed by the [French] law of the 17th Germinal, Year Eleven.”⁴⁶⁹

466 *Ibid.*, p. 116.

467 *Ibid.*, p. 117.

468 *Ibid.*

469 *Ibid.*, pp. 118-119.

On the contention, by Brazil, that where a contract is ambiguous, resort may be had to the manner of performance in order to ascertain the intention of the Parties, that is, that it should be concluded that the contracts provided for payment in French paper francs, the Court noted that there was no ambiguity at least in the loan contracts of 1910 and 1911, nor was there ambiguity in the contract of 1909, insofar as payment of interest was concerned, and as to the payment of the principal, they were to be read in connection with the bonds, which were in fact offered as gold obligations. In this connection, the Court also noted that if the subsequent conduct of the Parties was to be considered, it must be remembered that during the war until 1919 those were times of great difficulties for bondholders; "that as individuals they were powerless as against the Brazilian Government, and it was necessary for them to associate themselves together and to interest the French Government in their case;" if all that is considered, "there is no adequate basis for an inference from the conduct of the bondholders that they were of opinion that they were not entitled to obtain payment on the basis of the gold standard." Yet more, given that the bonds "are bearer bonds which entitle the bearer to claim, simply because he is a bearer, all the rights accruing under the bond", the bondholders, because of their acceptance of depreciated paper franc, "cannot be regarded as estopped to seek payment in gold value."⁴⁷⁰

The Court did not accept the plea of *force majeure* holding that economic dislocation caused by the war had not, "in legal principle," released the Brazilian Government from its legal obligations, and "as for gold payments, there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable."⁴⁷¹

On the contention, by Brazil, that French law (namely, the forced currency regime which rendered banknotes compulsory tender) made it impossible to claim payment otherwise than in banknotes and for the same amount of francs as are specified in the contract (thus rendering the gold clauses ineffective), the Court commented that, as regards the substance of the debt and the validity of the clause defining it, at all events,

470 *Ibid.*, pp. 119-120.

471 *Ibid.*, p. 120.

it was Brazilian “and not French law which must be held to govern the obligations contracted”. The Court explained this as follows:⁴⁷²

“The loans in question are loans contracted by the Government of the United States of Brazil under laws and decrees having the force of law and laying down the conditions relating to the loans. These decrees are cited in the bonds, and accordingly the validity of the obligations set out therein is indisputable in Brazilian law. The bonds are bearer bonds signed by the delegate of the Brazilian Treasury in London. *It follows from the very nature of bearer bonds that the substance of the debt, which in principle must be the same in respect of all holders, cannot be dependent on the identity of the holder or the place where he has acquired his bond. Only the identity of the borrower is fixed; in this case it is a sovereign State, which cannot be presumed to have made the substance of its debt and the validity of the obligations accepted by it in respect thereof, subject to any law other than its own.*”

But, as the judgment points out, the fact that French law was not applicable as regards the substance of the debt and the validity of the provisions relating thereto, did not prevent the currency in which payment was to be made in France from being governed by French law. For, the Court stated, as in the case of the *Serbian Loans Case*, “it is a generally accepted principle that a State is entitled to regulate its own currency.”⁴⁷³

Thus, being confronted with the task of deciding as to the meaning and scope of municipal law, specially after the *Serbian Loans Case* in which it held that “whilst a gold clause in respect of domestic transactions is null and void, this is not the case as regards international contracts, even when payment is to be effected in France”, the Court made the following observations:⁴⁷⁴

“Though bound to apply municipal law when circumstances so require, the Court which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken.

Once the Court has arrived at the conclusion that it is necessary to apply the municipal of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would

472 *Ibid.*, p. 121 [emphasis added].

473 *Ibid.*, p. 122.

474 *Ibid.*, pp. 124-125 [emphasis added].

not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.

It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.

Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. *But to compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law.* As the Court has already observed in the judgment in the case of the Serbian loans, *it would be a most delicate matter to do so, in a case concerning public policy—[...].*

[...] while the Court is authorized to depart from the jurisprudence of the municipal courts, it remains entirely free to decide that there is no ground for attributing to the municipal law a meaning other than that attributed to it by that jurisprudence.”

For these reasons, by a majority of 11 to 2, Judges de Bustamante and Pessôa again dissenting, the Court, in its judgment dated July 12, 1929, held that, according to the jurisprudence of the French courts, a gold clause in an international contract was valid; therefore, the debtor government was bound to discharge its obligation on the gold value basis.

— In the *Société Commerciale de Belgique*,⁴⁷⁵ the Belgian Government, espousing the claim of this company, brought a case before the Court for the execution of two arbitral awards providing for the payment in gold dollars of a sum, in favour of the company, resulting from certain bonds issued as part of the Greek external debt.

The facts in this case were as follows:⁴⁷⁶ in 1925 the company and the Greek Government concluded an agreement for the construction of certain railway lines in Greece; the railway lines were to be financed by a loan extended by the company to the Greek Government, which, in turn, issued bonds to the company on the account of the

⁴⁷⁵ *Société Commerciale de Belgique*, Judgment of June 15, 1939, *PCIJ Series A/B*, pp. 160-190.

⁴⁷⁶ *Ibid.*, pp. 165-168. See also CAFLISCH Lucius, “*Société commerciale de Belgique*”, *Précis de la jurisprudence de la Cour internationale / A Digest of the Decisions of the International Court* (éd. par K. Marek), Vol. I, 1974, pp. 954-971; and BŮLCK Hartwig, “*Société Commerciale de Belgique Case*”, *Ency. PIL* (dir. by R. Bernhardt), Vol. 2, 1981, pp. 258-260.

Greek public external debt. It was also established that disputes arising out of the contract were to be settled by a mixed Arbitration Commission. In 1932, owing to the general financial crisis, the Greek Government defaulted in the service of its debt with the result that the company could not continue the work and pay its sub-contractors. The company then resorted to arbitration in accordance with the terms of the contract and two arbitral awards were delivered; one on January 3, 1936, which provided for the cancellation of the contract as from the date at which the service of the debt by Greece ceased, and for the appointment of a body of experts to fix the amount and the method of payment of such sum; and, the other on July 25, 1936, which adopted and gave effect to the report of the body of experts appointed in pursuance of the first award, and by which the sum payable by the Greek Government was fixed at \$6,771,868 to be paid in gold dollars with interest at 5 % from August 1, 1936. The award also contemplated an arrangement for substituting the Belgian Government for the company and by which the latter was released from all and further responsibility in connection with the case.

The Greek Government complied with the other provisions of the awards, except for the payment of the sum, which, it said, should be made according to the method applicable for the payment of the other parts of the Greek public external debt; accordingly, it proposed a gradual payment of the sum due with a balance remaining until a final settlement was to be reached with regard to the Greek public external debt, and, as in the case of other external loans on a gold basis, payment of the sum could not be made in gold as provided in the original contract and in the arbitral awards. This was found inadequate by the Belgian company, which claimed that the "awards had confirmed the commercial character of the company's debt, that the debt was not part of the Greek external debt." The parties being unable to agree, in 1937 the Belgian Government, under request by the company, took up its claim referring the dispute to the PCIJ, by means of a unilateral application based on the Treaty of Conciliation, Arbitration and Judicial Settlement concluded between Belgium and Greece in 1929.

In its Application filed in May 1938, Belgium prayed the Court to declare that Greece, by refusing to carry out the second arbitral award, (a) has violated its international

obligations, and (b) is obliged to pay the amount awarded, (c) together with additional damages.⁴⁷⁷

In its reply, the Greek Government declared (a) to acknowledge “without reserve the definitive and obligatory character of all the provisions of the arbitral awards given in favour” of the company, but pleaded to declare (b) that “the conditions for the settlement of the Greek external public debt must remain foreign to execution of these awards”. In his oral argument, the Counsel for the Greek Government prayed the Court to dismiss the Belgian claims and declare (1) that Greece “has been prevented by *force majeure* from carrying out the arbitral awards”, (2) that the Court has no jurisdiction to adjudicate on a claim by Belgium for an order of the Court that Greece should pay the sums due under the second award, (3) that Greece acknowledges that the arbitral awards have the force of *res judicata*, “subject to the express reservation that it is unable to execute them as formulated”, and that it is ready to discuss and to conclude with the company an arrangement for the execution of these awards “so far as its budgetary and monetary capacity allows”, that, in principle, “the fair and equitable basis for such an arrangement is to be found in the agreements concluded or to be concluded by the Greek Government with the bondholders of its external public debt”.⁴⁷⁸

Subsequently, Belgium substituted for its original submission a request praying the Court to “adjudge and declare that all the arbitral awards” are “without reserve” binding for the Greek Government; that Greece is bound in law to execute the said awards; that “the conditions for the settlement of the Greek public external debt,” to which this Government “desires to subordinate payment of the financial charge imposed upon it, are and must remain foreign to the execution of these awards;” and that “it is without right or title that the Greek Government has sought to impose upon the company or the Belgian Government, as a condition precedent to payment, either the methods of settlement of its external debt or the sacrifice of other rights of the company by the arbitral awards”. At the same time, Belgium abandoned its claims for an additional payment of damages as reparation.⁴⁷⁹

477 *Société Commerciale de Belgique*, Judgment of June 15, 1939, *PCIJ Series A/B*, p. 162.

478 *Ibid.*, pp. 162-163.

479 *Ibid.*, p. 164.

To this amendment another change followed in the Greek's Counsel oral rejoinder. On behalf of that government he submitted (1) that "Greece has been prevented by *force majeure* from executing" these arbitral awards, (2) that the Court should dismiss the Belgian claim for an order by the Court that Greece should pay the sums due under the second award, (3) that Greece acknowledges that the arbitral awards have the force of *res judicata*, (4) that "by reason of its budgetary and monetary situation, however, it is materially impossible for the Greek Government to execute the awards as formulated", (5) that both the Greek Government and the company "should be left to come to an arrangement for the execution of these awards which will correspond with the budgetary and monetary capacity of the debtor", (6) that, "in principle, the fair and equitable basis for such an arrangement is to be found in the agreements concluded by the Greek Government with the bondholders of its external public debt." Having regard to the last changes in Greek submission, at the same hearing, Belgium requested the Court "to place on record that the Belgian Government declares that it has never been its intention to claim on behalf of the company settlement in full by means of a single payment".⁴⁸⁰

The Court observed that in their submissions the Parties stressed the need for negotiations "for the conclusion of an agreement as to the execution of the awards". In this connection, the Court noted that "the Belgian Counsel intimated that if, after the legal situation has been determined, the Belgian Government should have to deal with the question of payment, it would have regard to the legitimate interest of the company, to the ability of Greece to pay and to the traditional friendship between the two countries. In this spirit it would be disposed to conclude a special agreement with a view to settling *ex aequo et bono* any difficulties which might arise in regard to proposals made by Greece for instalment payments."⁴⁸¹

Concerning the amendment of the submissions, the Court held that it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submission into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interest of third States [...]. Similarly, a complete change in the basis of the case submitted to the Court might affect

480 *Ibid.*, pp. 163-164.

481 *Ibid.*, p. 172.

the Court's jurisdiction."⁴⁸² However, in this case the Court did not consider the change of the Belgian submission to infringe upon these principles, but this was so mainly owing to the absence of any objection on the part of the Greek Government's agent. Thus, the Belgian claims that the Court regarded as withdrawn were: the violation of international obligations by Greece, and the request of an order by the Court to pay the sums due to the company. As regards the arbitral awards to which these submissions related, the Court noted that according to the arbitration clause under which they were made, "they were made 'final and without appeal', and since the Court has received no mandate from the Parties in regard to them, it can neither confirm nor annul them either wholly or in part."⁴⁸³

With regard to the force of *res judicata*, having regard that, on the one hand, the Greek Government had never, at any time, intended to throw doubt upon the validity of the arbitral awards, or, refused to carry them out, that on the contrary, it had asked the Court to declare that it recognizes that they possess this force but that the financial conditions of the country had alone prevented it from complying with them and had obliged it to propose an arrangement to the company, and, on the other hand, the Belgian Government had asked the Court to rule that these arbitral awards have the force of *res judicata*, the Court found that both were in agreement, subject to two observations:⁴⁸⁴

"[...] If the award is definitive and obligatory, it is certain that *the Greek Government is bound to execute them and to do so as they stand: it cannot therefore claim to subordinate payment of the financial charge imposed upon it to the conditions for the settlement of the Greek external debt*, since that has not been admitted in the awards. Nor can it make the sacrifice of any right of the company recognized by the awards a condition precedent to payment.

Since the Greek Government states that it recognizes the arbitral awards as possessing the force of *res judicata*, it cannot contest this submission of the Belgian Government without contradicting itself. It does not in fact contest it; *its submissions regarding the execution of the awards proceed from another point of view*, [...].

The second observation to be made concern the words 'in law' which [...] qualify the obligation of the Greek Government to carry out the arbitral awards. In the opinion of the Court, these words mean that the Belgian Government here adopts *the strictly legal standpoint regarding the effects of res judicata*, a

482 *Ibid.*, p. 173.

483 *Ibid.*, p. 174.

484 *Ibid.*, p. 176 [emphasis added].

standpoint which, in fact, does not preclude the possibility of arrangements which, without affecting the authority of res judicata, would take into account the debtor's capacity to pay."

It was precisely, "the standpoint of fact and considerations as to what would be fair and equitable, as opposed to that of strict law," the point of view adopted by the Greek Government. The Court, however, confronted with the task of appreciating the precise import of the submissions recalled that "it should be above all be borne in mind that, according to the clear declarations made by the Parties during the proceedings, the question of Greece's capacity to pay is outside the scope of the proceedings before the Court."⁴⁸⁵ In so doing, with regard to the reservation made by Greece about the recognition of *res judicata*, the Court held:⁴⁸⁶

"[...] Apart from any other consideration, it is certain that the Court is not entitled to oblige the Belgian Government—and still less the company which is not before it—to enter into negotiations with the Greek Government with a view to a friendly arrangement regarding the execution of the arbitral awards which that Government recognizes as binding: *negotiations of this kind depend entirely upon the will of the parties concerned*. It is scarcely necessary to add that, if the Court cannot invite the Greek Government and the *Société commerciale de Belgique* to agree upon an arrangement corresponding to the budgetary and monetary capacity of the debtor, still less can it indicate the bases for such an arrangement."

Upon the question of Greece's capacity to pay, the Court reminded that it was outside the scope of the proceedings before the Court, but that "if regarded as a plea in defence designed to obtain from the Court a declaration in law to the effect that the Greek Government is justified, owing to *force majeure*, in not executing the awards as formulated", it held that it could not be entertained. It nevertheless ruled:⁴⁸⁷

"[...] *Indeed, it is clear that the Court could only make such a declaration [i.e., 'that the Greek Government is justified, owing to force majeure, in non executing the awards'] after having itself verified that the alleged financial situation really exists and after having ascertained the effect which the execution of the awards in full would have on that situation; [...]."*

Upon this point, dissenting Judge Jhr. Van Eysinga held that the Court "no doubt has jurisdiction to entertain [this] submission No. 4. It is a question of ascertaining a fact:

485 *Ibid.*, p. 177.

486 *Ibid.* [emphasis added].

487 *Ibid.*, p. 178 [emphasis added].

the budgetary and monetary situation of Greece. The ascertainment of this fact in its turn requires an expert report, for the Court cannot adjudicate simply on the basis of what the Parties—notwithstanding their statements that this question should remain outside the scope of the proceedings—have put before it regarding the financial and monetary capacity of Greece. Accordingly the Court should apply Article 50 of the Statute which provides that it ‘may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert report’.⁴⁸⁸ The other dissenting Judge, Manley Hudson, was of opinion that this question “would call for an examination of the municipal law applicable”, or, if requested “should be dismissed for want of proof of the alleged impossibility” by reason that the statistics presented does not relate directly to the budgetary and monetary situation of Greece, as it now exists.⁴⁸⁹

The Court found that it was not precluded from placing on record a declaration from the Belgian Government that, that “if, after the legal situation has been determined, the Belgian Government should have to deal with the question of payment, it would have regard to the legitimate interests of the company, to the ability of Greece to pay and to the traditional friendship between the two countries.” This declaration enabled the Court to state that “the two Governments are, in principle, agreed in contemplating the possibility of negotiations with a view to a friendly settlement, in which regard would be had, amongst other things, to Greece’s capacity to pay. Such a settlement is highly desirable.”⁴⁹⁰

The Court’s judgment, dated June 15, 1939, by a majority of 13 to 2, allowed the Belgian submission that the arbitral awards are definitive and obligatory and the Greek’s submission of recognition of *res judicata* of these awards, and, “noting the agreement between the Parties” stated, that the arbitral awards “are definitive and obligatory”. The other submissions of the two Parties were dismissed.

Summary of recourse to the PCIJ. In total, the PCIJ exercised its jurisdiction on the subject of the recovery of State loans, during the inter-War period, in three occasions.

488 *Ibid.*, p. 182.

489 *Ibid.*, p. 186.

490 *Ibid.*, p. 178.

The first two concerned disputes upon the question of what monetary basis (gold franc or paper franc) payment of the principal and interest of certain loans should be effected by the debtor governments, and the third was about the enforcement of two arbitral awards and the commercial or public character of a company's debt. The PCIJ dealt with these cases as disputes between governments, but the three were in fact related to disputes between governments and private interests.

What is important here is that the Court dealt, in both cases, with disputes relating to the choice of the applicable national law, including the dispositions of the national law selected. In so doing, it held that it was the law of the borrowing States (Serbia and Brazil, respectively) to be applicable to the creation of the debtor's obligations, but also held that it was the currency laws of the creditor State (France in both cases) to be applicable to the payment of the obligations insofar as it is "a generally accepted principle that a State is entitled to regulate its own currency". The Court then required the payment to be effected in gold francs and not in devaluated paper francs. Here the Court relied on a general principle of monetary law to distinguish between the place where the contract is made, which governs the substance of the debt, and the place of its performance. Today the distinction is clear and normally stipulated in all loan contracts.

In the *Société Commerciale de Belgique* the situation was different. Here, basically, Greece recognized from the outset that the two rendered arbitral awards had the force of *res judicata*, but argued that it was materially impossible for it to execute the awards as formulated. The PCIJ avoided the question of Greece's capacity to pay by stating that it was "outside the scope of the proceedings before the Court". However, this was important for dissenting Judge Van Eysinga, who considered that the Court had the jurisdiction to entertain such a submission, by means of ascertaining the budgetary and monetary situation of Greece, which required an expert report. In reality, in this case, the Court was dealing with its own impossibility to enforce not only the two arbitral awards, but also its own final decision. This is why it finally it declared that "the two Governments are, in principle, agreed in contemplating the possibility of negotiations with a view to a friendly settlement, in which regard would be had, amongst other things, to Greece's capacity to pay. Such a settlement is highly desirable". The PCIJ could confirm that the two arbitral awards were in law "definitive and obligatory", but could not confirm that they were in fact "enforceable".

Chapter 3. International Practice on the Recovery of State External Debts after World War II (the International Monetary Fund's Period)

After World War II, some of the methods studied employed to recover State external debts continued to be used in a more discrete way like diplomatic interventions. Others like the recovery by arbitral and judicial means, contrary to what is frequently asserted, that sovereign debt litigation is inexistent, were resorted to on a regular basis, especially following the 1982 debt crisis. Others were apparently brought to an end, like the threat or the use of force for the compulsory recovery of State debts, or became obsolete, like the *in situ* foreign financial interventions.

With the disappearance of the League of Nations' Economic and Financial Committees and its replacement by the Bretton Woods institutions, the efforts of "collective action" and a neutral third party involvement for the recovery and settlement of State debts were also brought to an end. Instead, some techniques of collective negotiation, surfaced and were adopted by the creditors' cartels. These techniques were and continue to be used within informal mechanisms by creditors themselves (the Paris and London Clubs). Moreover, these mechanisms were further reinforced by the intervention of the IMF, especially after the debt crisis of the 1980's. The IMF increasingly became a third party player in the maintenance of these informal mechanisms of debt settlement. More recently, a new mechanism has been proposed within the framework of the IMF, which seeks to settle "unsustainable" State debts in an institutionalized framework.

From the 1980's the recovery of State debts by judicial means shows new features: (1) an increase in sovereign debt litigation in the jurisdiction of New York as a result of public law interference in the form of currency legislation in debtor countries; (2) new judicial doctrines and theories have surfaced at domestic law level; and, most notably towards the end of this period, (3) domestic courts in this judicial jurisdiction have cleared the way to levy execution on States' assets.

A. Recourse to international courts and tribunals for the recovery of State external debts

a) **Arbitral jurisdictions.** In this sub-section we will examine the leading case on the subject of recovery of State external debts brought before an arbitral jurisdiction.

– On May 16, 1980, the Arbitral Tribunal, set up pursuant to Article 28 of the London Agreement on German External Debts of 1953, rendered, by 4 votes to 3, a decision in the *Young Loans Case*,⁴⁹¹ for which it was seised in 1971 by the Governments of Belgium, France, Switzerland, the United Kingdom, and the United States, as Applicants, against the Federal Republic of Germany, as Respondent.

The facts of this case were as follows:⁴⁹² as a result of the revaluations of the Deutschmark (DM) in 1961 and 1969, a dispute concerning the calculation of the amounts due in respect of certain sums advanced under the Young Loan bonds of 1930 arose between these Governments in the context of the London Agreement on German External Debts of February 27, 1953, to which they all were parties, together with other creditor countries.

The 1930 Young Loan (which was designed to replace the Dawes Loan) was part of the Young Plan of 1929, which was the last scheme containing a final and comprehensive settlement for the payment of the reparations agreed by Germany (*cf.* Article 233 of the Versailles Peace Treaty of 28 July 1919) following World War I. The Young Plan was put into force by The Hague Agreement with effect from 17 May 1930, and was designed to transfer the German obligation to pay reparations from the political to the financial level. To implement the commitments under the Young Plan, a “General Bond” was agreed upon between the German Government, as debtor, and the Bank for International Settlements (BIS), created to that effect, as Trustee for the Loan creditors. On this basis bonds in nine different currencies were issued and sold to private holders.

⁴⁹¹ *Young Loans Case* (Belgium, France, Switzerland, United Kingdom, United States v. Federal Republic of Germany), 16 May 1980, *RIAA*, Vol. XIX, pp. 67-145.

⁴⁹² *Ibid.*, pp. 70-84; see also KEWENING Wilhelm A., “Young Plan Loans Arbitration”, *Ency. PII* (dir. by R. Bernhardt), Vol. 2, 1981, pp. 296-298; and GIANVITI François, “Garantie de change et réévaluation monétaire: l'affaire de l'emprunt Young (Sentence du 16 mai 1980 du Tribunal d'arbitrage des dettes extérieures allemandes)”, *AFDI*, Vol. XXVI, 1980, pp. 250-273.

However, by 1933, owing to economical and political reasons, Germany slowed down her rate of payment under the Dawes and Young Plans, and, as from July 1934, it ceased paying interest or redemption, except to the neutral States of Sweden and Switzerland until shortly before the end of World War II.

After World War II, in March 1951, the Federal Chancellor, Herr Adenauer, accepted the liability of the Federal Republic of Germany for the outstanding pre-war debts of the German Reich. Subsequently, on April 1951, a Tripartite Commission on German Debts was set up by the three western occupying powers to act on their behalf in the forthcoming discussions and negotiations on post-war aid claims and debts under the Young loan. In the following discussions which led to the London Conference on German External Debts of 1952, the Governments of France, the United Kingdom and the United States declared that they were prepared to reduce substantially (France by 75 per cent, United Kingdom by 73.2 per cent, and the United States by 62.5 per cent) their claims arising out of their economic post-war aid if a fair and equitable settlement was found for the pre-war German debts.

At the London Conference on German External Debts (LDC) of 1952, in which representatives of private creditors were invited to take part, a solution was finally agreed upon: the gold clause, which was the main protective device of the Young Loan (and the same clause which nearly doubled the German reparations payment after World War I), was replaced by another clause to protect the individual bondholder against future losses. The clause in question, named “Deferred Multiple Currency Exchange Guarantee for Young Loan”, was presented by Sir George Rendel to the Tripartite Commission, which made to it some editorial changes, then the redrafted currency clause was submitted by the Tripartite Commission to the representatives of the Negotiating Committee A on “Reich debts and other public debts” of the Conference, where it was accepted subject to minor drafting changes). On February 27, 1953, the London Debts Agreement (LDA) was finally adopted by the Conference, and the new protective mechanism was included in the second paragraph of Article 2 (*e*) of Annex I A. It provided as follows:⁴⁹³

⁴⁹³ *Young Loans Case* (Belgium, France, Switzerland, United Kingdom, United States v. Federal Republic of Germany), 16 May 1980, *RIAA*, Vol. XIX, p. 78.

“Should the rates of exchange ruling any of the currencies of issue on 1st August, 1952, alter thereafter by 5 per cent or more, the instalments due after that date, while still being made in the currency of the country of issue, shall be calculated on the basis of the least depreciated currency (in relation to the rate of exchange current on 1st August, 1952) reconverted into the currency of issue at the rate of exchange current when the payment in question becomes due.”

Soon after the end of the London Debts Conference it became clear that differences in the interpretation of the protective clause existed. The discussions covered, among other things, the question whether the clause would also apply on the appreciation of a currency of issue, but no agreement was reached on a binding interpretation. In 1957, and again in 1958, the French franc devalued in each case by more than 5 per cent, and the guarantee clause was applied, the non-depreciated U.S. dollar being adopted as the “least depreciated currency”. In 1961, the Deutschmark revaluated by 5.000105 per cent of the old rate of exchange of 23.8095 U.S. cents to 1 Deutschmark, and simultaneously, the U.S. dollar devaluated by 4.761905 per cent of the old rate of exchange of 4.20 Deutschmark to 1 U.S. dollar. Again in 1969, the Deutschmark was revaluated by 12.857 per cent of the old (1952) rate of exchange for 1 U.S. dollar.

Whether the alteration in the rate of exchange between the Deutschmark and the dollar amounted to an appreciation (of the Deutschmark as against the U.S. dollar), or to a depreciation (of the U.S. dollar as against the Deutschmark), by more or less than the 5 per cent laid down in the protective clause of the LDA was subject to a divergence of views. The trustee asserted that “all the other currencies of issue of the Young Loan have depreciated and the 5 per cent minimum has been irrelevant since 1957 in the case of all issues”, while the Federal Republic of Germany said that there was no occasion for applying the guarantee clause. The BIS, as trustee, recommended recourse to the Arbitral Tribunal, which, after fruitless negotiations in 1964 and 1965, was finally instituted, according to Article 28 of the LDA, to decide upon the controversy.

During the proceedings, the Applicants, after asserting the jurisdiction of the Tribunal as regards the matter in controversy, argued that the second sub-paragraph of Article 2 (e) of Annex I A of the LDA applied not only to the depreciation but also to the appreciation of a currency of issue, since it appeared from the wording of the clause in dispute that this comprised not only the simple loss of a currency's value resulting from a devaluation imposed by a governmental act, but also from the appreciation of the other

currency, for “[a]ny appreciation of a currency automatically meant the depreciation of all other currencies in this broader sense.”⁴⁹⁴ Consequently, they asked the Tribunal to adjudge and declare that:⁴⁹⁵ (1) the revaluation of the Deutschmark in March 1961 gave rise to the application of the Exchange Guarantee (the protection clause); (2) the holders of each issue of the Young Loan, made in a non-German currency, have the right to have payments falling due on and after 1 June 1961 calculated and paid on the basis of the rate of exchange in force between the Deutschmark and that currency of issue on the due date; (3) the alteration in the exchange rates of the Deutschmark established by the revaluation of that currency in October 1969 gave rise to the application of the said Exchange Guarantee; and (4) the holders of the Young Loan, made in a non-German currency, have the right to have payments falling due on and after 1 December 1969 calculated and paid on the basis of the rate of exchange in force between the Deutschmark and that currency of issue on the due date.

The Respondent asked the Tribunal to reject these claims on the following grounds:⁴⁹⁶ (1) the Applicants do not have a legally justified interest in a decision by the Tribunal as it would not be binding on the relationship between the Respondent and private creditors; (2) at the time of the conclusion of the LDA none of the participants had thought about the possibility of an appreciation of the Deutschmark, because the disputed clause was intended only as a protection against the devaluation of the Deutschmark, but since the revaluation of the Deutschmark has not led to an alteration in the par values agreed between creditor countries and the IMF, it does not imply an increase in the sums due. Accordingly, it asked the Tribunal to adjudge and declare that:⁴⁹⁷ (1) the provision in the second sub-paragraph of Article 2 (*e*) of Annex I A of the LDA is a protective clause against depreciations of the respective (due) currency of issue; (2) it is applicable each time the (due) currency of issue depreciates by 5 per cent or more as compared to its position on 1 August 1952, or if, as a result of several depreciations of less than 5 per cent, a depreciation of 5 per cent or more is reached as compared to the position on 1 August 1952; and (3) the term “least depreciated currency” (*la devise la moins dépréciée*) cannot be understood to mean a currency that

494 *Ibid.*, p. 84.

495 *Ibid.*, p. 85.

496 *Ibid.*

497 *Ibid.*, pp. 85-86.

has appreciated as compared to the position on 1 August, 1952, but only a depreciated currency or a currency which has neither appreciated nor depreciated.

The Arbitral Tribunal in its judgment considered two questions concerning its jurisdiction.

The first was whether there was a dispute “between two or more of the Parties to the present Agreement or the Annexes thereto” within the meaning of Article 28 (2) of the LDA, insofar as there was “a fundamental distinction between the obligations agreed by the parties to the LDA and the agreement between the bondholders and the debtor, which arises when the recommended offer is accepted” and that “what remained were different obligations arising from the bearer bonds which incorporated terms originating from the LDA but which confer no cause of action upon the Applicant Governments” (as argued by the Respondent).⁴⁹⁸ As to this question the Tribunal ruled that “the Applicants’ legal interest in the proper satisfaction of the debts to the bondholders continued with full validity into the future and beyond the time when the new offer had been made and accepted. [...] The Applicants’ right to an authoritative interpretation of the clause in dispute [...] is grounded on the bedrock of the considerations which the Applicants gave and the concessions which they made in exchange for the disputed clause. They have the right to know what is the legal effect of the language used. The Tribunal in the exercise of its judicial functions is obliged to inform them.”⁴⁹⁹

The second question was whether the Tribunal’s jurisdiction was jeopardized by a clause in the General Bond giving the BIS as trustee the sole right to interpret the rules governing the servicing of the bonds. As to this question the Tribunal found that the Respondent had agreed that “the conditions for the exercise of the Tribunal’s jurisdiction had been met” in a “clear and unambiguous wording”, “explicitly acknowledged” in the Protocol of January 1965, and that “[a] decision by the Bank pursuant to its continuous right to interpret the provisions of Article VI of the General Bond does not, therefore, affect the competence of the Arbitral Tribunal in the present proceedings.”⁵⁰⁰ Accordingly, the Tribunal unanimously held that it had jurisdiction.

498 *Ibid.*, p. 87.

499 *Ibid.*, p. 89.

500 *Ibid.*, pp. 90-91.

Having asserted that it had jurisdiction, the Tribunal then dealt with the substance of the dispute and said that the outcome depended on “what is meant by the expressions ‘*Währung mit der geringsten Abwertung*’, ‘least depreciated currency’, ‘*devise la moins dépréciée*’ in the second part of the disputed clause of Article 2 (e) of Annex I A of the LDA. Does this phraseology—at least within the period from 1961 to 1969 with which we are concerned—relate only to devaluation in the strict sense, i.e. to cases where the par value of the currency concerned has been changed as a result of governmental action, or does the clause apply as soon as the currency in question is ‘depreciated’ in relation to another currency of issue owing to the revaluation of the latter?”⁵⁰¹

In its effort to define what is meant by “least depreciated currency” the Tribunal refused to rely on the “habit occasionally found in earlier international practice of referring to the basic or original text as an aid to interpretation” for being incompatible with the principle incorporated in Article 33 (1) of the Vienna Convention on the Law of Treaties (VCT), which, in respect of plurilingual treaties, states that where there is more than one authentic text, each of them has equal force. In the present case, although there was no doubt that the Agreement was drafted and discussed in English, the Tribunal could not attach any special interpretative weight to the English (basic) text of the Agreement since it would have also been incompatible with its final clause according to which the “three original texts, in the English, French and German languages respectively, all three texts [are] equally authoritative.”⁵⁰²

As the textual interpretation of the words “*Abwertung*”, “depreciation”, and “*dépréciation*” gave no clear guidance as to which of the possible meanings of all three words was intended, recourse to the “objectified” will of the parties, in turn, proved insufficient for concluding that at the time of the conclusion of the LDA the terms “depreciation” and “*dépréciation*” described the meaning of the term “*Abwertung*”; even at that time, there was some uncertainty in the use of the terms both in English and in French.⁵⁰³

501 *Ibid.*, p. 91.

502 *Ibid.*, p. 92.

503 *Ibid.*, pp. 93-94.

Since the vagueness of the terms used in the French and English texts and the possible discrepancy with the German version could not be eliminated by textual interpretation, the Tribunal decided that these words must be construed in the “context” of the disputed clause and the body of the LDA as a whole. In so doing, the Tribunal found that Article 13 of the LDA, being part of this context, played a decisive role, insofar as it governed “the conversion procedure in those cases where, under the provisions of the LDA and its Annexes, currency has to be converted” (it prescribed four different methods for calculations of amounts on the basis of a rate of exchange where this was necessary under the provisions of the LDA).⁵⁰⁴

From the structure and mandatory wording of Article 13 of the LDA, and from the fact that at the time the LDA was signed (1952) the parties concerned were members of the IMF (save Switzerland) and had agreed par values with it, the Tribunal found that it was clear that the normal or standard mode of calculation was that of Article 13 (*a*) of the LDA (paragraph (*a*) referred to the par values agreed with the IMF as a basis for conversion). The Tribunal said that this finding was confirmed by the practice: “When in 1957 and 1958, the French franc was twice devalued, the question as to whether a 5 per cent alteration in the exchange rate arose within the meaning of the clause in dispute was settled in the terms of Article 13 (*c*) of the LDA [which mentions as a yardstick, if neither paragraph (*a*) nor paragraph (*b*) applies, the middle exchange rate ruling on the date concerned in the currency of the country in which payment has to be made at the principal exchange market of the country in whose currency the debt is initially calculated], since the prerequisites for the application of paragraphs (*a*) and (*b*) did not exist. On the other hand recourse was had to Article 13 (*a*) of the LDA as the basis for conversion in all other cases where conversion was necessary.”⁵⁰⁵

In the understanding of the Tribunal, Article 13 placed the LDA and its Annexes into the Bretton Woods system, which was already in existence when the LDA was concluded, and which was based: in the beginning, on the fixed par value agreed between the IMF and each member State for almost every currency and expressed in terms of gold or U.S. dollar; later on, on fixed exchange rates anchored directly on these par values; and, presently, on a system of “floating”, continually fluctuating exchange

⁵⁰⁴ *Ibid.*, p. 95.

rates. This incorporation of the LDA and the disputed clause into the international monetary system made it necessary for the Tribunal to reject the argument put forward by the Applicants that “any revaluation of one of the currencies concerned automatically means a depreciation of all currencies not simultaneously revalued”. In view of the Tribunal:⁵⁰⁶

“True, there is no disputing that, e.g., a revaluation of the DM means that a person purchasing these has to spend more sterling or Belgian francs for the same amount in DM than he had to spend before the revaluation. However, since neither the par value of sterling as agreed with the IMF nor that of the Belgian franc is changed through the revaluation of the DM there can be no question of these currencies being depreciated—*abgewertet*, *dépréciée*—in the sense that the disputed clause uses this term. In the IMF system as outlined, the counter-value of both currencies expressed in terms of gold or the US dollar remains unchanged. Similarly unchanged is the purchasing power of these currencies on their home market and the external value of these currencies in relation to all other currencies—with the sole exception of the revalued currency. In other words, the view put by the Applicants effectively holds good only to the extent that, through the revaluation of one currency, the other currencies are traded more cheaply in the money markets in comparison to *it*, so that the holder of non-revalued funds must spend more when purchasing funds in the revalued currency. The specific money value and its relationship to gold or the dollar as guide currency are not affected. The holder of non-revalued funds can buy the same quantity of gold or the same amount in dollars—or, e.g., if the DM is revalued, also the same amount in Italian lire or in Swiss francs—after the revaluation of another currency as before. The position changes only if his own currency is devalued in the formal sense.”

With regard to the instant case, as all the States concerned (save Switzerland) had undertaken to respect the fixed par values agreed with the IMF, any conversion required when applying the disputed clause would have to be calculated in accordance with Article 13 (*a*) of the LDA, that is to say, any conversion would have to be based on the par values agreed with the IMF. As they had not changed as a result of the revaluation of the DM (apart from the DM itself), “the revaluation of the DM had not led to a depreciation (*Abwertung*, *dépréciation*) of the other currencies of issue in the sense that the disputed clause uses these terms.”⁵⁰⁷ The Tribunal, therefore, concluded that the two revaluations of the Deutschmark in 1961 and 1969 did not bring the disputed clause into action because none of the other currencies of issue had their par values readjusted at the same time as a result of the revaluation of the Deutschmark.

505 *Ibid.*, p. 96.

506 *Ibid.*, p. 97.

According to the Tribunal, the result reached was in no way contradictory to Article 8 of the LDA, which obliged the Federal Republic of Germany not to permit any discrimination or preferential treatment in the fulfilment of the terms of settlement in accordance with the Agreement “among the different categories of debts or as regards the currencies in which debts are to be paid or in any other respect”. But the article itself made an exception with regard to the preferential treatment “resulting from settlement in accordance with the provisions of the present agreement”.⁵⁰⁸

The Tribunal felt that its understanding of the disputed clause as a protective device only against “formal” devaluations was compatible with the “object and purpose” of the LDA to find a compromise between liability of the Federal Republic and its actual and foreseeable economic capacity. In this respect the Tribunal said that “[t]his clause undoubtedly constitutes an attempt by the contracting parties to find a sensible middle way between the desirable and the possible, as far as they could see it in 1952.”⁵⁰⁹

The Tribunal found additional support for its interpretation of the disputed clause in the *travaux préparatoires*. In the light of the minutes of the London Debts Conference available and in the light of the testimony of the witnesses, it became obvious to the Tribunal that at the LDC no one “had seriously reckoned with the possibility of a revaluation of the DM and had therefore mentioned this eventuality.” Nor was there mention of the possibility of a revaluation of other currency of issue. The Arbitral Tribunal concluded that “the established pre-history of the disputed clause, as derived from the *travaux préparatoires*, also supports the interpretation that it is a protection solely against the devaluation of individual currencies of issue.”⁵¹⁰

The dissenting arbiters regarded the principle of non-discrimination, embodied in Art. 8 of the LDA, as “the principle” underlying the whole settlement plan adopted at the LDC on Germany’s pre-war debts, and, for that reason, they were of opinion that it was not clear how do the interpretation of a provision of the LDA came within the exception to

507 *Ibid.*

508 *Ibid.*, p. 100.

509 *Ibid.*, p. 103.

510 *Ibid.*, pp. 108-109.

the general principle of Article 8. In the opinion of the dissenting arbiters, as the main function of the LDA was to ensure equality of treatment between all the creditors,⁵¹¹ the fall in the value of the currencies of issue in relation to the DM (as a result of the revaluation of the DM) benefited only the holders of the German tranche of the Young Loan to the prejudice of the other bondholders, especially of those residing inside the Federal Republic. Thus, the interpretation of the Respondent upon the disputed clause led to unjustified inequalities, or unreasonable results, which would only frustrate the operation of the disputed clause.

Furthermore, they read the disputed clause as a “multiple currency exchange guarantee”. According to this reading the guarantee system of the Agreement “no longer [treated] every currency of issue in its relation to gold but solely in its relation to the other currencies which it links, the one to the others, by referring exclusively to their exchange rates.”⁵¹² Thus the triggering of the new protective clause was in no way dependent on the formal devaluation (*Abwertung*) of a currency of issue, neither on the formal revaluation (*Aufwertung*), nor due to some other cause of depreciation or appreciation of a certain currency, but simply to the objective fact of an “alteration” (no matter for what reason) of the exchange rate of this currency, equal to or in excess to 5 per cent, in relation to any other currency of issue. “The search for the least depreciated currency arises only later for the calculation to be made”.⁵¹³ The dissenting arbiters based their interpretation of the disputed clause on its drafting history, on its text, on the practice following the signing of the LDA, on the importance of the “original” language in which the disputed clause was drafted and discussed, and, finally, on an interpretation of Article 13 of the LDA basically different from that of the judgement.

Summary of recourse to international arbitration. Recourse to international arbitration during this period has not been abundant. The arbitral decision on the *Young Loans Case* showed that it was not always easy to deal with questions such as appreciation or depreciation of a currency or currencies of payment, specially under a “par value” system, in which a country’s currency had to be determined in terms of gold and under which each currency had to have only one exchange rate.

511 *Ibid.*, pp. 113-114.

512 *Ibid.*, p. 118.

513 *Ibid.*, p. 128.

Significant in this case was the contention of the Applicants (Belgium, France, Switzerland, the United Kingdom and the United States) by which “any appreciation of a currency automatically meant the depreciation of all other currencies”. This was not upheld. The Arbitral Tribunal took up the view that the revaluation of the DM had not lead to a depreciation of the other currencies of issue, as there was no formal alteration in the par values agreed between concerned countries and the IMF. It held that “there can be no question of these currencies being depreciated—*abgewertet, dépréciée*—in the sense that the disputed clause uses these terms”. Determinant was Article 13 (a) of the LDA, which referred to the par values agreed with the IMF as a basis for conversion, thereby placing the LDA within the jurisdiction of the IMF. There is no doubt that the Arbitral Tribunal would have concluded otherwise in a system of “floating” currencies such as the one of today in which countries are free to determine their own exchange arrangements.

b) International Court of Justice (ICJ). The ICJ exercised its jurisdiction on the subject of the recovery of State loans only once in 1957, in the *Case of Certain Norwegian Loans*.⁵¹⁴ This case was brought to the Court under a unilateral application by the French Government, who espoused the claims of French bondholders. The dispute concerned again the question upon what monetary basis payment of the principal and interest of certain loans should be effected by the debtor State (*i.e.*, whether they should be effected on the basis of gold value or kroner banknotes).

The facts of the case were as follows:⁵¹⁵ from 1885 to 1909 the Norwegian Government and two Norwegian banks (the Mortgage Bank of the Kingdom of Norway and the Small Holding and Workers’ Housing Bank) floated several loans in foreign markets, including the French market. The French Government argued that these bonds “contain a gold clause which varies from bond to bond”, but which can be regarded as sufficient in the case of each bond so as to entail repayment or redemption at their gold value at

514 *Case of Certain Norwegian Loans*, Judgment of July 6, 1957, *ICJ Reports*, 1957, p. 9.

515 *Ibid.*, pp. 18-20. See also DREYFUS Simone, “Affaire relative a certains emprunts norvégiens”, *Précis de la jurisprudence de la Cour internationale/A Digest of the Decisions of the International Court* (éd. par K. Marek), Vol. II, 1978, pp. 480-495; MARTENS Ernst K., “Norwegian Loans Case”, *Ency. PIL* (dir. by R. Bernhardt), Vol. 2, 1981, pp. 210-211; and ORCASITAS LLORENTE Luis, “Sentencia del Tribunal Internacional de Justicia de La Haya de 6 de Julio de 1957 Sobre Ciertos Empréstitos Noruegos en el Mercado Francés”, *REDI*, Vol. X, N° 3, 1957, pp. 467-479.

the time of the redemption or repayment. The Norwegian Government contended that, the repayment was governed solely by Norwegian law and in particular by the law concerning pecuniary obligations whose payment was expressed in gold (law of December 15, 1923), according to which kroner debts expressed in gold could be discharged by payment in Norwegian banknotes on the basis of their nominal gold value, otherwise the debtor could request a postponement of payment for such period if the creditor refuses payment in banknotes, and that, the French bondholders should submit their cases to the Norwegian courts. Protracted diplomatic negotiations ensued, with the French Government extending diplomatic protection to its citizens.

As negotiations at the diplomatic level failed, France filed an Application to the ICJ on July 6, 1955, asking the Court to decide that, in view of the gold clause contained in the loans, “the borrower can only discharge the substance of his debt by the payment of the gold value of the coupons on the date of payment and of the gold value of the redeemed bonds on the date of repayment.”⁵¹⁶ In its reply the Norwegian Government raised several preliminary objections to the jurisdiction of the Court: (1) the subject of the dispute, as defined in the French Application, “is within the domain of municipal law, whereas the compulsory jurisdiction of the Court in relation to the Parties involved is restricted, by their Declarations of November 16th, 1946, and March 1st, 1949, to disputes concerning international law”, (2) the facts of the dispute are excluded from the undertaking given by France, as they have arisen before its acceptance of the compulsory jurisdiction of the Court, and, “by virtue of reciprocity, they are excluded from the undertaking given by Norway *vis-à-vis* France;”(3) proceedings cannot be instituted against Norway because the two borrower banks have a “legal personality distinct from that of the Norwegian State”; and (4) the French bondholders “have not previously exhausted the local remedies”.⁵¹⁷

On the merits, the Norwegian Government requested the Court to dismiss the claim of the French Government as unfounded. The French Government requested the Court to adjudge and declare, on jurisdiction: that its claim “constitutes a case of the recovery of contract debts within the meaning of Article I of the Second Hague Convention of October 18th, 1907; that this claim not having been settled by diplomatic means, has

⁵¹⁶ *Case of Certain Norwegian Loans*, Judgment of July 6, 1957, *ICJ Reports*, 1957, p. 13.

given rise to a legal dispute of an international character between the two States; [t]hat the two States, by their acceptance of the compulsory jurisdiction of the International Court of Justice, have recognized the competence of the Court in all legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation; [t]hat the recovery of a debt due under an international loan, claimed from the Government of the debtor State by the Government which has adopted the cause of its nationals who are holders of bond certificates, raises an issue which, within the meaning of Article 36, paragraph 2, sub-paragraphs (b) and (c), falls within the competence of the Court by virtue of the acceptance of both Parties; [t]hat the dispute may be brought before the Court without the need for the exhaustion of local remedies since it has not been shown that such remedies could be effectual.”⁵¹⁸

As to the merits, the French Government asked the Court to hold its claim well-founded, since the loans subject matter “are international loans” and that, from the nature of the bearer bonds, it followed that, in respect of all foreign holders, “the substance of the debt is the same and that payments to foreign holders of an identical certificate must be made without any discrimination;” that the loans “contain an undertaking to pay in gold value interest and amounts due on redemption of the bonds”, that undertakings as to the amount of a debt contracted “cannot be unilaterally modified by that State without negotiation with the holders, with the State which has adopted the cause of its nationals, or without arbitration as to the financial capacity of the debtor State to fulfil its obligations”, that Norway “having expressly promised and guaranteed payment in gold value of the sums due in performance of its obligations under the various loans in issue, the debtor State cannot validly discharge this obligation except by payment as they fall due in gold value.”⁵¹⁹

The French Government disputed the preliminary objections raised by Norway and requested that they be joined to the merits. Norway did not oppose and the preliminary objections were joined to the merits by the Order of September 28, 1956.

517 *Ibid.*, pp. 13-14.

518 *Ibid.*, p. 15.

519 *Ibid.*, pp. 15-16.

The Court found that its competence was challenged by the first preliminary objection upon two subsidiary grounds,⁵²⁰ both equally important: (1) the assertion, by Norway, that the dispute is within the domain of municipal law and not international law, and (2) the reliance, by Norway, on the principle of reciprocity to benefit from the reservation contained in the French Declaration accepting the compulsory jurisdiction of the Court, which reads as follows: “This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.”⁵²¹

In its judgment of July 6, 1957, the Court decided, by 12 votes to 3, that it did not have jurisdiction to adjudicate upon the dispute referred to it by the French Application. Norway, which had accepted the compulsory jurisdiction of the Court without reservation, availed herself, on the basis of reciprocity, of the French reservation, by which France excluded from the jurisdiction of the Court “differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic”. Having advanced the subsidiary argument that the subject of the dispute was exclusively within the domain of municipal and not international law, Norway succeeded in its challenge to the jurisdiction of the Court. The Court held that “Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction.”⁵²²

With regard to the submission advanced by the French Government that “between France and Norway, there exist a treaty which makes the payment of any contractual debt a question of international law” and that in this connection “the two States cannot therefore speak of domestic jurisdiction”, the Court held that the Second Hague Convention of 1907 respecting the limitation of the employment of force for the recovery of contract debts “does not fall for consideration here” as its aim is “not to introduce compulsory arbitration in the limited field to which it relates. The only obligation imposed by the Convention is that an intervening Power must not have recourse to force before it has tried arbitration. The Court can find no reason why the

520 *Ibid.*, p. 26.

521 *Ibid.*, p. 23.

522 *Ibid.*, p. 24.

fact that the two Parties are signatories of the Second Hague Convention of 1907 should deprive Norway of the right to invoke the reservation in the French Declaration.”⁵²³

The Court declined to examine upon the validity of the claim of the French Government and gave “effect to the reservation as it stands and as the Parties recognize it.” The Court thus stated that “the Norwegian Government is entitled, by virtue of the condition of reciprocity, to invoke the reservation contained in the French declaration of March 1st, 1949; that this reservation excludes from the jurisdiction of the Court the dispute which has been referred to it by the Application of the French Government; that consequently the Court is without jurisdiction to entertain the Application.”⁵²⁴

Judge Moreno Quintana, after voting for the judgment, declared that the Court was without jurisdiction in the case but only by reason of the first ground (that the dispute is within the domain of municipal law and not international law), and not of the second (the principle of reciprocity); he stated that “State loans, as being acts of sovereignty, are governed by municipal law.”⁵²⁵ Judge Basdevant was of opinion that “adjudication upon this claim is a matter that comes within the purview not of Norwegian law but of international law.”⁵²⁶

Judge Read, after expressing regrets that the Court did not deal with the merits, assumed that the dispute would certainly have been based on three elements: discrimination, extraterritoriality, and the existence of the obligation of the gold clause of the bonds. As regards discrimination and extraterritoriality, he asked whether the catastrophic worldwide economic background (he said, “a sort of universal bankruptcy”) justified Norway in enacting laws that suspended gold payments, or the payment of gold equivalents. He answered that this justification necessarily involved a correlative obligation “to give equal treatment to all creditors involved.”⁵²⁷ With regard to the question whether the dispute was within the domain of municipal or international law, he said that, at one stage of the loan transaction the “rules and the chosen law would both be national, and not international, law”, but at a later stage, the one of diplomatic

523 *Ibid.*

524 *Ibid.*, p. 27.

525 *Ibid.*, p. 28.

526 *Ibid.*, p. 78.

protection, for a dispute to be transformed in an international dispute “something more is needed than the mere adoption of a dispute under the national law to give rise to a ‘question of international law’ within the meaning of the expression as used in Article 36, paragraph 2, clause (b). There must have been a breach by Norway of an obligation under international law due to France.”⁵²⁸ As, in the present case, questions of discrimination and extraterritoriality were raised, in these circumstances “there can be no doubt that questions of international law [were] involved” and the Court was competent to deal with. He then evoked that Norway had denied the existence of a rule of international law requiring equality of treatment, and justified the payments to the Danish and Swedish bondholders on the grounds of good-will, and that these were *ex gratia* payments and as such not a proper subject for complaint by France, but the reality was, he said, that these bonds “contained a real gold clause” and that “discrimination was an important element in the controversy” during 32 years; and, given that Norway relied, as justification for its action, in the world-wide economic catastrophe for enacting its extraterritorial law of *cours forcé*, which had impaired the obligations of the bonds, such justifications necessarily involved questions of international rather than of national law.⁵²⁹

Judge Read referred next to the contentions raised by the French Government as to the effect of Norway’s extraterritorial legislation. He said that France’s first argument was that international law treats the obligations arising from the marketing of bonds abroad as being “something more than obligations arising under national law”, and that since these bonds were (1) marketed abroad, (2) expressed in several currencies, (3) payable abroad, and (4) expressed in several languages, “they cannot be repudiated without giving rise to a breach of international law.” This position was, according to France, supported by the practice of States as indicated by the arbitrations in such matters, especially in the closing years of the last century and the early years of this century, and by Article I of The Hague Convention of 1907. France’s second argument was that there was a French doctrine, which expressed a broad principle of international law, recognized by civilized nations, that prevents a State from enacting extraterritorial legislation impairing the contractual rights of non-resident aliens. Both arguments were

527 *Ibid.*, p. 84.

528 *Ibid.*, p. 87.

529 *Ibid.*, pp. 88-89.

countered by Norway, which also relied on the practice of States, and in the rule of minimum standard. In view that the French contentions and the Norwegian justifications were both based upon considerations of international law, Judge Read found “insuperable difficulty in reaching the conclusion that a case involving these issues can be treated as being solely one of national law”.⁵³⁰

Concerning the Norwegian contention that proceedings cannot be instituted against Norway because the two borrower banks have a “legal personality distinct from that of the Norwegian State”, Judge Read, holding that this contention was unacceptable, evoked that the “records show that in 1954 a bondholder brought an action against the Mortgage Bank of Norway in a French court, the Tribunal de la Seine. The Bank objected to the jurisdiction of that court on the ground that it was an instrumentality of the Norwegian Government, and for that purpose furnished the court with a certificate, signed by the Minister of Finance of Norway and dated 28th December, 1931, to that effect. It is established that the Bank, both in the matter of the litigation and in the course followed as regards gold payments, payments in Swedish crowns, and other matters in dispute, was not acting as a separate personality with a separate power of decision, but was acting on the basis of the advice, instruction and approval of the Minister of Justice of Norway and the Minister of Finance of Norway. This has been the case since the 9th December, 1925, as is proved by Annex V to the Memorial. The proceedings in the French court were concluded in March, 1956, by a default judgment owing to the unwillingness of the bank to appear and contest the proceedings on the merits.” He then stated:⁵³¹

“It thus appear that the Norwegian State completely identified itself with the Bank for the purpose of preventing the bondholder from obtaining a judicial determination of his rights. *It is a sound doctrine that a party cannot blow both hot and cold at the same time, and Norway cannot retreat from the position of complete identification taken in 1931*, and persisted in in the proceedings before the French court, from the purpose of preventing this Court from adjudicating upon the matter.”

As regards the obligation by the French bondholders to exhaust the local remedies before bringing the action to the Court, Judge Read held that it was difficult to reach the conclusion that “the bondholder could reasonably have been expected to bring

⁵³⁰ *Ibid.*, pp. 90-91.

proceedings in the Norwegian courts.” He explained that “since 9th December, 1925, he has had the notion hammered into his head by the Norwegian Government that such a course would be futile because the matter was governed by the law of 15th December, 1923. If he had brought an action and had persuaded the Norwegian court that there was a real gold clause in his bond, he would have met an insuperable barrier in the law of 1923. It would have been in vain for him to have argued that the enactment of that law was contrary to the rules of international law.”⁵³² For this, and other reasons, he found difficulty in upholding the Norwegian submission that the French bondholders should have exhausted the local remedies.

With respect to the obligation of the gold clause, Judge Read held that as it is based in the law of contract, it is governed by Norwegian national law and not by international law, despite the fact that France had adopted the claims of its nationals, which “does not change the nature of the claims” nor “transfer them from the national to the international plane.” Accordingly, this was a case in which the competence of the Court to adjudge the two purely international elements was not ousted, “by reason of the coexistence of a closely related, but severable, element which is within the exclusive national competence of Norway.”⁵³³

In his individual opinion, Judge Lauterpacht said that he was unable to accept the view that the subject-matter of the dispute concerned exclusively the national law of Norway and not international law. He said that, although the question of the interpretation of the loan contracts was primarily a question of national law, that it was not disputed that the proper law of the contract was Norwegian law, and that it was for the Norwegian courts to decide what Norway had actually promised to pay, the complaint by the French Government, however, was that the Norwegian legislation, in so far as it affects French bondholders, was the cause of the violation of international law. The view of the PCIJ in the *Serbian and Brazilian Loans* cases that an “international” contract must be subject to some national law did not mean that “national law is a matter which is wholly outside the orbit of international law. National legislation—including currency legislation—may be contrary, in its intention or effects, to the international obligations of the State. The

531 *Ibid.*, p. 96 [emphasis added].

532 *Ibid.*, p. 98.

533 *Ibid.*, pp. 99-100.

question of conformity of national legislation with international law is a matter of international law. [...] It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law. There may be little difference between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract. For these reasons it is difficult to accept the argument of Norway to the effect that as this Court can decide only on the basis of international law and that as the main substantive question in the dispute is the interpretation of Norwegian law, this is not a dispute which is covered by Article 36(2) of the Statute. The dispute now before the Court, although it is connected with the application of Norwegian law, is also a dispute involving international law. It is possible to find that if the Court had jurisdiction on the merits it would find that Norway has not violated any rule of international law by declining to repay the bonds in gold. However, in finding that, the Court would apply international law.”⁵³⁴

He found that several issues in the case raised important questions of international law, *e.g.*, the treatment by a State of property rights of aliens arising out of international loans, the equality of treatment of national and aliens, the difference between the resident aliens and aliens resident abroad, the allegation of discriminatory treatment between the bondholders, the question whether local remedies were exhausted, the allegation that The Hague Convention of 1907 imposes an obligation to arbitrate. In connection with the latter, Judge Lauterpacht noted that Article 53 of the Convention referred expressly, as suitable for arbitration, to disputes “arising from contract debts claimed from one Power by another Power as due to its nationals”. For these reasons, he was of opinion that “in principle, the present dispute is also one of international law and that it comes within the orbit of controversies enumerated in Article 36(2) of the Statute of the Court.”⁵³⁵

In explaining why France could not justify its failure to have recourse to Norwegian courts by arguing that “there was no need to exhaust local remedies” as “they could not be effectual”, Judge Lauterpacht observed that “in matters of currency and international

⁵³⁴ *Ibid.*, pp. 37-38.

loans the decisions of courts of various countries—including those of Norway—have not been characterized by such a pronounced degree of uniformity and certainty as to permit a forecast, with full assurance, of the result of an action in Norwegian courts.” Thus, an attempt ought to have been made to exhaust them. Even in the eventuality of an adverse decision by the Norwegian courts, the French Government could have always contended that Norwegian legislation was contrary to international law. By these, and other reasons, he considered the Norwegian objection (that the French bondholders should have exhausted the local remedies) well founded.

Summary of recourse to the ICJ. Not either the ICJ succeeded in attracting sovereign debt litigation.⁵³⁶ The ICJ was requested to exercise its jurisdiction only once in the *Case of Certain Norwegian Loans*, which concerned, once again, the question upon what monetary basis payment of the principal and interest of certain loans should be effected by the debtor State. The Court, having found that its competence was challenged by the first preliminary objection, decided to endorse Norway’s contention and declined to examine the validity of the French claim. Norway succeeded on relying on the principle of reciprocity to benefit from the French reservation to the compulsory jurisdiction of the Court.

However, during the procedure, a number of interesting issues were raised, including the question whether the payment of any contractual debt is a question of municipal or international law. The Court held that the Second Hague Convention of 1907 “does not fall for consideration here” as its aim is “not to introduce compulsory arbitration in the limited field to which it relates. The only obligation imposed by the Convention is that an intervening Power must not have recourse to force before it has tried arbitration. The Court cannot find reason why that the two Parties are signatories of the Second Hague Convention of 1907 should deprive Norway of the right to invoke the reservation in the French Declaration.” On this question, Judge Lauterpacht, in his individual opinion noted that Article 53 of the Convention referred expressly as suitable for arbitration to disputes “arising from contract debts claimed from one Power by another Power as due to its nationals”, he concluded that the present dispute was “one of international law”

535 *Ibid.*, p. 38.

and that it comes within the orbit of controversies enumerated in Article 36(2) of the Statute of the Court. Other important allegations raised were the discriminatory treatment between bondholders, the extraterritoriality of Norway's monetary legislation, the complete identification doctrine, the exhaustion of local remedies and the existence of the obligation of the gold clause, but, unfortunately, the Court could not decide upon these questions.

B. Recourse to municipal courts for the recovery of State external debts

Generally, in this period, creditors had not faced limitations arising from public international law doctrines such as reciprocal independence, equality and sovereignty of States, but only limitations arising from interference of the debtor countries' public laws, mainly in the form of currency regulations. It is only from this period that the courts in creditor countries allowed the bringing of actions against States without their consent. More recently, New York courts have even paved the way for a levy of execution on foreign States' assets. This evolution has taken place as a result of a change in the domestic legislation of creditor countries with the adoption of the restrictive theory of sovereign immunity.

It should be noted that, while English case law concerning international loans is abundant, most of the cases are related to private or corporate international litigation and not sovereign debt litigation, which is our subject of study. Therefore, in this section, we will only review judgments brought before the United States courts.

a) United States. Sovereign debt litigation in this creditor country is significant, specially after the 1980's. Among the many cases brought before the New York courts and Court of Appeals of the United States, several deserve special consideration because of their impact on the development of the law relating to the recovery of State external debts.

536 On the Court's incapability or unwillingness to deal in a satisfactory way with economic disputes generally, see WELLENS Karel, *Economic Conflicts and Disputes Before the World Court (1922-1995): A Functional Analysis*, 1996, 318 p.

– On April 12, 1982, in *Libra Bank Ltd. v. Banco Nacional de Costa Rica*,⁵³⁷ an appeal by Libra Bank from an order of the District Court for the Southern District of New York granting appellee’s motion to vacate a prejudgment attachment of its property on the ground that, as an instrumentality of a foreign government, it had not waived its immunity from prejudgment attachment under the Foreign Sovereign Immunities Act (FSIA), the Court of Appeals for the Second Circuit held that it had waived its immunity, and, consequently, reversed and vacated the order of the lower court.

This action arose out of a lending operation of \$40 million to Banco Nacional de Costa Rica by 16 banks. As a result of a default in the payment of the loan and on the promissory notes evidencing the loan, the plaintiffs obtained in the New York County Supreme Court an order of attachment on default and levied upon the property of the Banco Nacional held by several banks in the City of New York. The defendant appeared to remove the suit to the District Court for the Southern District of New York, and, once before it, moved to dismiss the action for lack of *in personam* jurisdiction and to vacate the order of attachment. On the essential issue whether the defendant “explicitly” waived its immunity from prejudgment attachment within the meaning of § 1610(d)(1) of the FSIA, District Judge Constance Baker Motley held that the defendant’s waiver of prejudgment attachment was not “explicit” within the meaning of the FSIA and vacated the attachment.

In the instant case it was undisputed that Banco Nacional was an instrumentality of Costa Rica and, therefore, was a “foreign State” within the meaning of the FSIA. As such its assets were generally immune from attachment. However, Section 1610(d) of the FSIA provided, by way of exception, that such property will not be immune from prejudgment attachment where there is an “explicit” waiver. Hence, the question was whether the defendant “explicitly” waived its immunity from prejudgment attachment within the meaning of the FSIA. Circuit Judge Timbers, after analysing the letters containing the agreements entered into by Banco Nacional with the plaintiffs, delivered the judgment of the Court of Appeals, and held that:⁵³⁸

⁵³⁷ *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47 (1982).

“Section 1610(d)(1) does not require recitation of the words ‘prejudgment attachment’ as an operative formula. Although the legislative history is silent on this point, the purpose of § 1610(d)(1) is to preclude inadvertent, implied, or constructive waiver in cases where the intent of the foreign state is equivocal or ambiguous. Under this interpretation of the statute, Banco Nacional’s waiver clearly was explicit.

[...]

As in all contract cases, we must ascertain the intent of the parties. Section 1610(d)(1) affects our interpretation of the operative language here only to the extent that that language might not be clear; § 1610(d)(1) does not require verbatim recitation or express enumeration of immunity from prejudgment attachment as one of the waived immunities.

In the instant case, in which the foreign state has waived all immunities in writing, there can be no doubt as to intent. We hold that the waiver is explicit within the meaning of § 1610(d)(1).”

Accordingly, the Court reversed and vacated the order of the District Court.

– On July 8, 1983, in *Allied Bank v. Banco Credito Agricola*,⁵³⁹ an action brought by Allied Bank International, on behalf of a syndicate of 39 lending banks, against three Costa Rican State-owned borrower banks to accelerate certain promissory notes and recover the balances (\$5,233,453.82) with accrued interest, District Judge Griesa, of the District Court for the Southern District of New York, denied the plaintiff’s motion for summary judgment and accepted the defense of the act of State doctrine submitted by the defendants.

The facts of this case may briefly be stated as follows: as a result of a Central Bank Resolution passed in August 1981, and an Executive Decree, by the President of Costa Rica, in November 1981, the defendants were impeded from obtaining the foreign currency necessary to meet their external debt payments until the conclusion of the renegotiation of the entire Costa Rican external debt. As a consequence, *vis-à-vis* their creditors they incurred in default and faced this suit.

During the proceedings, the defendants claimed lack of *in personam* jurisdiction, including the validity of service of process, asserted sovereign immunity, and raised the defense of act of State. District Judge, Griesa, denied the first and second points on the grounds that “defendants agreed that the debts were to be paid in New York and expressly agreed to be sued in New York”. As regards the doctrine of sovereign

538 *Ibid.*, pp. 49, 50.

immunity, he held that the execution of the promissory notes was a “commercial activity” within the meaning of the Foreign Sovereign Immunities Act (FSIA), and that the action was based upon these notes, it was thus an action covered by the statute. However, the fact that, “the payment of the notes *was prevented* by certain directives of the Central Bank of Costa Rica and of the President and Ministry of Finance of that country”, raised a different question that he found necessary to answer in light of certain requirements summarized by the Second Circuit in other decisions for justifying application of the act of State doctrine; the question was whether the governmental acts preventing payment of the notes fall within the act of State doctrine. As to this, he stated:⁵⁴⁰

“The crucial factor which has been shown to exist in the instant case is that *the conduct of the Costa Rican government which ‘prevented payment’ of the notes was public in nature, rather than commercial, and its purpose was to serve a governmental function.* The record demonstrates that the actions of the Central Bank of Costa Rica and the President and Finance Ministry of that country were undertaken in response to a serious national economic crisis, and that these actions were of the type which some governments undertake to try to assist in such a crisis—*i.e.*, restrictions upon foreign currency transactions. *There is no doubt that the actions of the Costa Rican government there were intended to serve a public, rather than a commercial, purpose. They were clearly an exercise of a governmental function.*”

Having noted that there was a distinction between the fact that “the action is based upon” a “commercial activity” for the purposes of the FSIA, and the fact that payment of the notes was prevented by certain other acts of the Costa Rican Government, Judge Griesa concluded the act of State doctrine prevented the granting of summary judgment to Allied. He said:⁵⁴¹

“A judgment in favor of Allied in this case would constitute a judicial determination that defendants must make payments contrary to the directives of their government. This puts the judicial branch of the United States at odds with policies laid down by a foreign government on an issue deemed by that government to be of central importance. Such an act by this court risks embarrassment to the relations between the executive branch of the United States and the government of Costa Rica.”

539 *Allied Bank v. Banco Credito Agricola*, 566 F.Supp. 1440 (1983).

540 *Ibid.*, p. 1443 [emphasis added].

541 *Ibid.*, p. 1444.

In the meantime, the parties began to negotiate a rescheduling of the debt. In July 1982, the suit was dismissed by agreement after the parties stipulated that no issues of fact remained with respect to the act of State doctrine. In September 1983, a refinancing agreement was signed between the syndicate of lending banks and the Costa Rican Government, but one creditor (Fidelity Union Trust Co.) refused to participate and appealed.

In April 23, 1984, on appeal,⁵⁴² the Court of Appeals for the Second Circuit affirmed the decision of the District Court and dismissed the action of appeal. With regard to the assertion by the appellant that the act of State doctrine was inapplicable to the action because the situs of the debt was New York, the Court held that the location of the debt was not determinative of the outcome of the action.

The Court recalled that the act of State doctrine precluded the examination of a foreign sovereign's confiscation of property within its own territory, but when the property or contractual obligations affected by the foreign government's action are located within the United States, the United States courts will give effect to those actions "only if they are consistent with the policy and the law of the United States." The Court found that in this case the acts of the foreign government were consistent with the law and policy of the United States and comity required that the actions should be given effect in United States courts. Circuit Judge Metzner, delivering the judgment of the Court, said:⁵⁴³

"The actions of Costa Rica that resulted in the prohibition of payments on external debt are consistent with the law and policy of the United States. In *Canada Southern Railway Co. v. Gebhard* [quoted: 109 U.S. 527, 27 L. Ed. 1020, 3 S.Ct. 363 (1883)], the Supreme Court bound New York bondholders to the Canadian government's reorganization of the debts of the government owned Canada Southern Railway. In ordering the dismissal of the bondholder's suit on the old bonds, the Court stated:

[The plan] is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows Congress "to establish ... uniform laws on the subject of bankruptcy throughout the United States." ... Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."

⁵⁴² *Allied Bank v. Banco Credito Agricola*, *ILM*, Vol. XXIII, 1984, pp. 742-747.

Not only the Court found that the acts of Costa Rica, which resulted in the prohibition of payments on external debts, were consistent with the law and policy of the United States, but these acts were also analogous to the reorganization of a business pursuant to Chapter 11 of the United States Bankruptcy Code. Circuit Judge Metzner explained that under Chapter 11, “all collection actions against a business filing an application for reorganization are automatically stayed to allow the business to prepare an acceptable plan for the reorganization of its debts.” This additional reason led the Court to state that “Costa Rica’s prohibition of payment of debt was not a repudiation of the debt but rather was merely a referral of payments while it attempted in good faith to renegotiate its obligations. That Costa Rica’s renegotiation of its debts is also consistent with our foreign policy is indicated by the support voiced for the renegotiation by both the legislative and executive branches of our government.”⁵⁴⁴

Concerning the appellant’s argument that Costa Rica’s actions should not be given effect because the Government of Costa Rica was acting as a commercial entity and not as a sovereign nation, the Court held that, although the actions of Costa Rica affected commercial activity, Costa Rica was clearly acting as a sovereign in preventing a national fiscal disaster; that the act of State doctrine remained available regardless of any commercial component of the activity involved.

The Court further found that, in this case, the actions of Costa Rica as a sovereign nation that prevented the timely payment of the debt obligations were consistent with the law and policy of the United States, and that comity considerations required that these actions should be recognized in the courts of the United States. The Court held, in consequence, that the District Court had properly dismissed the action, and affirmed.

The matter was then brought, on rehearing, before the Court of Appeals for the Second Circuit,⁵⁴⁵ because the Court considered that its earlier interpretation of the United States policy was wrong. Circuit Judge Meskill, delivering the judgment of the Court of Appeals, held that, since the situs of the debt was New York, and not Costa Rica, and that there was no taking of property by Costa Rica within its own territory, the act of

543 *Ibid.*, p. 746. [see *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527, *infra* at p. 81]

544 *Ibid.*

545 *Allied Bank v. Banco Credito Agricola*, 757 F.2d 516 (1985).

State doctrine did not apply to preclude judicial examination of Costa Rican decrees which conditioned all payments of external debt on express approval from Central Bank of Costa Rica. Accordingly, the Court of Appeals would not give effect to the Costa Rican directives, for to do so would vitiate an express provision of the contracts between the parties (in the instant case the appellees had provided that their obligation to pay would not be excused in the event of failure by the Central Bank to provide the necessary foreign exchange for payment).

In this new hearing of the case, the Executive Branch of the United States joined as *amicus curiae* to dispute the previous reasoning of the Court. Circuit Judge Meskill, delivering the judgment of the Court, mentioned parts of the Justice Department brief to the Court, in which the United States stated that it supported the “debt resolution procedure that operates through the auspices of the IMF”, and that:⁵⁴⁶

“Guided by the IMF, this long established approach encourages the cooperative adjustment of international debt problems. The entire strategy is grounded in the understanding that, while parties may agree to renegotiate conditions for payment, the underlying obligation to pay nevertheless remain valid and enforceable. *Costa Rica’s attempted unilateral restructuring of private obligations*, the United States contends, *was inconsistent with this system of international cooperation and negotiation and thus inconsistent with United States policy.*

The United States government further explains that its position on private international debt is not inconsistent with either its own willingness to restructure Costa Rica’s intergovernmental obligations or with continued United States aid to the economically distressed Central American countries. [...]”

On the basis of the United States “government’s elucidation of its position, we believe [Circuit Judge Meskill said] that our earlier interpretation of United States policy was wrong.”⁵⁴⁷

As regards the inapplicability of the act of State doctrine to the case, Circuit Judge Meskill first evoked the core concepts of the doctrine by referring to the United States judicial decisions; then, he said that the doctrine was applicable to the dispute “only if, when the decrees were promulgated, the situs of the debt was in Costa Rica. Because we conclude that the situs of the property was in the United States, the doctrine is not

⁵⁴⁶ *Ibid.*, pp. 519-520 [emphasis added].

⁵⁴⁷ *Ibid.*, p. 520.

applicable.” He explained that it depended “in large part on whether the purported taking can be said to have ‘come to complete fruition within the dominion of the [foreign] government.’ [...] In this case, Costa Rica could not wholly extinguish the Costa Rican banks’ obligation to timely pay United States dollars to Allied in New York. Thus the situs of the debt was not Costa Rica.”⁵⁴⁸

He reached the same result by applying “ordinary situs analysis”:⁵⁴⁹

“The Costa Rican banks conceded jurisdiction in New York and they agreed to pay the debt in New York City in United States dollars. Allied, the designated syndicate agent, is located in the United States, specifically in New York; some of the negotiations between the parties took place in the United States. *The United States has an interest in maintaining New York’s status as one of the foremost commercial centers in the world.* Further, New York is the international clearing center for United States dollars. In addition to other international activities, United States banks lend billions of dollars to foreign debtors each year. *The United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of the United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law.*

In contrast, while Costa Rica has a legitimate concern in overseeing the debt situation of state-owned banks and in maintaining a stable economy, its interest in the contracts at issue is essentially limited to the extent to which it can unilaterally alter the payment terms. Costa Rica’s potential jurisdiction over the debt is not sufficient to locate the debt there for the purposes of act of state doctrine analysis.”

Having concluded that the situs of the debt was in New York and not in Costa Rica, Circuit Judge Meskill then evoked the question whether the Court should give effect to the Costa Rican directives. He concluded that it should not by the following reasoning:⁵⁵⁰

“*The Costa Rican government’s unilateral attempt to repudiate private commercial obligations is inconsistent with the orderly resolution of international debt problems. It is similarly contrary to the interest of the United States, a major source of private international credit.* The government has procedures for resolving intergovernmental financial difficulties. See, e.g., Foreign Assistance Act of 1961 [...]. *With respect to private debt, support for the IMF resolution strategy is consistent with both the policy aims and best interests of the United States.*

548 *Ibid.*

549 *Ibid.*, pp. 521-522 [emphasis added].

550 *Ibid.*, p. 521 [emphasis added].

Recognition of the Costa Rican directives in this context would also be counter to principles of contract law. Appellees explicitly agreed that their obligation to pay would not be excused in the event that Central Bank failed to provide the necessary United States dollars for payment. This, of course, was the precise cause of the default. If we were to give effect to the directives, our decision would vitiate an express provision of the contracts between the parties.

The Costa Rican directives are inconsistent with the law and policy of the United States. We refuse, therefore, to hold that the directives excuse the obligations of the Costa Rican banks. The appellees' inability to pay United States dollars relates only to the potential enforceability of the judgement; it does not determine whether judgment should enter."

Consequently, the Court vacated its previous decision, reversed the District Court's denial of Allied's motion for summary judgment and its dismissal of the action, and directed the District Court to enter judgment for Allied.

— *Banque Compafina v. Banco de Guatemala, et al.*⁵⁵¹ is an action brought by Compafina, a Swiss banking corporation, to recover of six promissory notes issued by defendant Desarrollo de Pistas y Carreteras de Guatemala S.A., but guaranteed by Banco de Guatemala (the Central Bank). Owing to a default in the payment of the promissory notes by the defendants, Compafina commenced proceedings and obtained an order from the New York Supreme Court directing the Sheriff of the City to levy upon any property in which Banco de Guatemala has an interest up to the amount of \$1,140,300. Pursuant to this order, the Sheriff of the City levied on Banco de Guatemala property held in one bank in New York. Subsequently, the defendant Banco de Guatemala was directed by the New York Supreme Court to show cause but, after appearing, it removed the action to the District Court for the Southern District of New York, in which it moved to vacate the order of attachment.

On March 23, 1984, upon motions of Compafina, to confirm an *ex parte* order of attachment, and, of Banco de Guatemala, to vacate the order of attachment, District Court Judge Sweet held that funds held in United States for account of the Central Bank of Guatemala were immune from prejudgment attachment and this immunity could not be waived.

⁵⁵¹ *Banque Compafina v. Banco de Guatemala, et al.*, 583 F.Supp. 320 (1984).

In the instant case it was undisputed that Banco de Guatemala was a “foreign State” within the meaning of the FSIA and that its property was generally immune from attachment. However, Section 1611(b)(1) of the FSIA, a provision which overrides the exceptions provided for in § 1610, stipulated that such property shall be immune from attachment and from execution if the central bank’s money is “held for its own account”, unless there is an “explicit” waiver of “immunity from attachment in aid of execution, or from execution”. Thus, the main questions were (1) whether the defendant Banco de Guatemala held the attached funds “for its own accounts”, and (2) whether it “explicitly” waived its immunity from “prejudgment attachment in aid of execution, or from execution” within the meaning of the FSIA.

Circuit Judge Sweet, referring to the submissions of the parties, pointed out to the affidavit (a written statement) of the president of the Federal Reserve Bank of New York, in which it was stated that:⁵⁵²

“[...] if foreign central banks such as Banco de Guatemala become concerned that their United States assets are subject to attachment by private litigants, they might withdraw their dollar assets from this country, thereby destabilizing the dollar and the international monetary system.”

Concerning the first issue, the District Judge, after analysing the evidence which included an affidavit of the vice-president of Banco de Guatemala and the affidavit of the president of the Federal Reserve Bank of New York certifying, *inter alia*, that the “assets the Reserve Bank holds for the account of Banco de Guatemala are held solely for the account of Banco de Guatemala and are not held directly or indirectly for any other party”, concluded that Banco de Guatemala had established that the attached funds were held for its own account and, therefore, § 1611(b)(1) was applicable.⁵⁵³

As to the second issue, whether Banco de Guatemala “explicitly” waived its immunity from “prejudgment attachment in aid of execution”, District Judge Sweet, having had recourse to interpretation based upon the statutory language, concluded that the phrase “attachment *in aid of execution*” was used in the FSIA to mean “only *post* judgment attachment” and, therefore, held that Section 1611(b)(1) permitted “a foreign central

⁵⁵² *Ibid.*, p. 321 [emphasis added].

⁵⁵³ *Ibid.*, p. 322.

bank to waive immunity from postjudgment attachment but not from prejudgment attachment.”⁵⁵⁴

Having reached the conclusion that central banks are statutorily forbidden from waiving immunity from prejudgment attachment, the Court considered the case under the assumption that Section 1611(b)(1) allowed foreign central banks to waive this immunity, but found that, even under this assumption, the attachment would still be improper “since Banco de Guatemala did not explicitly waive its immunity from prejudgment attachment within the meaning of Section 1610(d)(1).”⁵⁵⁵

Accordingly, the District Court vacated the attachment for being improper under both § 1611(b)(1) and § 1610(d)(1) of the FSIA.

– On May 14, 1985, in *Crédit français international S.A. v. Sociedad Financiera de Comercio S.A.*,⁵⁵⁶ an action brought by a French banking corporation against a Venezuelan financial institution for breach of a deposit agreement and for recovery of principal balance due, Justice Greenfields, of the New York Supreme Court County, held that the plaintiff was not a proper party and had no standing to sue individually, and for that reason, its motion for summary judgments was denied.⁵⁵⁷

Owing to a default by the defendant in the payment of the loan, *Crédit français* started proceedings individually and obtained the attachment of certain sums allegedly owing to the defendant. This attachment was confirmed by decision and order of Justice Klein, who held that the plaintiff could maintain its action even in the absence of other member banks, because its individual suit had demonstrated “a likelihood of success on the merits.” Subsequently, the defendant cross-moved to dismiss the action on the grounds of *forum non conveniens*, and alternatively, for summary judgment on the ground that the Venezuelan decrees prohibiting repayment should be respected and accorded

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.*, p. 323. On the meaning of Section 1610(d)(1) of the FSIA, see *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47 (1982) [*infra*, p. 219].

⁵⁵⁶ *Crédit français international S.A. v. Sociedad Financiera de Comercio S.A.*, 490 N.Y.S.2d. 670 (Supp. 1985), 128 Misc.2d 564.

⁵⁵⁷ *Ibid.*, p. 684.

comity, and that plaintiff was not a proper party to bring a suit individually under the terms of the deposit agreement; it therefore asked to vacate the order of attachment.

In view of the fact that neither the plaintiff nor the defendant was a New York resident, and that the critical question of law involved was the interpretation and application of Venezuelan currency decrees, Justice Greenfield, on the issue of whether New York was the appropriate forum for the resolution of the dispute (or whether it should be handled elsewhere), stated:⁵⁵⁸

“New York, as the center of international trade and finance, has expressly recognized, as a service to the business community, that its courts will be hospitable to the resolution of all substantial contractual disputes in which the parties have agreed before hand that our neutrality and expertise should govern their relationships. Just as the dollar has become the international standard for monetary transactions, so may the parties agree that New York law is the standard for international disputes.”

On the assertion by the defendant of the common-law doctrine of *forum non conveniens*, which permits a court to stay or to dismiss an action on the ground that, the action, although jurisdictionally sound, would be better adjudicated elsewhere, Justice Greenfield found that the defendant gave an “irrevocable” commitment and waiver not to object to a suit against it in New York, but was doing exactly the contrary; that, despite that it should be estopped from making such a claim, he had to deal with it to determine whether the agreement unfairly imposed an undue burden on the courts of New York. He found that it did not. He explained: “It is the New York agent who has the responsibility of distributing all payments to each of the participant banks. New York is expressly declared to be governing. [...] The parties in this case having bargained for the decision by a New York court under New York law, this court is prepared to go forward on the merits.”⁵⁵⁹

With regard to the issue that the plaintiff was not a proper party to bring suit individually under the terms of the deposit agreement, evidence showed: that, the agreement was between the defendant borrower and a consortium of lending banks, and not between the borrower and 9 individual lenders; that, it was apparent that the parties contemplated that there would be collective action taken by the Agent on behalf of all

⁵⁵⁸ *Ibid.*, p. 676.

members of the consortium, or pursuant to the direction of the majority depositors, and that there was no blanket authorization for each individual depositor to proceed on its own; that, since the Venezuelan currency decrees of March 1983, which restricted the use of dollars, and called on all Venezuelan financial institutions to restructure their debt payments and suspend all payments of principal until 1986, permitted nevertheless the payment of interest, the majority of the constituent banks and depositors agreed to go along with the situation and had refrained from joining the suit in order not to drive the defendant into insolvency and not to endanger their chances for ultimate repayment in full. Justice Greenfields thus stated: “The nine members of the consortium, like the famous Three Musketeers, must stand ‘all for one, and one for all’.”⁵⁶⁰

Accordingly, since the plaintiff lacked standing to sue, the Court could not deal with the merits, for instance, if timely performance of the obligation to pay could be excused by “impossibility of performance” by reason of governmental intervention, nor with the questions of comity and the effect of the Venezuelan currency decrees.

— On June 20, 1984, in *Braka v. Bancomer*,⁵⁶¹ an action brought by some United States investors against a Mexican commercial bank (nationalized by the Republic of Mexico in 1982) for breach of contract and violation of securities laws, Judge Sofaer, of the District Court for the Southern District of New York, held: (1) that the FSIA did not render the Mexican bank immune from a suit; (2) but the act of State doctrine did bar judicial review of plaintiffs’ claims; and (3) that the Hickenlooper Amendment did not apply to prevent application of the act of State doctrine to bar the suit.

The facts of this case may briefly be stated as follows: as a result of a governmental decree passed on August 13, 1982, by the President of Mexico, prohibiting the use of dollars as legal tender, the defendant was impeded from complying with its contractual obligation to repay peso- and dollar-denominated certificates of deposit and any interest due in United States dollars. Some days later, in September 1, 1982, President Lopez Portillo signed two decrees, one nationalizing Mexico’s private banks, including Bancomer, and the other establishing a general system of exchange controls. As a

559 *Ibid.*, p. 679.

560 *Ibid.*, p. 684.

561 *Braka v. Bancomer*, 589 F.Supp. 1465 (1984).

consequence, the plaintiffs claimed, *inter alia*, to have suffered damages of \$994,800, representing the difference between the sums they received and what they would have received had their certificates of deposit been redeemed in dollars or exchanged at a free market rate.

During the proceedings, Bancomer moved to dismiss these claims by advancing three primary defenses: 1) it argued lack of jurisdiction under the FSIA; 2) if jurisdiction was proper, it argued the defense of the act of State doctrine; and 3) it contended that the certificate of deposits were not “securities” within the meaning of the securities laws.

As regards the doctrine of sovereign immunity, District Judge Sofaer recalled that, before attempting to characterize an act or activity as governmental or commercial, the first step in evaluating a claim under the FSIA was to define with precision the activity, and the act in connection with that activity, that gave rise to plaintiff’s claim. He found that the act that gave rise to plaintiff’s claim was Bancomer’s breach of its contractual obligation to repay the deposits and any interests due in dollars. Further, he recognized that in cases of State-owned commercial enterprises, the line between governmental acts and nongovernmental acts in connection with a commercial activity in compliance with governmental decrees was difficult to draw. He, however, held that Bancomer’s act in paying pesos instead of dollars was not “peculiarly within the realm of government”; he said, its breach was no more a sovereign act than that of any other debtor, private or public, that had contracted to repay an obligation in dollars rather than pesos. He stated correspondingly that, the fact “that [Bancomer] was prevented from complying with its contract by a governmental decree flatly prohibiting the use of dollars as legal tender does not make it immune from a suit as an agent of the Republic of Mexico.”⁵⁶²

With regard to the defense of act of State doctrine, District Judge Sofaer recalled that the fact that the defendant was not immune under the FSIA did not mean that a United States court should proceed to adjudicate plaintiff’s claim, for these are two different things: “While the effect of sovereign immunity is to shield the person of the foreign sovereign and, by extension, his agents from jurisdiction, the act of state doctrine

562 *Ibid.*, p. 1470.

shields the foreign sovereign's internal laws from intrusive scrutiny."⁵⁶³ He found that the certificate of deposits named Mexico City as the situs of the deposit. Interest and principal, while sometimes remitted at plaintiff's instructions via interbank transfer, were nonetheless paid in Mexico City. Moreover, Bancomer did not surrender its depositors' funds to a third party but rather complied with a law mandating that the bank's debts "shall be discharged" by payment of pesos at the official rate. When plaintiffs presented their certificates in exchange for pesos, the debt was extinguished for the purposes of Mexican law. As the situs of the obligation is Mexico, the act of State doctrine prevented a challenge to the resolution of the parties' rights.⁵⁶⁴ On the plaintiffs' contention that Mexico's act was a repudiation of a commercial debt and that for that reason did not qualify as an act of State, Judge Sofaer held:⁵⁶⁵

"[...] Mexico's act in this instance cannot be construed as a simple repudiation of a government entity's commercial debt. While the ultimate result may seem similar—i.e. *Mexico has enriched itself at plaintiffs' expense*—the mechanisms used by Mexico are conventional devices of civilized nations faced with severe monetary crises, rather than the crude and total confiscation by force of a private person's assets. [...] Like Costa Rica's limits on foreign exchange, Mexico's exchange controls were promulgated by formal executive and legislative decrees [...] in the exercise of the recognized governmental function of setting monetary policy. Mexico acted in response to a fiscal crisis and its mandate touched all foreign currency obligations, private as well as public."

On the plaintiffs' contention based on the Hickenlooper Amendment, which provided that "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination of the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state ... based upon (or traced through) a confiscation or other taking ... by an act of that state in violation of the principles of international law...", Judge Sofaer cited former Chief Judge Fuld, of the New York State Court of Appeals, refuting a similar claim that the Hickenlooper Amendment applied to losses incurred as a result of a State's act in regulating the currency. Chief Judge Fuld said:⁵⁶⁶

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*, p. 1471.

⁵⁶⁵ *Ibid.*, p. 1472 [emphasis added].

⁵⁶⁶ *Ibid.*, pp. 1472-1473. *Per* Chief Judge Fuld in *French v. Banco Nacional de Cuba* [cited: 23 N.Y.2d. 46, 55-56, 295 N.Y.S.2d. 433, 442-43, 242 N.E.2d. 704 (1968)] [emphasis added].

“A currency regulation which alters either the value or character of the money to be paid in satisfaction of contracts is not a ‘confiscation’ or ‘taking.’ ... A legislator who reduces rates of interest or renders agreements invalid or incapable of being performed or prohibits exports, or renders performance more expensive by the imposition of taxes or tariffs does not take property. Nor does he take property if he depreciates currency or prohibits payment in foreign currency or abrogates gold clauses. *Expectations relating to the continuing intrinsic value of all currency or contractual terms such as the gold clause are, like favorable business conditions and good will, ‘transient circumstances, subject to changes’, and suffer from ‘congenital infirmity’ that they may be changed by the competent legislator. They are not property, their change is not deprivation.*”

Judge Sofaer accepted the defendant’s contention that “the legality of such foreign exchange controls is widely accepted by authorities on international law. The Restatement Second of Foreign Relations Law of the United States, § 198 (1965), approves such measures when ‘reasonably necessary’ to preserve a nation’s exchange resources, and Comment (b) states that ‘the application to an alien of a requirement that foreign funds held within the territory of the state be surrendered against payment in local currency at the official rate of exchange is not wrongful under international law, even though the local currency is less valuable on the free market than the foreign funds surrendered’.” Since the United States and Mexico were signatories of the IMF Articles of Agreement, the defendant also relied on its Article VIII, 2 (b), which stipulates that “[e]xchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member”, and on a written statement of the Director of the Legal Department of the IMF declaring that Mexico’s currency control measures “do not violate and are not inconsistent with the Articles of Agreement” of the IMF, to argue that plaintiffs’ contract for repayment in dollars was unenforceable in the United States courts. As this was supported by recent judicial decisions by the United States courts, Judge Sofaer stated:⁵⁶⁷

“Although act of state principles do not depend on a finding of legality under domestic law and in fact forestall consideration of the merits, *defendant arguments lend support to the conclusion that plaintiffs accepted the risks attending their foreign investments.*”

⁵⁶⁷ *Ibid.*, p. 1473 [emphasis added].

Concerning the contention raised by plaintiffs that the certificate of deposits were not “securities” within the meaning of the securities laws, and the question whether the defendant’s contacts within the United States were sufficient to allow *in personam* jurisdiction under the FSIA, Judge Sofaer held that there was no need to determine these questions since the plaintiffs’ claims were not justiciable “as drawing into question a foreign sovereign’s act of state within its own territory”.⁵⁶⁸

On May 20, 1985, on appeal,⁵⁶⁹ the Court of Appeals for the Second Circuit affirmed the decision of District Judge Sofaer and dismissed the action of appeal.

In reviewing the District Court’s conclusion, the Court of Appeals recalled that the test adopted in *Allied Bank v. Banco Credito Agricola* was whether the purported taking was “able to come to complete fruition within the dominion of the [Mexican] government”.⁵⁷⁰ In this regard, the Court found that the property at issue was Bancomer’s obligation to pay the “contractually mandated return on plaintiffs’ investment.” But since the certificates of deposit named Mexico City as the place of deposit and of payment of interest and principal, Circuit Judge Meskill, delivering the opinion of the Court, held that the situs of the defendant’s obligation was Mexico. In explaining his reasoning he said: “The fact that plaintiffs’ deposits were occasionally accepted and transmitted to Mexico by Bancomer’s New York agency does not alter the situs of Bancomer obligation.” The certificates were located in Mexico and were therefore subject to the effects of the exchange control regulations. For these reasons, he added: “To intervene to contradict the result of the exchange controls would be an impermissible intrusion into the governmental activities of a foreign sovereign.”⁵⁷¹

With regard to the assertion by the appellants that even if their claim is barred by the act of State doctrine, a commercial activity exception will permit them to prevail, the Court held that even if it is decided that the act of State doctrine is not applicable to commercial transactions of foreign governments, the result would be the same: in this case the activity that implicated act of State was the issuance by the Mexican

568 *Ibid.*, p. 1474.

569 *Braka v. Bancomer*, S.N.C., 762 F.2d 222 (1985).

570 *Ibid.*, p. 224.

571 *Ibid.*, p. 225.

Government of exchange controls which prevented Bancomer from performing its contractual obligations. This action, taken by the Mexican Government for the purpose of saving its national economy from the brink of monetary disaster, surely represented the “exercise of powers peculiar to sovereigns”. Those sovereign powers, unlike acts that could be taken by a private citizen, trigger no commercial exception.⁵⁷²

The Court having found that Bancomer already paid all that it may under Mexican law, it further added that if it was to issue an order in the way the plaintiffs seek, it would find itself “directing a State-owned [foreign] entity to violate its own national law with respect to an obligation wholly controlled by Mexican law. This would clearly be an impermissible ‘inquiry into the legality, validity, and propriety of the acts and motivation of foreign sovereigns acting in their governmental roles within their own boundaries’.”⁵⁷³

Accordingly, the Court affirmed the judgment of the District Court.

— On July 8, 1985, in *Callejo v. Bancomer, S.A.*,⁵⁷⁴ an action on appeal brought by some United States investors against a Mexican commercial bank (nationalized by the Republic of Mexico in 1982) for breach of contract, Circuit Judge Goldberg, of the Court of Appeals for the Fifth Circuit, affirming the judgment of the District Court, held that: (1) the action arose as a result of a “commercial activity” within the meaning of the commercial activity exception under the FSIA; (2) Bancomer was not entitled to sovereign immunity (contrary to the lower court’s decision which found that Bancomer was immune under the FSIA); and (3) the act of State doctrine did bar judicial review of the plaintiffs’ action because under this doctrine the Court is barred from inquiring into the validity of acts of foreign States performed in their own territory—including the validity of Mexico’s exchange control regulations.

The facts of this case were the same as in *Braka v. Bancomer*: as a result of a governmental decree passed on August 13, 1982, by the President of Mexico, prohibiting the use of dollars as legal tender, the defendant was unable to comply with

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.*

⁵⁷⁴ *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (1985).

its contractual obligation to repay peso- and dollar-denominated certificates of deposit and any interest due in United States dollars. Some days later, in September 1, 1982, President Lopez Portillo signed two decrees, one nationalizing Mexico's private banks, including Bancomer, and the other establishing a general system of exchange controls.

As a consequence, the plaintiffs filed this suit claiming breach of contract and securities act violations, and sought either the rescission of the sale of the certificates of deposit or money damages. In response, Bancomer filed a motion to dismiss the suit, to which the District Court granted on February 27, 1984, on the grounds that the plaintiffs' suit was not based on Bancomer's commercial activities, and that Bancomer, as an instrumentality of the Mexican Government, was instead entitled to sovereign immunity. Then the plaintiffs brought this appeal.

Upon the question of sovereign immunity, the Court, affirming the result but reversing the grounds of the District Court's opinion, held instead that the plaintiffs' suit was based on Bancomer's commercial activities, and that therefore Bancomer, as an instrumentality of the Mexican Government, was not entitled to sovereign immunity. In reaching this conclusion the Court applied the following test: "In determining whether Section 1605(a)(2) applies, two questions are relevant: (1) Is the Callejos' suit 'based upon a commercial activity' by Bancomer? (2) If so, did this commercial activity have the required jurisdictional nexus with the United States?"⁵⁷⁵

In applying the test, the District Court assumed that the action was "based upon" a sovereign act: the promulgation by Mexico of exchange control regulations; and not upon Bancomer's banking activities. But the Court of Appeals disagreed. In its view, the Callejos' action arose as a result of a commercial banking activity by Bancomer, which had a direct effect in the United States—thus satisfying the jurisdictional requirement of § 1605(a)(2). For this reason, the Court of Appeals held that Bancomer was not entitled to sovereign immunity under the FSIA,⁵⁷⁶ and that the District Court erred in dismissing the suit on the ground that the suit was based on sovereign, and not commercial, activity.

⁵⁷⁵ *Ibid.*, p. 1107.

To explain the jurisdictional requirement of “nexus” contained in § 1605(a)(2) of the FSIA (which grants an exception from sovereign immunity for suits based upon a commercial activity by an instrumentality of a foreign State, but only if the commercial activity had a sufficient connexion with the United States), the Court, upon the question whether the breach of the certificates of deposit had direct effects in the United States, assumed that this question could be resolved without reference to the place of payment. The Court said: “Since the Callejos were located within the United States, the effects of Bancomer’s breach were inevitably felt by them there. Moreover, these effects in the United States were foreseeable.”⁵⁷⁷ As Bancomer had engaged in a longstanding business relationship with the plaintiffs in the United States, the Court did not perceive any material difference whether the legal place of payment was Mexico or the United States. The Court further held that policy considerations underlying the FSIA supported its conclusions that the place of payment was not decisive:⁵⁷⁸

“[...] Where either the foreign state’s interest in independence is great or the United States’ interest in asserting jurisdiction is weak, the FSIA grants sovereign immunity in order to serve our larger interest in preserving international amity.

In weighing these competing interests, arcane doctrines regarding the place of payment are largely irrelevant. In the even more complex world of international banking, these doctrines doubtless serve a useful function. However, in ordering relations between sovereign states, a larger perspective is appropriate.”

For these reasons, the Court said that “it failed to perceive why jurisdiction should not be exercised.”⁵⁷⁹

In considering the doctrine of act of State, the Court cautioned, “we traverse much of the same path that we did in the sovereign immunity context—again, our focus is on preventing friction with coequal sovereigns. However, if the [FSIA] is a tangled web of statutory ambiguities, the act of state doctrine is an airy castle.”⁵⁸⁰ In the present case, Bancomer claimed that Mexico’s promulgation of exchange control regulations constituted an act of State, and that consideration of the Callejos’ claim would require

576 *Ibid.*

577 *Ibid.*, p. 1112.

578 *Ibid.*

579 *Ibid.*

the Court to inquiry into the validity of these regulations; whereas the Callejos argued that: (1) Mexico's promulgation of the exchange control regulations was a commercial activity; (2) the "treaty exception" to the act of State doctrine applies, since the exchange control regulations violate Mexico's obligations under the Article of Agreement of the IMF; and (3) the situs of the certificates of deposit was Texas, and therefore were not governed by the Mexican decrees.⁵⁸¹

The Court, referring to *Braka v. Bancomer*, held that "to disregard the exchange regulations by enforcing the Callejos' certificates of deposit, we would render nugatory the attempts by Mexico to protect its foreign exchange reserves. While we are doubtful of our ability to foresee what will vex the peace of nations, we have no doubt that disregarding the Mexican regulations would be very vexing indeed. We therefore reject the Callejos' commercial activity argument."⁵⁸² Upon the "treaty exception" contention that the act of State doctrine applies because the exchange control regulations violated Mexico's obligations under the Articles of Agreement of the IMF, the Court held, in view of the evidence submitted by Bancomer (as in *Braka v. Bancomer*, a written statement of the Director of the Legal Department of the IMF declaring that Mexico's currency control measures "do not violate and are not inconsistent with the Articles of Agreement" of the IMF), that the Fund's interpretation was highly persuasive authority on the meaning of the IMF Agreement. It therefore rejected the Callejos' treaty exception argument in that it rendered the act of State inapplicable.⁵⁸³ Upon the Callejos' contention that the situs of the certificates of deposit was Texas rather than Mexico, the Court held that the incidents of the certificates of deposit clearly placed them in Mexico: they were issued by Bancomer's Nuevo Laredo branch, where the Callejos' deposits were carried, and called for payment in Mexico. This grouping of contacts placed the debt in Mexico and called for the application of Mexican law. That the Callejos regularly received their payments in Texas did not mean that the situs was modified by the course of conduct of the parties, since these were only interbank remittances and not payments.⁵⁸⁴

580 *Ibid.*, p. 1113.

581 *Ibid.*, p. 1114.

582 *Ibid.*, p. 1116.

583 *Ibid.*, p. 1121.

Consequently, the Court of Appeals applied the act of State doctrine and affirmed the dismissal of the suit.

– On January 6, 1987, in *West v. Multibanco Comermex, S.A.*,⁵⁸⁵ an action on appeal brought by several United States investors against three Mexican banks (nationalized by the Republic of Mexico in 1982) for damages resulting from breach of contract, Circuit Judge Reinhardt, of the Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court, held that: (1) the federal courts could have jurisdiction over an action consistent with the FSIA; (2) the certificates of deposit were not “securities” within the meaning of the federal securities law; and (3) the institution of exchange controls by Mexico was not a taking of property in violation of international law.⁵⁸⁶

The facts of this consolidated case arose out of the same context as in *Braka v. Bancomer* and *Callejo v. Bancomer, S.A.*: as a result of a governmental decree passed on August 13, 1982, by the President of Mexico, prohibiting the use of dollars as legal tender, the defendant was impeded from complying with its contractual obligation to repay peso- and dollar-denominated certificates of deposit and any interest due in United States dollars. Some days later, on September 1, 1982, President Lopez Portillo signed two decrees, one nationalizing Mexico’s private banks, including the defendants, and the other establishing a general system of exchange controls.

As a consequence, the plaintiffs filed their suits claiming that there was a violation of the federal securities laws, and a taking of property by a foreign State in violation of international law, and sought to recover losses. In response, the defendant banks filed a motion to dismiss the actions, which the District Court granted on the grounds that the certificates of deposit issued by the Mexican banks were not “securities”, and that the takings claim was barred under the act of State doctrine. The plaintiffs then brought this appeal.

584 *Ibid.*, p. 1124.

585 *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987).

586 *Ibid.*

The Court of Appeals, after recalling that the defendants were, under the FSIA, “instrumentalities” of the Mexican Government, considered first the question whether or not they were entitled to sovereign immunity.

The Court, tracing the development of the doctrine of sovereign immunity, said that there are two basic theories of sovereign immunity, absolute and restrictive, and that “the latter approach has gained the favor of most nations internationally and has been the policy of the United States since 1952”, where the Department of State changed its position on the granting of sovereign immunity to foreign governments. This new policy was announced in a letter from the Department’s Acting Legal Advisor, Jack Tate, to the Acting Attorney General, Philip Perlman, dated May 19, 1952. The “Tate letter” adopted the “restrictive theory”—as opposed to the “absolute theory” in which a tangential involvement of a foreign sovereign was sufficient to prevent United States courts from exercising jurisdiction—in which the immunity of the sovereign is recognized only with regard to sovereign or public acts (*jure imperii*) of the State but not with respect to private acts (*jure gestionis*). Prior to this, the “absolute theory” prevailed and was found in the opinion of Chief Justice Marshall, in *The Schooner Exchange v. McFaddon*, who ruled that as a consequence of the “perfect equality and absolute independence of sovereigns,” foreign nations were immune from the exercise of jurisdiction by the United States courts. From 1952, the State Department made case-by-case decisions as to whether immunity was appropriate, until the enactment of the FSIA, in 1976, in which Congress replaced this method by codifying, as a matter of federal law, the restrictive theory. Under the FSIA, the actions taken by foreign States or their instrumentalities are sovereign acts unless one of the enumerated exceptions to the FSIA applies [cited: 28 U.S.C. § 1605(a)(1-5) & (b)]. Further, when an exception to immunity was found, the State or instrumentality was liable to the same extent as a private person, except that punitive damages were not available against the State.⁵⁸⁷

In the present case, the plaintiffs argued that the “commercial” exception to immunity was found. The Court, in determining whether or not the banks’ activities were “commercial”, noted the fact that the banks solicited, marketed, and generally encouraged U.S. investors to deposit monies in their banks and promised extraordinary

⁵⁸⁷ *Ibid.*, p. 824.

rates of return, and further it adopted the reasoning of the Fifth Circuit in *Callejo v. Bancomer, S.A.* The Court said: “Here, as in *Callejo*, the defendants engaged in a regular course of commercial conduct in the United States and it was certainly foreseeable at the time of the solicitations that their commercial activities would subject them to suit.”⁵⁸⁸ The Court concluded that the banks’ selling and redeeming of the certificates of deposit came within the commercial activity exception of the FSIA and that the Court had jurisdiction.

As regards West’s securities claim based upon the alleged material breach of his contract with the banks, the Court made clear that “the fact that the defendants were implementing exchange controls goes to whether that breach should be excused and not to whether this Court has jurisdiction.” Consequently, it found that the defendant banks were not entitled to immunity from suit under the securities claim.⁵⁸⁹

Upon West’s claim that the certificates of deposit he purchased should be considered to be “securities” under the federal regulatory scheme governing securities, and that because of the fact that the defendant banks did not comply with these securities laws, they were liable for the losses occasioned by the devaluation of the Mexican pesos and the losses associated with the conversion of the dollar accounts to pesos, the Court, after recalling that in *Marine Bank v. Weaver* [cited: 455 U.S. 551, 102 S.Ct. 1220, 71 L.Ed.2d 409 (1982)] it was held that by reason that the holders of certificates of deposit were “abundantly protected” against the risk that a bank would become insolvent, those financial instruments were held not to be “securities”, held that the Mexican Government’s regulation provided certificate holders the same degree of protection against insolvency as does the United States federal system (as held in *Wolf v. Banco Nacional de Mexico, S.A. (Banamex)* [cited: 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 778 (1985)]). But since West also challenged that the scheme of regulation, *as applied* by the system of Mexican regulation governing the operation of its banks, did not satisfy the “insolvency protection” test, the Court held that the scope of its “inquiry into the actions of foreign governments” was limited by the act of State doctrine, which prevented it from scrutinizing the alleged non-feasance or

588 *Ibid.*, p. 825.

589 *Ibid.*, p. 826.

misfeasance of the Mexican officials charged with enforcing their country's banking laws. The Court explained:⁵⁹⁰

“Although ‘the trial court must hear evidence on the degree of protection that structure offers a depositor against insolvency,’ 739 F.2d at 1463, it may not examine the actual operation of the regulatory system to the extent that such inquiry would directly implicate the failure (whether willful or negligent) of officers of the foreign state to enforce their own laws, at least in the absence of consent of the foreign government. As a matter of comity, we presume that Mexican officials are acting in a manner consistent with the requirements of Mexican law.

Here the only question as to the adequacy of the Mexican regulatory structure is the compliance of Mexican officials with the requirements of Mexican law. Because our inquiry into the foreign officials' actions is barred by the act of state doctrine, our holding in *Wolf* that the certificates of deposit are not ‘securities’ is applicable. Since the certificates were not subject to the requirements of the U.S. securities law, the plaintiffs cannot prevail on their securities law claim.”

Upon West's claim that the “conversion” of his dollar-denominated certificate of deposit to pesos at a rate specified by the Mexican Government (less than the market rate of exchange) was a “taking of property” that violated international law, the Court found that, as this was an “expropriation claim” it called for the application of the so-called Second Hickenlooper Amendment [cited: 22 U.S.C. § 2370(e)(2) (1982)]. Under this amendment, the United States courts are barred from invoking the act of State doctrine in cases involving the acts of foreign governments or foreign officials regarding “a claim of title or other rights of property [...] based upon (or traced through) a confiscation or other taking”.⁵⁹¹ As the defendants contended that the amendment was not applicable because it referred only to “tangible property” and not to rights arising out of ownership of certificates of deposit or contractual, the Court ruled first that the Hickenlooper Amendment was broad in scope and that it afforded protection to tangible or intangible property interests, that this was a distinction not recognized in international, federal, or State law, that “although the certificates of deposit may be characterized as intangible property or contracts, they are ‘property interests’ that are protected under international law from expropriation”, hence, they are “rights to property” capable of being expropriated by foreign States under international law within the meaning of the amendment.⁵⁹²

590 *Ibid.*, pp. 826-829.

591 *Ibid.*, p. 829.

592 *Ibid.*, p. 830.

Having found that the Hickenlooper Amendment was applicable, the Court then proceeded to determine whether or not the taking of property violated international law within the meaning of the amendment, *i.e.*, whether “an action by a government is a legitimate exercise of the police power in the regulation of its internal affairs”. The Court held that the validity of currency regulations such as exchange controls that alter either the value or character of the money to be paid in satisfaction of contracts were not “confiscation” or “takings” under international law and that “[a]ctions such as those taken by the Mexican government generally do not constitute takings under international law.”⁵⁹³ It also held that, since these actions fall within the rule enunciated by the Restatement (Second) of Foreign Relations Law of the United States § 198 (1965), it could not conclude that “the program of exchange controls instituted by Mexico was unlawful.” Thus, “Mexico’s institution of exchange controls was an exercise of its basic authority to regulate its economic affairs.”⁵⁹⁴

Having concluded that there was simply “no taking”, it held, accordingly, that “no question as to the adequacy of compensation arises.”

Finally, as regards “expropriation claims”, the Court felt, however, necessary to warn against future similar actions. It held that:⁵⁹⁵

“Even if there had been a taking of plaintiffs’ property, we would be reluctant to adopt the effective result of their position here: a judicially established guarantee of the full repayment of investments abroad in certificates of deposits notwithstanding the actions of foreign governments attempting to control their own economies. *The courts of this country should not operate as an international deposit insurance company, hauling foreign sovereigns before us whenever disgruntled investors so desire. West and his fellow plaintiffs chose to purchase both dollar and peso certificates of deposit because of the extraordinary rates of return. The actions of the government of Mexico and the losses they occasioned were within the purview of the risks associated with those potentially extraordinary returns. The judgment of the District Court is AFFIRMED.*”

— On August 20, 1987, in *A.I. Credit Corp. v. Government of Jamaica*,⁵⁹⁶ an action brought by a bank before the District Court for the Southern District of New York

⁵⁹³ *Ibid.*, p. 831.

⁵⁹⁴ *Ibid.*, p. 832.

against the Government of Jamaica, for the collection of a debt, District Judge Sand held that the bank was entitled to bring a collection action for the enforcement of the foreign government's contractual obligations without the participation of the other lenders that were parties to a rescheduling agreement which stipulated that each bank had the right to sue the foreign government independently without joinder of the other creditors.

The facts of this case were as follows: as a result of a depressed national economy, the Government of Jamaica ceased paying principal on its foreign bank debt in mid-1983. Following three rescheduling agreements of the debt in 1978, 1979, and 1981, Jamaica entered into a fourth debt rescheduling in 1984. This agreement encompassed old as well as new incurred debts, and affected debts owed to a total of 113 banks and institutions ("banks"). In 1984, in accordance with the 1984 rescheduling agreement, a bank assigned 90 percent of its rescheduled debt, as well as all rights and obligations, to A.I. Credit Corporation, the plaintiff in this suit. As it became apparent that Jamaica would default again on the payment of principal under the 1984 agreement, a fifth rescheduling took place in 1985, and another one in 1987. All the banks which were party to 1984 agreement entered into the 1985 and 1987 agreements except the plaintiff and two other banks in 1985, and one other bank in 1987.

A.I. Credit Corporation alleged that Jamaica defaulted on six rescheduling agreements and asked the District Court to grant it summary judgment.

District Judge Sand noted at the outset that no other bank attempted to enforce the 1984 agreement nor to intervene in the litigation, despite their mutual interest in the outcome of the lawsuit and in any payment that plaintiff would receive from Jamaica (according to the agreements the bank had to share its payment *pro rata*, and Jamaica was obliged to make ratable payments to all banks in the event that it made any payment).

Upon the contention by Jamaica that the plaintiff had no standing to sue without the participation of the other lenders, the District Judge held, after examining the 1984 and subsequent agreements, that each bank had the right to bring a collection action without

595 *Ibid.*, p. 833 [emphasis added].

596 *A.I. Credit Corp. v. Government of Jamaica*, 666 F.Supp. 629 (S.D.N.Y. 1987).

the joinder of the other creditors, on what are in this respect divisible debts.⁵⁹⁷ Judge Sand also found that under the 1984 agreement the powers of the agent to sue were clearly limited and that the individual banks had the right to sue individually. Moreover, he found that according to judicial practice the courts had always held that “suits to enforce negotiable instruments are suitable cases for summary judgment”, and that there was no dispute that Jamaica failed to meet its scheduled principal payments. Therefore, it held that summary judgment was appropriate to this case, and that the plaintiff was entitled to its unpaid instalments, interest, costs, and expenses.⁵⁹⁸

Finally, on the advice by Jamaica that the Court’s holding could have a devastating financial impact on the Government of Jamaica due to the sharing and default provisions contained in the 1984 and 1987 agreements, District Judge Snd stated:⁵⁹⁹

“[...] it is not the function of a federal district court in an action such as this to evaluate the consequences to the debtor of its inability to pay nor the foreign policy or other repercussions of Jamaica’s default. Such considerations are properly the concern of other governmental institutions. [...]”

– On December 22, 1989, in *National Union Fire Insurance v. People’s Republic of the Congo*,⁶⁰⁰ an action of recognition and enforcement of a default judgment pursuant to the FSIA and the New York Uniform Foreign Country Money-Judgments Recognition Act, Judge Kimba M. Wood, of the District Court for the Southern District of New York, held that: (1) the insurer properly followed the English procedure in serving notice of its application for default; (2) the insurer did not work constructive fraud; and (3) public policy did not preclude the recognition of a default judgment.

The facts of this case were as follows: in March 1984, the Congo issued a promissory note to Meridien International Bank in the amount of \$26,425,000 pursuant to the terms of a Credit Facilitation Agreement. On the same date, the National Union Fire Insurance became the insurer of the Congo’s obligations under the note by a written insurance policy made effective and taken out by Bankers Trust Company, which was assigned the

⁵⁹⁷ *Ibid.*, p. 631.

⁵⁹⁸ *Ibid.*, p. 633.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *National Union Fire Insurance v. People’s Rep. of the Congo*, 729 F.Supp. 936 (S.D.N.Y. 1989).

note. Since 1986, however, the Congo defaulted on several payments due and pursuant to the terms of its insurance policy, the insurer made the payments, with interest, to Bankers Trust. In July 1987, Bankers Trust and Meridien International Bank transferred and assigned their rights under the Agreement to the insurer, who brought suit against the Congo in the High Court of Justice, Chancery Division, in London.

On October 23, 1987, the insurer obtained in London a default judgment in the amount of \$22,457,273.62 against the Congo, as a consequence of its failure to repay the loan and subsequent failure to appear in the action against it. In the present action, the insurer sought the recognition and enforcement of the default judgment. Both sides moved for summary judgment.

The District Court, having found that the Congo waived its sovereign immunity under the Agreement, examined the Congo's three bases for its opposition to recognition of the default judgment: (1) the insurer did not properly follow English procedure in serving the notice of its application for a default judgment; (2) the insurer worked out a "constructive fraud" upon the Congo in failing to adequately appraise the High Court of Justice of the Congo's desire for a postponement of the hearing; and (3) that recognition of the English judgement awarding damages resulting from the Congo's failure to repay a loan would be contrary to principles of equity and international law.⁶⁰¹

The District Court found, *inter alia*, that the plaintiff served the defendant in accordance with the terms of the Credit Facility Agreement and precisely in the manner to which the State agreed; that there was no requirement under the Agreement to serve the Congo in French; and, that there was no evidence that the insurer misled the Court or the Congo; the District Court said that "a party must do more than merely assert fraud in order to have a foreign judgment set aside".

With regard to the contention by the Congo that such a judgment would interfere with the Congo's "London Club Agreement", an agreement with commercial banks creditors that provided for rescheduling of the Congo's external debt (this agreement was entered

601 *Ibid.*, p. 940.

into on February 26, 1988, after two years of negotiations, and the insurer was the only creditor to refuse to participate in the rescheduling), the District Court held:⁶⁰²

“This Court will recognize and enforce the default judgment despite the existence of the London Club Agreement. Participation in international debt rescheduling agreements is voluntary; foreign governments may not unilaterally impose international debt restructuring agreements on unwilling private creditors. [cited: *Allied Bank International v. Banco Credito Agricola*] Indeed, even when the parties *agree* to renegotiate conditions of payment, ‘the underlying obligation to pay nevertheless remain valid and enforceable.’ *Id.* If this Court were to refuse to enforce this default judgment on the ground that to do so would interfere with the Congo making payments pursuant to a debt rescheduling agreement entered into with other creditors, it would have the effect of depriving a creditor of its rights to choose whether to reschedule a debt or to enforce the underlying obligation to pay. Such a result would be contrary to United States policy as articulated in *Allied Bank*, 757 F.2d at 519.”

With regard to the allegation by the Congo that the insurer sought “only to disrupt the Congo’s international trade and banking business in an effort to obtain for itself preferential refinancing terms”, the District Court ruled that the “mere recognition by a lender that enforcement of its contractual rights may have adverse effects upon a borrower (which in turn could be expected to place pressure on the borrower to comply with its contractual duties) does not render enforcement of its contractual rights ‘illegitimate’”. The Court was mindful of the fact that enforcement of the default judgment could cause financial difficulties to the Congo, but stated that:⁶⁰³

“This Court is not the appropriate government institution to weigh the harm to the Congo of paying a valid judgment, against the harm of an insurer (including its shareholders, and, ultimately, other policy holders) that would flow from its being denied its legal right to enforcement of the judgment. No material issue of fact exists for trial, and recognition and enforcement of the default judgment obtained in Great Britain is appropriate.”

– On June 12, 1992, in *Republic of Argentina v. Weltover*,⁶⁰⁴ an action brought by two Panamanian corporations and a Swiss bank against the Argentine Republic for breach of contract and default on certain bonds, Justice Scalia, delivering the opinion of the Supreme Court of the United States, affirmed the judgment of the Court of Appeals

602 *Ibid.*, p. 944.

603 *Ibid.*, p. 945.

604 *Republic of Argentina v. Weltover*, 119 L.Ed.2d 394 (1992); see *ILR*, Vol. 100, 1995, pp. 509-519.

and held that “Argentina’s issuance of ‘Bonods’ was a ‘commercial activity’ under the FSIA; that its rescheduling of the maturity dates on those instruments was taken in connection with that commercial activity and had a ‘direct effect’ in the United States; and that the District Court therefore properly asserted jurisdiction, under the FSIA, over the breach-of-contract claim based on that rescheduling.”⁶⁰⁵

The facts of this case were as follows: in 1981, Argentina instituted a foreign exchange insurance contract programme (FEIC), under which it effectively agreed to assume the risk of currency depreciation in cross-border transactions involving Argentine borrowers by means of selling to domestic borrowers, in exchange for a contractually predetermined amount of local currency, the U.S. dollars necessary to repay their foreign debts when they matured, irrespective of intervening devaluations. However, by 1982, as Argentina did not possess sufficient reserves of U.S. dollars, the Argentine Government adopted certain emergency measures, including refinancing of the FEIC-backed debts by issuing to the creditors bonds, which were called “Bonods”. The Bonods provided for payment of interest and principal in U.S. dollars, they were payable through transfer in London, Frankfurt, Zurich, or New York market, at the election of the creditor. Under this refinancing programme the foreign creditor had the option either accepting the Bonods in satisfaction of the initial debt, thereby substituting the Argentine Government for the private creditor, or maintaining the debtor/creditor relationship with the private borrower and accepting the Argentine Government as guarantor.

In May 1986 the bonds matured and Argentina lacked sufficient foreign exchange to retire them. Pursuant to a Presidential Decree, Argentina unilaterally extended the time for payment, and offered bondholders substitute instruments as a means of rescheduling the debts. Two Panamanian corporations and a Swiss bank refused to accept the rescheduling, and insisted on full payment, specifying New York as the place where payment should be made.

Argentina did not pay and they brought this action for breach of contract and default on their bonds in the District Court for the Southern District of New York. They relied on

⁶⁰⁵ *Ibid.*, pp. 518-519.

the FSIA as the basis for jurisdiction. Argentina moved to dismiss for lack of subject-matter jurisdiction, lack of personal jurisdiction, and *forum non conveniens*. The District Court denied these motions [cited: 753 F.Supp. 1201 (1991)] and the Court of Appeals affirmed [cited: 941 F.2d. 145 (CA2 1991)]. The Supreme Court granted Argentina's petition for *certiorari*, which challenged the Court of Appeals' determination that under the FSIA Argentina was not immune from the jurisdiction of the federal courts in this case.

The Supreme Court found that its intervention was limited to the consideration of the issue whether, according to § 1605(a)(2) of the FSIA, this lawsuit was (1) "based ... upon an act outside of the territory of the United States"; (2) that was taken "in connection with a commercial activity" of Argentina outside this country; and (3) that "cause[d] a direct effect in the United States."⁶⁰⁶

As regards whether the issuance of "Bonods" constituted a "commercial activity" and that the extension of the payment schedules was taken "in connection with" that activity within the meaning of Section 1605(a)(2), the Court held that "when a foreign government acts not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."⁶⁰⁷ The Court distinguished the issuance of regulations limiting foreign currency exchange (a sovereign activity, because such authoritative control cannot be exercised by a private party) and a purchase of army boots or even bullets (a commercial activity, because private companies can similarly use sales contracts to acquire goods). In the present case, the commercial character of the Bonods was confirmed by the fact that they were negotiable and could be traded in the international market (save in Argentina), and that they promised a future issue of cash income. Moreover, as the FSIA clearly provided that the commercial character of an act was to be determined by reference to its "nature" rather than by its "purpose", the Court, reversing a former authority suggesting that the issuance of public debt instruments did not constitute a commercial activity [cited: *Victory Transport*, 336 F.2d., at 360], stated:⁶⁰⁸

606 *Ibid.*, p. 513.

607 *Ibid.*, p. 515.

608 *Ibid.*, pp. 515-516.

“[...] we perceive no basis for concluding that the issuance of debt should be treated as categorically different from other [than commercial] activities of foreign states.”

Quoting *Shapiro v. Republic of Bolivia* [cited: 930 F.2d. 1013, 1018 (CA2 1991)] in which it was held that “it is self evident that issuing public debt is a commercial activity within the meaning of the FSIA”, the Court held that “there is nothing about the issuance of these Bonods (except perhaps its purpose) that is not analogous to a private commercial transaction.”⁶⁰⁹

The question was not whether Argentina acted in order to make a profit or with the aim of fulfilling uniquely sovereign objectives but whether its actions were of the type by which a private party engages in commerce. The Bondos were essentially common debt instruments and there was nothing about their issue that was not analogous to a private commercial transaction. The fact that they were created to help Argentina to address a domestic credit crisis (as a component of a programme designed to control its critical shortage of foreign currency) was not a valid basis for distinguishing them from ordinary debt instruments. Under Section 1603(d) of the FSIA it was irrelevant why Argentina had participated in the bond market in the manner of a private actor. It mattered only that it had done so.⁶¹⁰

On the question whether Argentina’s unilateral rescheduling of Bonods had a “direct effect” in the United States within the meaning of Section 1605(a)(2) of the FSIA, the Court found that there was neither an express nor an implicit requirement in the FSIA that the effects to be felt in the United States had to be both “substantial” and “foreseeable” (as contended by Argentina before the Court of Appeals). An effect was direct if it followed “as an immediate consequence of the defendant’s... activity”.⁶¹¹ The respondents designated their accounts New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. “New York was thus the place of performance for Argentina’s ultimate contractual obligations, the rescheduling of those obligations necessarily had a ‘direct effect’ in the United States: Money that was supposed to have

609 *Ibid.*, p. 516.

610 *Ibid.*, pp. 516-517.

611 *Ibid.*, p. 517.

been delivered to a New York bank for deposit was not forthcoming.”⁶¹² That they were all foreign corporations with no other connections to the United States was irrelevant. Argentina established the “minimum contacts” test required by issuing negotiable debt instruments denominated in U.S. dollars and payable in New York, and by appointing a financial agent in that city. Argentina “purposefully availed itself of the privilege of conducting activities within the United States.”⁶¹³

Accordingly, the Supreme Court affirmed the judgment of the Court of Appeals.

– On March 25, 1997, in *Pravin Banker Associates Ltd. v. Banco Popular del Peru*,⁶¹⁴ an action brought by a private bank against State-owned Banco Popular of Peru, and the Republic of Peru, as guarantor, for non-payment of certain loans, Circuit Judge Calabresi, delivering the opinion of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court for the Southern District of New York, held that “extending international comity to Peru’s Brady negotiations would be contrary to the United States policy”, that the District Court properly refused to dismiss or stay the proceedings until the completion of those negotiations.

The facts of this case were as follows: in March 1983, Peru announced that it had insufficient foreign exchange reserves to service its foreign debt, and that it was unable to get credit to do so. Afterwards, Peru negotiated a series of settlement agreements with its creditors, including Mellon Bank, to whom it owed \$14 million as a result of several loans. Subsequently, in 1984, Peru failed to renegotiate its foreign debt and imposed new restrictions in the payment of foreign exchange in order to prevent the depletion of its external reserves. As a result, Banco Popular defaulted on the Mellon loans and Mellon filed a lawsuit to preserve its legal rights. Likewise, many of Peru’s commercial lenders filed lawsuits to prevent the statute of limitations to expire the outstanding debts. In 1990, Peru and its creditors (headed by Citibank, N.A.) signed an agreement to stay all pending lawsuits in order to promote negotiations to resolve the entire problem

612 *Ibid.*, p. 518.

613 *Ibid.*

614 *Pravin Banker Associates Ltd. v. Banco Popular del Peru*, 109 F.3d 850 (2nd Cir. 1997): see *AIL Cases*, Vol. 1, 1997, pp. 469-475.

of its unpaid foreign debt. Peru then continued negotiations with the aim of reaching a restructuring agreement that would be consistent with the Brady Plan.

Pursuant to an assignment agreement, Pravin acquired, in December 1990, at a discount in the secondary market for sovereign debt, \$9 million (face value) of Banco Popular's debt to Mellon (which resold almost immediately but retained \$1,425,000), and refused to join either Banco Popular's liquidation or the Brady negotiations. Instead they filed a suit against Banco Popular and its guarantor, Peru, for non-payment of the debt.⁶¹⁵

Banco Popular and Peru cross-moved to dismiss, stay, or deny Pravin's motion for summary judgment arguing that allowing the action to go forward would reawaken all of the other lawsuits that the Bank Advisory Committee (a committee of Peru's creditor's headed by Citibank, N.A.) had succeeded in having stayed. The defendants contended that it would result in a creditor stampede to find and attach Peruvian assets, and such stampede would, in turn, disrupt Peru's structural reform efforts. The District Court thus granted six months stay to allow the orderly completion of Banco Popular's liquidation proceedings.⁶¹⁶ After six-month stay elapsed, Pravin renewed its motion for summary judgment, and Banco Popular and Peru renewed their cross-motions for a stay or for dismissal of the complaint. They argued that this was essential to facilitate Peru's ongoing negotiations with the Bank Advisory Committee under the Brady Plan. The District Court granted an additional two-month stay to permit the parties to submit further information to the Court relating to: the extent of Peru's debt problem, Peru's effort to resolve the problem through negotiations with its creditors, whether there were other foreign debt actions pending against Peru, and whether Peru had entered into any agreements that would toll the statute of limitations on short-term working capital on Pravin's debt if Pravin did not continue its lawsuit against Peru.

After the two-month delay expired, Pravin again renewed its motion for summary judgment, and the defendants renewed their cross-motion for a stay or for dismissal. At this time, Banco Popular and Peru argued for the first time that Pravin was not a proper assignee because, allegedly, not being a "financial institution", it was prohibited from buying the Mellon debt. District Judge Sweet rejected this claim, denied their motion to

⁶¹⁵ *Ibid.*, p. 471.

dismiss, and granted Pravin's motion for summary judgment, thereby allowing the enforcement of the debt.⁶¹⁷ Later, on January 19, 1996, the District Court entered judgment for Pravin in the amount of \$2,161,539.78.

After this decision, the defendants once again moved to stay the judgment pending the resolution of their Brady negotiations with creditors. The District Court rejected the motion, but stayed the judgment for 30 days to allow the defendants to appeal the denial. The Court thereupon denied the motion to stay unless a bond was posted in the full amount of the judgment. Before doing so, however, the Court asked the United States to express its views as to whether either denial of the motion to stay, or denial of the motion unless bond were posted, would contravene the United States policy. The United States Attorney's office declined to submit a statement of interest, but sent a letter indicating various sources of United States policy on foreign sovereign debt.

Banco Popular and Peru appealed the denial of the motions to stay the proceedings and the grant of summary judgment. They argued that the District Court erred in failing to extend international comity to Peru's negotiations with the Bank Advisory Committee and in concluding that Pravin was a proper assignee of the Mellon debt.

Upon the first contention, by Banco Popular and Peru, that the District Court's grant of summary judgment was inconsistent with and disruptive to its efforts to negotiate a settlement, and that the grant of summary judgment must be evaluated in the light of principles of international comity, the Court of Appeals first recalled: that comity is a rule of "practice, convenience, and expedience" rather than a rule of law; that, in *Allied*, it was held that "courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States"; that, it was held, in *Laker Airways Ltd. v. Sabena, Belgian World Airlines* [cited: 731 F.2d. 909, 937 (D.C.Cir. 1984)] that "[n]o nation is under unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of

⁶¹⁶ *Ibid.*, 165 B.R. 379 (Bankr. S.D.N.Y. 1994): see *AIL Cases*, Vol. 8, 1997, pp. 4571-4582.

⁶¹⁷ *Pravin Banker Associates Ltd. v. Banco Popular del Peru and the Republic of Peru*, 895 F.Supp. 600 (S.D.N.Y. 1995): see *AIL Cases*, Vol. 2, 1997, pp. 947-956.

comity expires when the strong public policies of the forum are vitiated by the foreign act.”⁶¹⁸

The Court of Appeals, having found that Peru’s efforts to negotiate a settlement of its unpaid debt to foreign creditors were acts that had an extraterritorial effect in the United States, examined whether or not extending comity to them was consistent with United States government policy. The Court of Appeals held that the District Court correctly identified two substantial aspects of the United States policy that are implicated by this suit:⁶¹⁹

“First, the United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures under the Brady Plan. [...] Second, the United States has a strong interest in ensuring that enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to the United States lenders. [...] This second interest limits the first so that, although the United States advocates negotiations to effect debt reduction and continued lending to defaulting foreign sovereigns, it maintains that creditor participation in such negotiations should be on a strictly voluntary basis. It also requires that debts remain enforceable throughout the negotiations. [...]”

Circuit Judge Calabresi explained that the six-month stay to allow the completion of Banco Popular’s liquidation did not significantly harm United States interests, but that the granting of an indefinite stay would certainly prejudiced it. He went on to say:⁶²⁰

“To deny summary judgment in Pravin III, however, would have had a very different effect. It would first have denied Pravin its right to enforce the underlying debt—despite clear United States policy that it be able to do so—by making Pravin’s rights conditional on the completion of a process which had no obvious (and reasonable proximate) termination date. Second, *it would have converted what the United States intended to be voluntary and open-ended negotiations between Peru and its creditors into the equivalent of a judicially-enforced bankruptcy proceeding, for it would, in effect, have prohibited the exercise of legal rights outside the negotiations.* [...]”

Upon the second contention, by Banco Popular and Peru, that Pravin was not a proper assignee of the Mellon debt, the Court of Appeals held that there was nothing in the

618 *Pravin Banker Associates Ltd. v. Banco Popular del Peru*, 109 F.3d 850 (2nd Cir. 1997): see *ALL Cases*, Vol. 1, 1997, p. 473.

619 *Ibid.*

620 *Ibid.*, 474 [emphasis added].

language of the assignment agreement that limited or restricted the assignment to entities other than financial institutions, and that under New York laws, the debt was assignable to Pravin, whether or not it was a financial institution.⁶²¹

Accordingly, the Court of Appeals affirmed the decision of the District Court and held that it properly issued summary judgment.

– On November 18, 1997, in *Yucyco, Ltd. v. Republic of Slovenia*,⁶²² an action brought by a Cyprus corporation against the Republic of Slovenia, the Central Bank of Slovenia, four Slovenian banks, and the Chase Manhattan Bank as agent, for non-payment of a debt, District Judge Chin, of the District Court for the Southern District of New York, held *inter alia* that the plaintiff could not recover because it had not sufficiently sustained its claim of breach of contract, that it was in no privity with the defendants, and that its claim for damages for tortious interference with contract was inadequately pleaded.

The facts of this case may briefly stated as follows: as a consequence of the economic difficulties of the 1980's, Yugoslavia and its State-controlled banks were forced to restructure their foreign debt. In 1988, a new financing agreement (NFA), guaranteed by Yugoslavia, was signed involving hundreds of international banks and financial institutions. After the dissolution of Yugoslavia into several independent States, Slovenia, one of them, offered to assume a share of the former Yugoslavia's debt under the NFA. Specifically, it sought to exchange its own newly issued obligations for a portion of the outstanding debt under the NFA. However, this exchange was offered only to a list of "participating creditors", which did not include those entities appearing in a list compiled by the United States Treasury Office of Foreign Assets (OFAC). The plaintiff, who was in the latter list (of entities presumed to be controlled by the Serbian Government), was removed in June 25, 1996, but after the exchange closed.

Yucyco filed a suit on June 10, 1996, seeking to hold Slovenia defendants liable for breach of contract; alternatively, it contended that they should be ordered to permit

⁶²¹ *Ibid.*, 475.

⁶²² *Yucyco, Ltd. v. Republic of Slovenia*, 984 F.Supp. 209 (S.D.N.Y. 1997); see *AIL Cases*, Vol. 3, 1997, pp. 1517-1534.

Yucyco to participate in the exchange on the same terms as the other creditors under the NFA; finally, it asserted an alternative claim for tortious interference with contract.

Upon the breach of contract claim by Yucyco, the District Court, after recalling that “[i]t is well established that a plaintiff in a breach of contract action ‘may not assert a cause of action to recover damages for breach of contract against a party with whom it is not in privity’,” held that: Slovenia agreed to the terms of the exchange and nothing more; that it agreed to accept only a limited proportion of the former Yugoslavia’s obligations and did not agree to assume any further obligations under the NFA; and that its involvement was no basis for holding it liable under the NFA in general. The Court added that since “a non-signatory to a contract cannot be named as a defendant in a breach of contract action unless it has thereafter assumed or been assigned the contract,” Yucyco could not assert its NFA-based claim against Slovenia. In short, the District Court found that Yucyco had no sufficiently alleged a basis for a breach of contract claim under the NFA.⁶²³

With regard to the claim, by Yucyco, that Slovenia voluntarily assumed Yugoslavia’s financial duties under the Guaranty, the District Court held that under principles of international law a successor State such as Slovenia was not bound by its predecessor’s agreements. The District Court explained that, in the instant case, it lacked “judicially discoverable and manageable standards for resolving” Yucyco’s claim against Slovenia; and, that while the international norm may arguably be that the successor State should be held liable for a share of its predecessor’s liabilities, Yucyco did not offer any basis by which the District Court may “equitably” apportion Slovenia’s liability, if any, under the Guaranty. The District Court added that Yucyco did not supply any evidence of existence of any controlling agreement, treaty, or similar instrument allocating the economic liabilities of the former Yugoslavia under the Guaranty between the various successor States. As a result, the District Court lacked “satisfactory criteria for a judicial determination” of Yucyco’s equitable claims against Slovenia. Since Slovenia did not automatically succeed Yugoslavia as a NFA guarantor and that there were no

⁶²³ *Ibid.*, pp. 1522-1524.

indications that Slovenia substituted itself as NFA guarantor, the District Court held that Yucyco was in no privity with Slovenia.⁶²⁴

Therefore, Yucyco was unable to state a claim against Slovenia under the NFA or the Guaranty, and its claims against Slovenia were dismissed.

As regards Yucyco's claim that it suffered damages as a result of defendants' allegedly tortious interference with its contractual rights, the Court, having concluded before that the language of Section 1605(a)(5) of the FSIA did not limit the "commercial activity" exception to sovereign immunity and that Section 1605(a)(5)(B) did not preclude Yucyco's tortious interference claim (because this provision applies only to torts "not otherwise encompassed" in sub-section (a)(2), *i.e.*, commercial torts), held that Yucyco failed to provide sufficient facts to prove its claim, that it did not demonstrate the "procuring" of a breach, nor specified which defendants intentionally procured such a breach and described the conduct of each defendant allegedly inducing the parties to breach their obligations. This claim was inadequately pleaded and was dismissed.

– On November 18, 1997, in *Lloyds Bank Plc v. Republic of Ecuador*,⁶²⁵ an action brought by various creditors against the Republic of Ecuador, for non-payment of interest, District Judge Chin, of the District Court for the Southern District of New York, held that (1) Ecuador's obligation to pay interest on Consolidation Agreement Debt was not extinguished upon conversion of debt principal; and (2) Ecuador's obligation to pay the accrued interest on Consolidation Agreement Debt was not eliminated by either implementation of the 1994 Financing Plan or its own policy regarding unpaid, past due interest in 1995. Therefore, Ecuador had no legal basis for refusing payment of the "Past Due Interest Bonds" to the creditors.

The facts of this case, in short, were as follows: between 1985 and 1986, Ecuador and its foreign creditors renegotiated a Deposit Facility and Loans Agreement. These negotiations culminated in the execution of a Consolidated Agreement (CA) in August 1986, by which Ecuador's foreign debt was consolidated and restructured. Pursuant to

⁶²⁴ *Ibid.*, pp. 1524-1527.

⁶²⁵ *Lloyds Bank Plc v. Republic of Ecuador*, 1998 WL 118170 (S.D.N.Y. 1998); see *AIL Cases*, Vol. 2, 1998, pp. 567-583.

the CA, the principal debt (Consolidated Agreement Debt, hereinafter: CAD) was divided into various “tranches”, each of which had a different maturity date and bore an interest rate provided for in the CA, which also provided for the payment of interest that accrued on its various tranches of principal, in quarterly instalments. Section 5.11 of the CA provided an avenue through which the principal, CAD, could be converted into new obligations, payable in sucres. The converting parties could acquire the debt at a discount, but convert it at face value, thus realizing a substantial profit. Consequently, a secondary market developed for the trading of CAD and between August 1986 and January 1993, \$550,000,000 worth of CAD was converted by over 90 different entities worldwide. Following execution of the CA, Ecuador remained current on its obligation to pay interest on its foreign debt until late 1986/early 1987. But in March 1987, due to a drop in oil prices and an earthquake, which damaged its oil pipelines, Ecuador was forced to declare a moratorium on the service of its foreign debt. Then, it remained in default on its interest obligations until May 1994, and during this time substantial amounts of interest on CAD accrued but was not paid.⁶²⁶

Facing the serious dilemma of how to handle the accrued interest on CAD once the debt was converted, in 1994, Ecuador and its creditor banks entered into an agreement to restructure \$7 billion of Ecuador’s foreign debt (the “1994 Financing Plan”). Pursuant to it, Ecuador’s foreign creditors could exchange outstanding principal amounts of Ecuadorean loans for new U.S. dollar-denominated bonds issued by Ecuador. According to Ecuador, under the 1994 Financing Plan, all existing obligations were to be eliminated, that is to say, that CA was superseded by the 1994 Financing Plan. However, according to the creditors, no new agreement was reached concerning the interest on converted debt. As an additional component of the 1994 Financing Plan, Ecuador and many of its creditors entered into the Past Due Interest (PDI) Bond Exchange Agreement, in October 1994, which provided the means by which Ecuador would pay the interest arrears that had accrued over the years on the tranches of outstanding CAD. Under this arrangement, PDI bonds (comprising interest on principal and interest on interest) were offered in exchange for cancellation of their original

626 *Ibid.*, pp. 568-569.

obligations to holders of debt owed or guaranteed by Ecuador, and Lloyds Bank was appointed to act as closing agent.⁶²⁷

In February 1995, Ecuador issued a memorandum outlining its new policy regarding the issue of accrued interest associated with CAD that had been converted. It effectively eliminated creditor's rights to collect the unpaid PDI on converted principal debt unless they could prove that they expressly reserved this right at the time of the conversion of debt. Ecuador justified its new policy on the grounds that (1) the conversions themselves involved the negotiation of new agreements, (2) the new conversion agreements constituted novations extinguishing prior obligations under Ecuadorean law, and (3) the policy was based on the law of Ecuador and its Central Bank was obliged to comply with its country's laws. In August 1995, Ecuador held a special meeting at which it explained the new policy to converters of debt. Ecuador urged to drop their claims to PDI bonds, and most of the converters acquiesced. Several creditors, however, including the plaintiffs, refused to renounce their claims.⁶²⁸

Subsequently, the unreconciled PDI bonds were placed in an interpleaded fund held by Lloyds Bank and Chase Manhattan Bank, and this litigation was commenced. Ecuador sought a summary judgment against all the other parties contending that (1) Ecuadorean law governs the conversion of CAD and that, under Ecuadorean law, the conversions were novations that extinguished the interest on debt principal, and (2) that the 1994 Financing Plan and its 1995 internal policy left the Central Bank with no choice but to deny creditors' claims fro PDI bonds without proper proof of entitlement thereto. The plaintiffs in turn moved for summary judgment against Ecuador, contending basically that Ecuador devised and implemented its so-called "policy" in 1995 merely to avoid paying the interest arrears, as it was obliged to do under the earlier CA.⁶²⁹

The District Court found that its decision depended mainly on the resolution of one central issue: whether Ecuador's obligation to pay the interest that accrued on CAD was extinguished (as contended by Ecuador).

627 *Ibid.*, p. 570.

628 *Ibid.*, p. 571.

629 *Ibid.*, pp. 571-572.

In its support of summary judgment, Ecuador advanced two arguments: (1) that conversions of CAD extinguished its obligation to pay the accrued interest associated with that principal debt; and (2) that its 1994 Financing Plan and the adoption of its internal policy in 1995 justified its refusal to pay the interest arrears as required by the CAD.

Upon the first claim by Ecuador, that the obligation to pay interest on each tranche of debt principal was immediately extinguished upon conversion of that tranche, the District Court held that this argument failed for two reasons: (1) application of New York choice-of-law analysis compelled the conclusion that conversions of CAD were not to be analysed separately from the CA itself and that it was New York law, and not Ecuadorean law, the law governing all disputes arising out of the CA (the District Judge refused to apply the “technique of depeçage” cited by Ecuador—under which a court can perform a separate choice-of-law analysis for each issue in the case in order to determine which jurisdiction’s law applies—for the reason that the issues were “not separate and distinct”); the District Judge found that there was rather one issue: the proper construction of the CA, which face itself demonstrated that conversions were an integral part of the CA, that the CA was the channel through which conversions of the CAD could occur, and that, as a result, separate choice-of-law analysis was not justified; besides, the CA contained a choice-of-law clause which provided that the agreement “shall be governed by, and construed in accordance with, the law of the State of New York”);⁶³⁰ and (2) under New York law, conversions of debt principal did not constitute novations that cancelled the right to collect the interest on the debt that existed under the CA (the District Court found that Ecuador failed to offer any evidence of a “clear and definite” intent to extinguish the parties’ prior obligations under the CA); on the contrary, basic principles of contract interpretation made it clear that the right to receive interest on CAD remained intact notwithstanding conversions of such debt, and that the parties to such agreements intended to preserve creditor’s rights to the interest under all circumstances (section 5.11 of CA unambiguously provided that conversions of CAD affected debt principal only; it therefore followed that the right to collect accrued interest on tranches of converted debt remained intact upon conversion).⁶³¹

630 *Ibid.*, pp. 574-577.

Upon the second claim by Ecuador, that its 1994 Financing Plan and the adoption of its internal policy in 1995 justified its refusal to pay the interest arrears as required by the CAD, the District Court rejected both contentions. As to the first one, the District Court, citing *Allied Bank*, said that “authority in this circuit is clear that international debt resolution measures such as the Brady Plan and those guided under the [IMF] do not alter prior obligations of the participant States.”⁶³² As to the second contention, the District Court, having found that Ecuador, by relying on the adoption of its 1995 internal policy to reinforce its position that the interest was extinguished, it was in fact asserting as defence the doctrine of the act of State to justify its refusal to pay the interest arrears; that if it did not argue it affirmatively it was because Ecuador knew that this would fail as it did happen in other identical cases (quoted: *Allied Bank*, and *Libra Bank*) in which it was held that the United States courts “will give effect to acts of State only if they are consistent with the policy and the law of the United States”, held that Ecuador’s obligations with respect to CAD principal were indeed extinguished upon conversion, but its interest obligations clearly remained intact, that Ecuador’s “unilateral attempt to repudiate” this obligation was “inconsistent with the orderly resolution of the international debt problems”; accordingly, Ecuador’s prior obligation under the CA to pay interest on converted debt was unaffected by implementation of either the 1994 Financing Plan or the 1995 internal policy.⁶³³

Accordingly, Ecuador’s motion for summary judgment was denied.

– On October 20, 1999, in *Elliott Associates v. Banco de la Nacion and Peru*,⁶³⁴ an action brought by a creditor against Peru and a Peruvian bank, for non-payment of a debt, the Court of Appeals for the Second Circuit, reversing the judgments of the District Court, held that the defendants, Banco de la Nacion and Peru were liable for breach of contract, and that the plaintiff, Elliott, in acquiring Peruvian debt instruments for the primary purpose of enforcing it, with the intent to resort to litigation to the extent necessary to accomplish the enforcement, did not violate Section 489 of the New York

631 *Ibid.*, pp. 577-580.

632 *Ibid.*, p. 580.

633 *Ibid.*, p. 581.

634 *Elliott Associates v. Banco de la Nacion and Peru*, 194 F.3d 363 (2nd. Cir. 1999).

Judiciary Law, because, in that case, intent to litigate was ‘merely incidental and contingent’.

The facts of this case were as follows: in January 1996, Elliott, a New York investment fund, purchased Peruvian debt from ING Bank, N.V. and Swiss Bank Corporation for approximately \$20.7 million (in principal amount) of the “working capital debt” of bankrupt State-owned Banco Popular del Peru and Banco de la Nacion (“working capital debt”, contrary to syndicated bank debt, does not involve an agent or a lead bank but instead consists of direct loans between single lenders and sovereign borrowers; under this type of debt there are no books and records for all holders; because of the risks involved in these transactions in which the buyer has to rely upon the seller to convey good title, they are sold at a greater discount to value than syndicated debt—typically at a four to six percent discount from syndicated debts, but in a lawsuit seeking full payment of the debt they may have more value). Elliott paid approximately \$11.4 million.

Elliott is an investor in the securities of “distressed” debtors, that is, debtors that have defaulted on their payments to creditors. He invests in sovereign debt when he believes that the true or “fundamental” value of the debt is greater than the market value. Thus his approach, as he himself characterizes it, is “activist”. Other times he had engaged in direct negotiations with the debtor, and occasionally had received greater return than other creditors in the secondary market. In the present case, he was approached by Jay Newman, an independent consultant, and attorney Michael Straus, of Water Street Bank & Trust Co. (who specializes in purchasing “distressed” foreign sovereign debt and filing lawsuits seeking full payment of the debt) to act as a “substitute plaintiff”. Prior to this action, in October 1995, at Newman’s recommendation, he purchased \$28.75 million (principal amount) of Panamanian sovereign debt for approximately \$17.5 million. In July 1996, Elliot brought a suit against Panama seeking full payment of the debt, and obtained a judgment and an attachment order, and, with interest, ultimately received over \$57 million in repayment.

As found by the District Court, the timing of Elliott’s purchases of Peruvian debt and the closing of the assignment agreements paralleled key events in *Pravin Banker Associates Ltd. v. Banco Popular del Peru* (despite that at the trial Newman claimed

that Elliott's decision to purchase Peruvian debt, shortly after the ruling on damages in *Pravin Banker* case, was "just a coincidence").

In May 1996, Elliott delivered joint notices of the assignment to the Debtors' reconciliation agent, Morgan Guaranty, to register the debt it had purchased in order that it could obtain its *pro rata* share of the interest payments the Debtors promised to make to all creditors. The following day Elliott notified Nacion, Popular, and Peru by letter that it was now one of their creditors and that it wished to initiate discussions regarding repayment. No negotiations took place. The Debtors were of the opinion that Elliott was not a proper assignee because it was not a "financial institution" within the scope of the assignment provision of the Letter Agreements and that Elliott should either transfer the debt to an eligible "financial institution" or participate in the Brady Plan with other creditors. On June 25, 1996, after a continued impasse in the parties' discussions, Elliott formally requested repayment by sending the Debtors a notice of default.

On October 18, 1996, three weeks before the execution of an Exchange Agreement between Peru and 180 commercial lenders and suppliers, under which old Peruvian commercial debt was to be exchanged for Brady bonds and cash, Elliott filed a suit against the Debtors in the New York Supreme Court and sought an *ex parte* order of prejudgment attachment. The Debtors subsequently alleged at trial that the reason for Elliott filing the suit at that time was that the collateral for the Brady bonds was United States Treasury bonds, which were held at the Federal Reserve Bank of New York, and thus made suitable assets for attachment. Elliott's suit was subsequently removed to federal district court pursuant to the FSIA [quoted: 28 U.S.C. § 1441(d) (1994)] where Elliott's motions were denied on December 12, 1996 (for prejudgment attachment), and on April 28, 1997 (for summary judgment).⁶³⁵ After discovery, the case was tried by a bench from March 17 to March 25, 1998, and final argument was heard on May 26, 1998.

On August 6, 1998, the District Court issued its judgment⁶³⁶ dismissing Elliott's complaint on the ground that Elliott's purchase of the Peruvian debt violated Section

⁶³⁵ *Elliott Associates v. the Republic of Peru and Banco de la Nacion*, 961 F.Supp. 83 (S.D.N.Y. 1997).

⁶³⁶ *Ibid.*, 12 F.Supp. 328 (S.D.N.Y. 1998).

489 of the New York Judiciary Law. The District Court held that “Elliott purchased the Peruvian debt with the intent and purpose to sue.”⁶³⁷ It also noted that Elliott had no familiarity with purchasing sovereign debt until it met Newman, who together with Straus, had “a long history” in purchasing sovereign debt and suing on it. It further found that Elliott intentionally “delayed closing its purchases of Peruvian debt until the Second Circuit had clarified the risks.”⁶³⁸ Moreover, the District Court found that Elliott did not seriously considered alternatives to bringing an action”, including holding and reselling the debt, participating in Peru’s privatization programme, participating in the Brady Plan, or negotiating separately with the Debtors to obtain a better deal than the Brady terms.⁶³⁹ It found that “none of these alternatives was realistically considered by Elliott” and from the start Elliott intended to sue and the testimony to the contrary was not credible, that the letters accompanying steps to negotiate were “pretextual and never demonstrated a good faith negotiating position.”⁶⁴⁰

The District Court concluded that Banco de la Nacion was liable under the contract for failure to pay the debts, and that Peru was liable under the Guaranty for failure to pay the debts following Banco de la Nacion’s default.⁶⁴¹

The District Court then turned to the Debtors’ defense that Elliott’s claim should be dismissed because the assignment violated Section 489 of the New York Judiciary Law, which prohibits the purchase of a claim “with the intent and for the purpose of bringing an action or proceeding thereon.” The District Court explained that while Elliott’s position was strong as a matter of policy in the world of commerce, however, its role was “not to make policy assessments—to rank its preferences among contracts, property, and champerty doctrines.”⁶⁴² The District Court noted that “the intent Peru established was the intent to sue, and that intent was not contingent or incidental.”⁶⁴³ Examining the legislative history, the District Court explained that while Section 489 was originally aimed at attorneys, subsequent revisions indicated an intent to cover

637 *Ibid.*, p. 332.

638 *Ibid.*, p. 336.

639 *Ibid.*, p. 338.

640 *Ibid.*, p. 342.

641 *Ibid.*, p. 344.

642 *Ibid.*, p. 345.

643 *Ibid.*, p. 346.

“corporations” and “associations”⁶⁴⁴ Moreover, the District Court observed that “§ 489’s roots in the Medieval law of champerty and maintenance provides support for the conclusion that, while not all assignments with the intent to bring suit thereon are barred, assignments taken for the purpose, or motive, of stirring up litigation and profiting thereby are prohibited.”⁶⁴⁵

The District Court then rejected Elliott’s arguments that the statute was only aimed at: (1) suits which have the purpose of obtaining costs; or (2) suits where corporations engage in the unauthorized practice of law by taking claims with the intent to sue on them *pro se* without hiring counsel.⁶⁴⁶ The District Court also rejected Elliott’s argument that the statute does not apply where all right, title, and interest are conveyed by the assignor.⁶⁴⁷ Finally the District Court rejected as without merit Elliott’s argument that: (1) Elliott, as a limited partnership, is not an “association” within the meaning of the statute; (2) Peru’s interpretation of the statute would render it violative of the Commerce Clause of the United States Constitution; and (3) the Peru Defendants lacked standing to raise the Section 489 defense because they were not parties to the assignment agreements.⁶⁴⁸ Consequently, because Elliott purchased the debt with the intention to bring a suit thereon, the District Court concluded that Elliott’s assignment contracts violated Section 489 and that cannot be enforceable.⁶⁴⁹

Turning to other arguments and defenses, although section 3 of Peru’s Guaranty provided that Peru shall pay all guaranteed amounts “regardless of any law, regulation or order now or hereafter in effect in any jurisdiction,” the District Court rejected Elliott’s argument that the text of the waiver was sufficiently broad enough to embrace Peru’s defense based on Section 489, reasoning that Section 489 is a penal law directed at the public interest that cannot be waived.⁶⁵⁰ Finally, although not necessary to its disposition, the District Court rejected Banco de la Nacion’s argument that it was excused from performance due to impossibility as a result of a Peruvian Government

644 *Ibid.*, pp. 349-350.

645 *Ibid.*, p. 351.

646 *Ibid.*, pp. 351-354.

647 *Ibid.*, p. 354.

648 *Ibid.*, p. 356, footnote 20.

649 *Ibid.*, p. 356.

650 *Ibid.*, pp. 356-358.

decree purportedly removing Banco de la Nacion as a debtor under the Letter Agreements.⁶⁵¹

The District Court thus entered its judgment dismissing Elliott's complaint on August 26, 1998. Elliott immediately filed its notice of appeal.

On October 20, 1999, the Court of Appeals, reversing the judgment of District Judge Robert W. Sweet, held: "contrary to the district court's interpretation, the pertinent case law demonstrates that Section 489 does not preclude reliefs in lawsuits, such as Elliott's, seeking primarily to collect on lawful debts [...]."⁶⁵² The Court of Appeals found that there was "sufficient case law for us to determine that Elliott's conduct, as found to have occurred by the district court, was not proscribed by Section 489 of the New York Judiciary Law."⁶⁵³ It also found that the pivotal issue on which this appeal necessarily turned was whether, within the meaning of Section 489, Elliott's purchase of Peruvian sovereign debt was "with the intent and for the purpose of bringing an action or proceeding thereon," thereby rendering the purchase a violation of law.⁶⁵⁴

In interpreting Section 489, the Court of Appeals explained that "[w]hile New York courts have not been unwilling to characterize Section 489 as a champerty statute, it is apparent that they have consistently interpreted the statute as proscribing something narrower than merely 'maintaining a suit in return for a financial interest in the outcome.' Indeed, far from prohibiting the taking of a financial interest in the outcome of a lawsuit, payment of attorneys by fees contingent upon the outcome of litigation is expressly permissible in New York by statute and court rule."⁶⁵⁵ The Court of Appeals then cited the New York Court of Appeals' case *Moses v. McDivitt* [quoted: 88 N.Y. 62, 1882 WL 12577 (1882)], as the leading case interpreting the champerty statute. It said that this case confirmed that "the mischief Section 489 was intended to remedy did not include the acquisition of debt with the motive of collecting it, notwithstanding that litigation might be a necessary step in the process." Citing another case, it added: "Although decided [over] 100 years ago, [*Moses*] still remains good law." [quoted: 1015

651 *Ibid.*, pp. 358-360.

652 *Elliott Associates v. Banco de la Nacion and Peru*, 194 F.3d at 365 (2nd. Cir. 1999).

653 *Ibid.*, p. 370.

654 *Ibid.*, p. 371.

Gerard Realty Corp. v. A & S Improvements Corp., 457 N.Y.S.2d 821, 822, 91 A.D.2d 927, 928, (1st Dep't 1983)].⁶⁵⁶

In *Moses*, the plaintiff, an attorney, had purchased an assignment of a bond and mortgage that had been executed by the defendant and he brought a suit for collection of the debt. As a defense, the defendant alleged that the plaintiff's purchase was in violation of the then-in-force predecessor statute to Section 489 because it was a purchase by an attorney of a chose in action "with the intent and for the purpose of suing thereon." The New York Court of Appeals, in this case, held:⁶⁵⁷

"[...] a mere intent to bring a suit on a claim purchased does not constitute the offense; *the purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose.* As the law now stands, an attorney is not prohibited from ... purchasing bonds ... or other choses in action, either for investment or for profit, or for the protection of other interests, and *such purchase is not made illegal by the existence of the intent on his part at the time of the purchase*, which must always exist in the case of such purchases, to bring suit upon them if necessary for their collection. *To constitute the offense the primary purpose of the purchase must be to enable him to bring a suit, and the intent to bring a suit must not be merely incidental and contingent.* The object of the statute ... was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right to the assignee.

[The court concluded]

[t]his purpose, whether honest or reprehensible, was not within the prohibition of the statute. The intent to sue upon the bond was secondary and contingent..." [emphasis supplied by the court]

After *Moses*, the Court of Appeals cited other New York Court of Appeal's cases (*Sprung v. Jaffe* and *Fairchild Hiller Corp. v. McDonnell Douglas Corp.*) to demonstrate that the principles set forth in *Moses* continued to be followed.⁶⁵⁸ To reinforce even further its opinion that *Moses* remained the law of New York, it cited other New York precedents on the issue (for instance, *Limpar Realty Corp. v. Uswiss Realty Holding, Inc.*, 492 N.Y.S.2d 754, 112 A.D.2d 834 (1st Dep't 1985)) in reference to which it observed, *inter alia*, that:⁶⁵⁹

655 *Ibid.*, p. 372.

656 *Ibid.*, p. 373.

657 As quoted in *ibid.*, p. 374.

658 *Ibid.*, p. 375.

659 *Ibid.*, p. 376.

“Peru’s Brady Plan was not binding on all creditors, such as Elliott, that were not members of the Bank Advisory Committee. Thus, given that the Brady system purposefully does not create such a binding obligation, there was no settlement and, consequently, unlike the district court, we do not condemn Elliott merely because ‘[i]ts purpose was to stand apart from the lenders who had agreed to the Brady restructuring, and to use judicial process to compel full payment’.”

Then, it concluded:⁶⁶⁰

“The cases, spread over more than a century, are not always entirely clear or plainly consistent. Thus the district court found some basis for its construction of the coverage of Section 489 to include Elliott’s purchase of the Peruvian debt. We do not agree, however, with this interpretation. Furthermore, in light of the case law surveyed above, we do not agree with the district court that *Moses* in conjunction with later New York case law ‘provides’ little guidance for construing the statute’s proper scope.

[...]

We believe that the district court misunderstood *Moses*. The *Moses* court made clear that where the debt instrument is acquired for the primary purpose of enforcing it, with intent to resort to litigation to the extent necessary to accomplish the enforcement, the intent to litigate is ‘merely incidental and contingent’ and does not violate the statute. [...]

While *Moses* does not set forth a complete taxonomy of conduct prohibited by Section 489 (and neither do we), it plainly sets forth certain conduct that is *not* made unlawful by Section 489.”

The Court of Appeals gave two additional conclusions by which it could not agree with the District Court’s “equating of Elliott’s intent to be paid in full, if necessary by suing,” with the “primary intent to sue” prohibited by Section 489. It said: first, any intent on Elliott’s part to bring suit against the Debtors was “incidental and contingent” as those terms are used in *Moses* and the New York case law; and, second, *Moses* specified that conduct not proscribed by the statute includes where “the plaintiff bought the bond as an investment, but with the intention of collecting it by suit if compelled to resort to that means for obtaining payment.”⁶⁶¹

With regard to the interest of the United States and New York in the context of interpreting Section 489, the Court of Appeals, citing *Pravin Banker*, in which it was held that the interest of the United States in ensuring the enforceability of valid debts

660 *Ibid.*, pp. 377-378.

661 *Ibid.*, pp. 378-379.

under the principles of contract law prevailed over its interest in the success of foreign debt resolution procedures under the Brady Plan, stated:⁶⁶²

“Rather than furthering the reconciled goal of voluntary creditor participation and the enforcement of valid debts, the district court’s interpretation of Section 489 effectively forces creditors such as Elliott to participate in an involuntary ‘cram-down’ procedure and makes the debt instruments unenforceable in the courts once the Bank Advisory Committee has reached an ‘agreement in principle’ in the Brady negotiations. Undermining the voluntary nature of Brady Plan participation and rendering otherwise valid debts unenforceable cannot be considered to be in New York’s interests, as made plain by this court in *Pravin Banker*.”

The Court of Appeals also noted the “unreasonable results that might ensue” if it had accepted the District Court’s opinion:⁶⁶³

“While the district court’s rule might benefit the Debtors in the short run, *the long term effect would be to cause significant harm to Peru and other developing nations and their institutions seeking to borrow capital in New York*. The district court’s interpretation would mean that holders of debt instruments would have substantial difficulty selling those instruments if payment were not voluntarily forthcoming. This would therefore add significantly to the risk of making loans to developing nations with poor credit ratings. The additional risk would naturally be reflected in higher borrowing costs to such nations. It could even make loans to some of them unobtainable in New York. *A well-developed market of secondary purchasers of defaulted sovereign debt would thereby be disrupted and perhaps destroyed even though its existence provides incentives for primary lenders to continue to lend to high risk countries*.

The interpretation posited by the district court would also create ‘a perverse result’ because it ‘would permit defendants to create a champerty defense by refusing to honor their loan obligations.’ *Banque de Gestion Privee-Sib v. La Republica de Paraguay*, 787 F.Supp. 53, 57 (S.D.N.Y. 1992). An obligor could simply declare unwillingness to pay, thereby making it plain that no payment would be received without suit. [...]

Although all debt purchases would be affected by the district court’s expansive reading of Section 489, high-risk debt purchases would be particularly affected because of the increased likelihood of non-payment in such transactions leading to the likely necessity of legal action to obtain payment. As ably pointed out by Elliott and the various *amici curiae*, such increased risks could be expected to increase the costs of trading in high-risk debt under New York law and thereby encourage potential parties to such transactions to conduct their business elsewhere. [...].”

662 *Ibid.*, p. 380.

663 *Ibid.* [emphasis added].

Consequently, the Court of Appeals held:⁶⁶⁴ that, in light of the pertinent New York precedent and “compelling policy considerations,” the District Court erroneously interpreted Section 489 of the New York Judiciary Law; that Elliott’s “primary goal” was satisfaction of a valid debt and its intent was only to sue in the absence of full performance; hence, that there was no violation of Section 489. Given that the District Court already found that the Debtors are liable for breach of contract, it remanded only for the purposes of calculating damages more accurately than the approximate figures given before and for the possible resolution of other attendant damages-related issues. The judgments of the District Court were reversed and the case was remanded.

Summary of the U.S. practice. The cases reviewed on sovereign/private debt litigation under U.S. laws have involved, basically, loans by U.S. banks and other financial institutions in industrialized nations to banks, governments, and private parties from developing countries. The typical difficulty found is that borrowers have been prevented from paying as a result of liquidity problems or shortage of hard currency, which has made it impossible for them converting from domestic to foreign currency in order to meet their external contractual obligations. In most cases failure to pay has been settled by using the rescheduling method through negotiation with the debtor. If negotiations fails the last resort has usually been the New York judiciary, which has been designated directly or indirectly in the loan agreement as the appropriate forum.

Sovereign/private debt litigation in U.S. courts has raised an important number of issues, including the effectiveness of the defenses that debtors have asserted in the course of the proceedings. It has also given rise to an impressive body of literature. However, this work about the practice of judicial recovery of State external monetary debts in creditor countries does not call at this stage for a systematic analysis of each defense on its proper merits. For the purpose of our work, suffice to mention that it is from this period (more precisely, after the debt crisis in the 1980’s) that the U.S. courts and have started to allow legal actions against States without their consent. Thanks to the introduction of a number of legal techniques provided for in the loan agreements and the adoption, by creditor countries in general, of the “restrictive theory” of sovereign immunity, the borrowing States and/or their borrowing entities were required to waive

664 *Ibid.*, p. 381.

their immunity and to repay debt denominated in U.S. dollars to an account in a major financial centre such as New York, which is perceived by creditors as a “creditor-friendly” governing law and jurisdiction. In the U.S. the sovereign immunity question is now governed by the FSIA, which, as mentioned, has adopted the restrictive view on sovereign immunity. This defense has rarely been found applicable because of either the waiver of exception or the commercial activity exception to the defense. A more viable defense available to both sovereign and private creditors has been the Act of State doctrine, under which it is said that “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory” (*Underhill v. Hernandez*⁶⁶⁵). However, because of the numerous exceptions to its application, including the difficulty to its application to international contractual obligations, and because of the stance that may be adopted by the U.S. Executive Branch in any given case (*Allied Bank v. Banco Credito Agricola*⁶⁶⁶), it is difficult to predict whether or not this doctrine will be upheld as consistent with the U.S. policy. One of the most controversial issues before U.S. courts has been Article VIII 2 (b) of the IMF Articles of Agreement has been raised as a defense during litigation; this defense requires a court not to enforce an exchange contract which breaches the exchange control laws of an IMF member, provided that such laws are maintained or imposed consistently with the IMF Agreement; however, it has never been successfully asserted in any reported case in the U.S. (*Braka v. Bancomer*⁶⁶⁷). Another defense, the common-law *forum non conveniens* permits a court to stay or to dismiss an action on the ground that, the action, although jurisdictionally sound, would be better adjudicated elsewhere (*Crédit français international S.A. v. Sociedad Financiera de Comercio S.A.*⁶⁶⁸); not either has it been successfully asserted. And the doctrine of comity, which has been asserted several times, but not upheld because comity is a rule of “practice convenience, and expedience” rather than a rule of law (*Pravin Banker Associates Ltd. v. Banco Popular del Peru*⁶⁶⁹).

⁶⁶⁵ *Underhill v. Hernandez*, 168 U.S. 250 (on certiorari to the United States Court of Appeals for the Second Circuit).

⁶⁶⁶ *Allied Bank v. Banco Credito Agricola*, 566 F.Supp. 1440 (1983).

⁶⁶⁷ *Braka v. Bancomer*, 589 F.Supp. 1465 (1984).

⁶⁶⁸ *Crédit français international S.A. v. Sociedad Financiera de Comercio S.A.*, 490 N.Y.S.2d. 670 (Supp. 1985), 128 Misc.2d 564.

⁶⁶⁹ *Pravin Banker Associates Ltd. v. Banco Popular del Peru*, 109 F.3d 850 (2nd Cir. 1997): see *AIL Cases*, Vol. 1, 1997, pp. 469-475.

More recently, new developments in judicial recovery of State external debts have taken place in U.S. courts (*Elliott Associates v. Banco de la Nacion and Peru*⁶⁷⁰). The Court of Appeals' decision in this case has paved the way for firms to invest in litigation and/or seek the purchase of securities of distressed debtors with the intention and purpose of bringing suit (the champerty doctrine, which is defined as maintaining a suit primarily in return for a financial interest in the outcome, was upheld). This evolution has taken place as a result of gradual changes in the domestic legislation of creditor countries (e.g. the adoption of legislation limiting State immunity) and has allowed a levy of execution on foreign States' assets. The effect that this case has on future debt restructurings is of particular importance to debtor and well as to creditor countries.

C. Recourse to collective negotiation techniques for debt repayment: the creditors' cartels

During this period, recourse to collective negotiation forms for the settlement of private (e.g., interbank deposits, long-, medium- and short-term single bank and syndicated multi-bank debt, interbank credit, trade credits not covered by government insurance or guarantee programmes, secured debt, leases, project financing, foreign exchange contracts, bonds, private placements and floating rate notes), and public debts (e.g., direct loans, credits under export insurance or guarantee programmes, and other obligations guaranteed by public sector entities), between government debtors and their creditors (foreign governments, banks, and sometimes bondholders), has become a regular feature.

Through the use of the techniques of debt restructuring and rescheduling,⁶⁷¹ many debt settlements have been reached at London, New York, and the Paris Club since 1956.

⁶⁷⁰ *Elliott Associates v. Banco de la Nacion and Peru*, 194 F.3d 363 (2nd. Cir. 1999).

⁶⁷¹ For a detailed explanation on the subject of sovereign debt restructurings, see, *inter alios*: SURATGAR David, "The International Financial System and the Management of the International Debt Crisis", *Default and Rescheduling, Corporate and Sovereign Borrowers in Difficulty* (ed. by D. Suratgar), 1984, pp. 151-160; MUDGE Alfred, "Sovereign Debt Restructuring: A Current Perspective", *ibid.*, pp. 85-90; *ibid.*, "Restructuring Private and Public Sector Debt: Country Debt Structure?", *Int'l Lawyer*, Vol. 20, No. 3, Summer 1986, pp. 847-855; CLARK Keith, "Sovereign Debt Restructurings: Parity of Treatment between Equivalent Creditors in Relation to Comparable Debts", *ibid.*, pp. 857-865; CLARK Keith and HUGHES Martin, "Approaches to the Restructuring of Sovereign Debt", *Sovereign Lending: Managing Legal Risk* (ed. by M. Gruson and R. Reisner), pp. 131-137; WALKER Mark A. and BUCHHEIT Lee C., "Legal Issues in the Restructuring of Commercial Bank Loan to Sovereign Borrowers", *ibid.*, pp. 139-156; MEISSNER Charles F., "Thoughts on More Comprehensive Procedures

The 1953 London Agreement on Germany's external debt (debts of public entities to private creditors), which considerably reduced the size of Germany's indebtedness and facilitated its economic recovery, provided the example of a successful collective negotiation of a sovereign debt.

Since the 1982 Mexican debt crisis, the IMF plays a major role in these exercises: to reach an agreement with private and public creditors the sovereign debtor must implement an economic adjustment programme designed by the IMF, which includes specific, measurable, and performance criteria (*i.e.*, conditionality). It is only under these conditions that private and public creditors will stick to their commitments to reschedule.

These negotiations are engaged as a result of the inability or imminent default of a sovereign debtor to service some or all of its outstanding debt. They are initiated with the debtor government's declaration of moratorium, which is followed by a voluntary standstill and a stay on creditor enforcement during the restructuring negotiations. Sometimes sovereign debtors have offered to discharge by other means of payment, such a payment in local currency for investments under favourable conditions within its territory.

Without pre-determined legal procedures these negotiations are conducted by the major creditor banks through self-appointed advisory or steering committees, which invite the other creditor banks to join in order to ensure a balanced representation. The negotiations are further pursued through a "working group" and *ad hoc* sub-committees until a term sheet is established and submitted for approval to the other banks. If some banks disagree, their claims are sometimes bought by other banks, or their disagreement are ignored, in which case the final agreement will only be signed by the consenting banks (without affecting the ability of the non-concurring banks to enforce their claims by other means).

for Rescheduling of Sovereign Debt", *The International Debt Problem and its Impact on Finance and Trade* (ed. by B. Campbell and R. Herzstein), 1984, pp. 131-157; HECKART Robert L., "The Process of Rescheduling Sovereign Debt to Bank Creditors", *ibid.*, pp. 107-123; same article in: *International Borrowing: Negotiation and Renegotiation* (ed. by D. Bradlow and W. Jourdin Jr.), Vol. II, 1984, pp.

The agreement thus reached will impose certain obligations upon the participant banks and the sovereign debtor, some of which are frequent, for example, the debtor undertakes not to pay one bank in preference to another, and, if one bank is paid by preference, it will have to share the payment *pro rata* with the others. These agreements also include a negative pledge clause, whereby the debtor undertakes not to grant any pledge or other collateral to any creditor without offering the same to the others.

Generally, the negotiations are handled by creditors on an *ad hoc* basis. As there are no common standards against which the fairness and workability of each settlement can be measured, they are generally based on political considerations, *i.e.*, they are not rules-based but are guided by unwritten rules of conduct arising from practice (which, in turn, are based on the “negotiating power” of uneven parties). Because they are dependent on these considerations, they may lead to different results. The creditor banks may agree to a multi-year rescheduling agreement of the debt. They may provide “new money” to the debtor (although banks have become increasingly reluctant to provide it). “New money” is often only a loan for the payment of accrued and unpaid interest on existing loans (it means that the creditor lends the money that will serve to pay his own claim).⁶⁷² As a rule the London Club does not reschedule interest payments, while the Paris Club reschedules both principal and interest. Sometimes “fresh money”, in the form of net additional loans, is part of the package (which will only add more debt to the principal).

The understanding reached in the Paris Club’s negotiations with creditor governments are recorded in an “agreed minute” (*procès-verbal agréé*). By this agreement, which is not legally binding upon the creditor governments and the debtor government, the parties only undertake to recommend to their respective authorities that the contents will be reflected in the subsequent bilateral agreements that will be negotiated between each creditor government and the debtor government. Therefore a second phase will be necessary for the conclusion of these bilateral agreements.⁶⁷³

7.A1.1-8; EBENROTH M. Carsten Tomas, “Innovations récentes dans la restructuration de la dette”, *JDI*, N° 4, Oct.-Nov.-Déc. 1992, pp. 859-905.

⁶⁷² KURZ William C.F., “Sovereign Restructuring”, *International Borrowing: Negotiation and Renegotiation* (ed. by D. Bradlow and W. Jourdin Jr.), Vol. II, 1984, p. 7.3A.15.

⁶⁷³ CARREAU Dominique, “Le rééchelonnement de la dette extérieure des États”, *JDI*, N° 1, janvier-février-mars 1985, p. 22. On the role of the Paris Club, see also CAMDESSUS Michel, “Governmental Creditors and the Role of the Paris Club”, *Default and Rescheduling, Corporate and Sovereign Borrowers in Difficulty* (ed. by D. Suratgar), 1984, pp. 125-129.

Despite that these techniques provide for the mitigation of conflicts arising from the incapacity to repay (for debtors), and the impossibility to recover according to the original terms of the lending contract (for creditors), the negotiations address solely a consequential problem (*i.e.*, the high levels of indebtedness)⁶⁷⁴ and not the *causa causans* of the increase of the “external debt”. By allowing the parties to modify, and in some cases novate, the original contractual terms, the final settlement of the debt is merely postponed *in futurum*, but the burden of the “external debt” is increased *ad aeternum*.

D. The IMF and the recovery of State external debts

It must be clarified from the outset that the purpose of this section is not to examine the various roles, functions, and activities of the IMF,⁶⁷⁵ including that of lender of last resort,⁶⁷⁶ neither its conditionality or surveillance procedures, nor to question its internal decision-making processes or use of compulsion toward distressed countries. As to its true impact in the world of reality, however, we assume as well founded the prevalent opinion (supported by overwhelming “first hand” evidence) that the IMF has since the 1980’s endorsed the unrestricted neo-liberal tendencies of the unregulated sectors of the global markets and promoted their credo (namely, “Washington consensus” between the IMF, the World Bank, and the U.S. Treasury about the “right” policies of the developing countries).⁶⁷⁷ In this section we are rather concerned with the question of whether or not the IMF plays a role at the recovering of State external debts and, if so, what kind of role.⁶⁷⁸

⁶⁷⁴ MILIVOJEVIC Marko, *The Debt Rescheduling Process*, 1985, p. 45.

⁶⁷⁵ For an overview of the IMF, see BRADLOW Daniel D., “The International Monetary Fund: An Overview of its Structure and Functions”, *International Borrowing: Negotiation and Renegotiation* (ed. by D. Bradlow and W. Jourdin Jr.), Vol. II, 1984, pp. 6.1A.1-35. For a more recent view on the IMF, see GIANVITI François, “Evolving Role and Challenges for the International Monetary Fund”, *Int’l Lawyer*, Vol. 35, No. 4, Winter 2001, pp. 1371-1403 [hereinafter: GIANVITI François, “Evolving Role of the IMF”, *Int’l Lawyer*, Vol. 35, No. 4, Winter 2001]; and LASTRA Rosa Maria, “The Bretton Woods Institutions in the XXIst Century”, *The Reform of the International Financial Architecture* (ed. by R.M. Lastra), 2000, pp. 67-90.

⁶⁷⁶ See LASTRA Rosa Maria, “Lender of Last Resort, An International Perspective”, *ICLQ*, Vol. 48, Part 2, April 1999, pp. 340-361.

⁶⁷⁷ See STIGLITZ Joseph, *Globalization and its Discontents*, 2002, pp. 13-16.

⁶⁷⁸ As to the relationship between the IMF and the “external debt”, see GIANVITI François, “The International Monetary Fund and External Debt”, *RCADI*, Tome 215, 1989-III, pp. 209-286 [hereinafter: GIANVITI François, “IMF and External Debt”, *RCADI*, Tome 215, 1989-III].

Through lending money to debtor States (money which afterwards serves right away to repay creditors) and by acting as a factual reference for the whole exercise of debt restructurings (its “seal of approval” for the adjustment policies of its members, and the decision on the availability of its resources influence all stages of the restructuring process), the IMF undeniably plays a key role at the recovering of State external debts. However, as a matter of fact, we need to get a more accurate picture of it, that is to say, we need to know whether or not that role, as implemented in discharge of its general duties of promoting exchange stability and maintaining orderly exchange arrangements in the international financial and monetary system, is one of an “agent facilitating debt collection” (insofar as it is apparent that the IMF is not properly speaking a “debt collector” but only an intervening structure facilitating sovereign debt settlements, and thereby debt collection), or an international organization promoting debt collection through new regulatory frameworks that allow the emergence of new methods of debt recovery (*e.g.*, a sovereign debt restructuring mechanism for collecting State debts through the liquidation of its assets). Our view is that the IMF plays both roles: the existing one of “agent facilitating debt collection”⁶⁷⁹ and the newly proposed one of “agent promoting debt collection through new methods of recovery”.

Bearing in mind the existence, at international relations, of various methods of recovery implemented throughout history to settle State external debts, and, at public international law, of concrete law relating to the recovery of State external debts arising from international arbitral and judicial case law, in this section we show that the recent IMF’s proposal for the establishment of a sovereign debt restructuring mechanism, insofar as it is a projected new method of recovery, is inconsistent with the development of a balanced law of recovery of State debts. We argue that, if approved, the result will be the creation of an antithesis of a rational law, because its proposed mechanism works towards ensuring a permanent liquidation of the very limited debtor States’ assets, with the ensuing adverse consequences for States’ economic autonomy and sovereignty, rather than promoting the attainment of a coherent law striving towards a compromise

⁶⁷⁹ “The IMF may not have become the bill collector of the G-7, but it clearly worked hard (though not always successfully) to make sure that G-7 lenders got repaid.” See STIGLITZ Joseph, *op. cit.*, p. 208.

between increased borrowing facilities for debtor States and better security for their creditors, without loss of States' economic autonomy and sovereignty.

a) The post-war financial and monetary legal framework brought up by the Bretton Woods institutions. Here, we seek to situate our subject with respect to the most recent developments in international organization, and regulation, by contrasting, in a succinct manner, the international regulatory regime promoted by the League of Nations with the types of international regulatory regimes set up through the Bretton Woods institutions, especially the IMF, since their establishment by the victorious countries after World War II.

As noted earlier (*supra*, in Chapter 2, section A), cooperative and regulatory work in the international financial and monetary fields did not start with the institution of the Bretton Woods “system”.⁶⁸⁰ A very important amount of cooperative and regulatory efforts in these economic fields was already accomplished by the League of Nations' Economic and Financial Committees. That the victorious countries who organized the post-World War II economic era (mainly, the United States and the United Kingdom) did not take these experiences into consideration is another matter (which is probably due to the fact that the United States was not a member of the League of Nations, and therefore was not concerned with taking into account its experience).⁶⁸¹ But, with regard to the development of international financial and monetary law it is important, because prospective works of the law in these fields could be misdirected by not taking into

680 A United States Treasury report, written in 1968, clarified the use of the word *system*: “In a strict sense, the international monetary system is not a system at all. It is a series of arrangements, procedures, customs and institutions which have evolved over time and which are laced together by a network of formal and informal agreements. It has been partially codified as to objectives, principles and procedures by the Articles of Agreement of the International Monetary Fund (IMF). It has been aided by international cooperation on the part of important central banks of the world—most notably through the so-called ‘swap network’. It works partly through correspondent relationships of the major commercial banks of the world. Money and capital markets in the United States and Europe are important factors in making the system work. In recent years it has been strengthened by a series of consultative arrangements undertaken under the auspices of the Organization for Economic Cooperation and Development (OECD). The system rests on five pillars:

— a dollar convertible into gold at \$35 per ounce; — other major currencies convertible into dollars at stated rates of exchange—under IMF rules they may vary plus or minus 1 percent from parity; — adequate international reserves and credit facilities designed to support these relationships; — a general presumption that a country will over time be in equilibrium in its international position—that surpluses will be offset by deficits on the average; — in seeking to adjust from deficit to surplus, or *vice versa*, a country will take into account the consequences of its actions on the world community.” See *Digest of International Law* (dir. by M.M. Whiteman), Vol. 14, 1970, p. 512.

account prior invaluable experiences like that of the League of Nations and by stating, or giving the impression, that international cooperation in these fields started with the creation of the IMF. Indeed, the origins of international economic cooperation can be traced back to 1865, with the establishment of the *Union monétaire internationale des pays latins* comprising Belgium, France, Italy and Switzerland, as well as Greece who joined in 1868.⁶⁸²

As stated, the League of Nations' work includes invaluable efforts and experiences of "collective action" on State financial reconstruction generally, as well as on State loans and their repayment such as the various State loan operations issued under its auspices. Equally significant were the collective efforts in the context of dispute resolution of international economic questions, which included a proposal for the establishment of an International Loans Tribunal. Most important, however, is the fact that, during the League of Nations' period, a new form of foreign financial intervention surfaced in order to protect not solely the interests of private creditors, but also to ensure most important and higher goals: the financial rehabilitation of the war-impooverished countries, the reorganization of their economic life, and the stabilization of their currencies, which took place without encroaching upon the economic autonomy, dignity and independence of the financially assisted countries, that is, without having recourse to the use of diplomatic economic coercion. In contrast, the Fund's work, insofar as we can judge from the results of its actions (which, in the world of reality, is the real barometer of success or failure) is far away from working under the same perspective. By these reasons, the League of Nations' proposals, in the fields of finance and money, were far in advance more substantial and noninterventionist than the current schemes submitted by the IMF to its members and to the international community.

Thus, when the organizers of the post-World War II era formulated the new economic system, they decided to give a central role to the IMF. They negotiated its Articles of Agreement at the Bretton Woods Conference in July 1944, which entered into force on December 27, 1945. Subsequently, they modified it through three amendments: the First, which became effective on July 28, 1969, was designed primarily to supplement

681 Fortunately, that was not the case for the International Court of Justice (ICJ), which could avail itself of the experience of its predecessor, the Permanent Court of International Justice (PCIJ).

existing reserve assets called the special drawing rights (SDR); the Second, which entered into effect on April 1, 1978, was a fundamental rewriting of the Articles after the breakdown of the “par value” or “gold exchange” system; and the Third, which took place on November 11, 1992, provided for quota increases and the suspension of a member’s voting rights, by a 70 percent majority, if the member has been declared ineligible to use the IMF’s general resources and persists in its failure to fulfil its obligations under the Articles.

According to the old system in place before the Second Amendment, par values were the initial par value for each currency established in agreement with the IMF. They were expressed in terms of gold, which was the common denominator of the system. Under this “system” a member of the IMF could change the par value of its currency after consulting with the Fund, which normally concurred after having been satisfied that the change was “necessary to correct a fundamental disequilibrium”. Sometimes the IMF had to approve temporary multiple currency practices, other times it allowed the floating of a currency to facilitate transition to a new par value, but members could not abandon their par values. In so doing the IMF was promoting the stability of exchange rates, one of its primary purposes (Article I of the IMF’s Articles of Agreement).

Before the Second Amendment came, the law of the IMF (then the law of the par value system) was still “firm law”. “For example, only a member was authorized to propose a change in the par value of its currency. The Fund could not make a proposal, and could not compel a member to make one, even though the member was in fundamental disequilibrium.”⁶⁸³ The obligation to maintain fixed exchange rates on the basis of parities was thus a firm international legal obligation through which stability was achieved. But the “system” as a whole did not inspire respect: some devaluations took place, without the consent of the IMF, and some countries let their currencies “float” outside the permitted margins.⁶⁸⁴ Thus the system collapsed because the whole system was dependent on the compliance, by the United States, with the obligation that it

⁶⁸² See CALVO Carlos, *Le droit international théorique et pratique*, Tome III, 1888, pp. 105-112. See also DE MARTENS F., *Traité de droit international*, Tome II, 1886, pp. 382-384.

⁶⁸³ See GOLD Joseph, “Strengthening the Soft International Law of Exchange Arrangements”, *AJIL*, Vol. 77, July 1983, No. 3, p. 446 [hereinafter: GOLD Joseph, “Soft Law of Exchange Arrangements”, *AJIL*, Vol. 77, July 1983, No. 3].

undertook to purchase and sale gold for its own currency (the United States was the only member that undertook this obligation, which placed them at the centre of the par value system).⁶⁸⁵ By that time a number of critics argued that the rigidity of the par value “contributed to the rigidity of the par value system”, and that stability could not be achieved through such rigidity.⁶⁸⁶ The new system of the Second Amendment then legalized the practice of floating currencies by recognizing the freedom of the countries to adopt the exchange arrangements of their choice.

Since the Second Amendment, the law of the IMF has changed from “firm and clear law” to *soft law* rules. This is evidenced by the malleability of the obligations set forth in the modified Article IV, which “are defined in terms of the objectives to be pursued rather than in terms of actions to be taken or avoided; they are broadly but loosely formulated, [...] the loose formulation of Article IV—with a proliferation of adjectives such as ‘sound’, ‘orderly’, or ‘reasonable,’ all of which denote subjective criteria—also gives ample room to the Fund, when implementing this provision, to define the obligations of its members either in general terms or on a case-by-case basis. *In some countries, had it being part of their national legislation, Article IV might have failed to pass the constitutional requirement of sufficient precision to ensure predictability of result and uniform treatment.*”⁶⁸⁷

The *soft law* character of the obligations contained in Article IV has otherwise been illustrated by the same author: “The general idea was that, instead of either requiring the maintenance of fixed exchange rates or giving full freedom to members, there would be a general obligation for all members ‘to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates.’ Therefore, instead of the former obligation to achieve a result, there is now an obligation to cooperate toward common goals. [...] In order to give more concrete substance to this rather vague obligation, Article IV lists specific obligations, which do

684 See GIANVITI François, “Evolving Role of the IMF”, *Int'l Lawyer*, Vol. 35, No. 4, Winter 2001, p. 1378.

685 The par value system collapsed in August 15, 1971, when the United States announced the end of the convertibility of foreign officials holdings of dollars with gold or other reserve assets, and that they would not take steps to confine exchange transactions involving dollars within defined margins. See GOLD Joseph, “Soft Law of Exchange Arrangements”, *AJIL*, Vol. 77, July 1983, No. 3, p. 447.

686 *Ibid.*, p. 446.

not exhaust the scope of the obligation to cooperate but provide guidance to the Fund and its members in the implementation of Article IV. Moreover, in order to make these obligations effective, the Fund was given the mandate to oversee the compliance of each member with these obligations.”⁶⁸⁸ As we can see, in addition to the obligation to cooperate, the Fund was given the peculiar mandate to oversee compliance, by its members, of obligations which are loosely defined in order to give itself ample room of manoeuvre to define and apply them *a posteriori* either in general terms or on a case-by-case basis.

This ambiguous regulatory approach, by the IMF, which started with the approval of its Second Amendment,⁶⁸⁹ continues today. However, as a consequence of this adoption, the IMF has dissociated itself from all possibility of promoting genuinely: (a) the instauration of the rule of law in the international financial and monetary sectors of the world economy; and (b) the settlement, by arbitral or judicial means, of international financial and monetary disputes (whose outcomes are, by nature, meant to generate binding and enforceable law). This, in a world economy in critical need of legal certainty, predictability, and stability for the international business operations, is completely paradoxical. Promoting vague regulatory approaches at law-making necessarily leads to a subjectivity in applying the law, and allows for solutions on the basis of the pre-eminence of power politics (which in turn makes international institutions to function as instrumentalities of the foreign policies of their most powerful members). In fact, it is the “soft law” character of the IMF law which has to some extent contributed to the failure of the system (a failure to the degree that the IMF is far away from having achieved its primary purposes as recognized by Articles I and IV of its Articles of Agreement: “*high* levels of employment and *real* income” “development of the productive resources of *all* members”, “economic growth with reasonable *price stability*”). [emphasis added] It is submitted, therefore, that one way of overcoming these deficiencies is the adoption and promotion of “firm but reliable law”.

⁶⁸⁷ See GIANVITI François, “Evolving Role of the IMF”, *Int'l Lawyer*, Vol. 35, No. 4, Winter 2001, p. 1374 [emphasis added].

⁶⁸⁸ See GIANVITI François, “Evolving Role of the IMF”, *Int'l Lawyer*, Vol. 35, No. 4, Winter 2001, p. 1379. On the *soft law* character of the obligations contained in Article IV and some other soft provisions, see GOLD Joseph, “Soft Law of Exchange Arrangements”, *AJIL*, Vol. 77, July 1983, No. 3, pp. 452-458.

Notwithstanding its inability to take lessons from the League of Nations, and that important problems have emerged following its adoption of *soft law* techniques for its processes of law creation and law application, the IMF has projected to add to its many tasks the one of “agent promoting debt collection through a new method of recovery”. This task, which is *prima facie* incompatible with the function of any (by definition, neutral) international organization, is in the case of the IMF more incongruent since it is obvious that the IMF is another major creditor (and acts as such) for many of its member countries.

b) Debt collection through State liquidation: the IMF’s proposed sovereign debt restructuring mechanism (SDRM). Here, we will discuss briefly the main trends of the IMF’s proposal to establish, via international conventional law, a “sovereign debt restructuring mechanism”, to the extent that it seems that this is a proposed new method of debt collection in international relations. In so doing a limitation must be taken into account: as of March 2003 (the date of conclusion of our research), such a proposal was still undergoing a process of consultation in search of “a consensus on the need for—and the design of—an SDRM”. Therefore, the analysis here will necessarily be limited to the “original proposal” of November 2001,⁶⁹⁰ and the “recent proposal” of November 2002,⁶⁹¹ the latter preceding a forthcoming “concrete IMF official proposal”, expected to be issued in April 2003.

As originally proposed, in November 2001, the SDRM was purportedly to be a new approach to sovereign debt restructuring.⁶⁹² It is asserted that the SDRM has emerged as a result of the important weakness that represents the “lack of adequate incentives to ensure the timely and orderly restructuring of unsustainable debts,” and that, its mechanism aims, *inter alia*: “to help preserve asset values and protect creditors’ rights,

689 On how it started, see GOLD Joseph, *ibid.*, p. 4.

690 KRUEGER Anne O., *A New Approach to Sovereign Debt Restructuring*, IMF, 2002, 40 p.

691 IMF, *The Design of the Sovereign Debt Restructuring Mechanism—Further Considerations*, November 27, 2002, 76 p.

692 However, it is not new in the doctrine of international law on the “external debt”. See, in particular: MILLER Brett H., “Sovereign Bankruptcy: Examining the United States Bankruptcy System as a Forum for Sovereign Debtors”, *L. & Pol’y Int’l Bus.*, Vol. 22, No. 1, 1991, pp. 107-131; ROSEN Leonard M., “International Reorganizations: The Prospects for Success”, *Default and Rescheduling, Corporate and Sovereign Borrowers in Difficulty* (ed. by D. Suratgar), 1984, pp. 41-47; and SURATGAR David, “The International Financial System and the Management of the International Debt Crisis”, *ibid.*, p. 155; *ibid.*, “The Legal Framework for Multinational Bankruptcies and Workouts”, *ibid.*, pp. 1-11.

while paving the way toward an agreement that helps the debtor return to viability and growth”; “to create incentives for a debtor with unsustainable debts to approach its creditors promptly—and preferably before it interrupts its payments”; “to avoid creating incentives for countries with unsustainable debts to suspend payments rather than make necessary adjustments to their economic policies”; “to render more predictable and less damaging the restructuring of debts”.⁶⁹³

Similarly, in view of the recent increase in the range of creditors resulting from the development of new “sources of sovereign financing”, and the ensuing “greater diversity of claims and interests” (which has made it “more difficult to secure collective action from creditors”, and which “has reinforced the tendency for debtors to delay restructuring until the last possible moment, increasing the likelihood that the process will be associated with substantial uncertainty and loss of asset values, to the detriment of the debtors and creditors alike”) under the SDRM, it was submitted that there exists “a growing consensus that the present process for restructuring the debts of a sovereign is more prolonged, more unpredictable and more damaging to the country and its creditors than would be desirable.”⁶⁹⁴ In the middle of this rather dense and ambivalent, but resounding *soft* language (characteristic of the IMF), the SDRM original proposal nevertheless made it clear that its objective was “to facilitate the orderly, predictable, and rapid restructuring of unsustainable sovereign debt, while protecting asset values and creditor’s rights.”⁶⁹⁵

To attain this objective, under the SDRM original proposal it was extracted certain features from domestic insolvency and corporate rehabilitation laws that could serve for a discussion of the design of a SDRM. These were the following: “(i) stay on creditor enforcement during the restructuring negotiations; (ii) measures that protect creditor interests during the period of stay; (iii) mechanisms that facilitate the provisions of new financing during the proceedings; and (iv) a provision that binds all relevant creditors to an agreement that has been accepted by a qualified majority.”

693 See KRUEGER Anne O., *op. cit.*, p. 2.

694 *Ibid.*, p. 1.

695 *Ibid.*, p. 4.

However, it was observed that the applicability of the corporate model to the sovereign context was limited because: (1) “corporate reorganization provisions operate within a context of the potential liquidation of the debtor, which could not apply to a sovereign state”; (2) “most modern laws allow for the creditors to commence proceedings unilaterally so as to acquire the company through a reorganization plan that includes a debt-for-equity conversion that, in some cases, may extinguish all ownership interests of the incumbent shareholders. [...] such a feature could not be applied to a sovereign state”; and (3) “it is difficult to envisage how the constraints that are applied to the activities of a corporate debtor to safeguard the interests of creditors during the proceedings could be made legally binding on a sovereign and enforced”⁶⁹⁶

It was also observed that the applicability of Chapter 9 of the United States Bankruptcy Code, which applies to municipalities, could serve to the sovereign context inasmuch as sovereigns, like municipalities, are entities that carry out governmental functions, and that both “cannot be converted into a liquidation case.” In this regard, features like “only the municipality (not its creditors) may commence proceedings and propose a reorganization plan”, and that “the bankruptcy court may not interfere with any of the municipality’s political or governmental powers, property or revenue or the municipality’s use or enjoyment of any income-producing property”, could be retained.⁶⁹⁷

Thus, by adapting these models, under the SDRM original proposal it was indicated that the “core features” of its mechanism could include the following:

- (i) a majority restructuring provision, which is “a mechanism that would enable the affirmative vote of a qualified majority of creditors to bind a dissenting minority to the terms of a restructuring agreement would be the most important element of the new restructuring agreement”;
- (ii) a stay on creditor enforcement, which is “a temporary stay on creditor litigation after a suspension of payments but before a restructuring agreement is reached would support the effective operation of the majority restructuring provision”;

⁶⁹⁶ *Ibid.*, pp. 11-12.

⁶⁹⁷ *Ibid.*, pp. 12-13.

- (iii) safeguards protecting creditor interests during the period of stay, which will require sovereign debtors not to make payments to non-priority creditors and to conduct policies that preserve asset values; and
- (iv) a priority financing mechanism allowing the facilitation of new money from private creditors during the period of stay, but on the condition that the new financing “would be senior to all pre-existing private indebtedness”.⁶⁹⁸

Another important feature was that it would include the treatment of “domestic debt”, because of the “tendency of residents and non-residents to hold similar instruments” and of inter-creditor equity reasons.⁶⁹⁹

Moreover, under the SDRM original proposal it was indicated that, if implemented, it would assist the IMF in its task of helping to maintain its members’ balance-of-payments viability, which could more easily be attained. By this means, the IMF would also safeguard its resources, and avert future crises, thereby enhancing stability of the international monetary system.⁷⁰⁰ However, in light of the concerns about its impartiality, it was proposed that its involvement in this context would be “limited”. Under an alternative approach “decisions under the SDRM would be left to the debtor and the majority of its creditors. Accordingly, the IMF would have no power to limit the enforcement of creditor rights. Rather, [it] would rely on its existing financial powers to create the incentives for the relevant parties to use the mechanism appropriately.”⁷⁰¹

The SDRM original proposal also contained a clear request for “the establishment of a single international judicial entity [akin to a bankruptcy court] would have exclusive jurisdiction over all disputes that would arise between the debtor and its domestic and international creditors and among such creditors.”⁷⁰² The rationale for this request was that, if one relies exclusively on domestic legislation, for SDRM implementation, and not in its establishment by means of a “statutory framework” (*i.e.*, via an amendment to the IMF’s Articles of Agreement), the process for dispute resolution and claims verification would be “fragmented”, with “different claims being subject to the

698 *Ibid.*, pp. 14-17.

699 *Ibid.*, p. 18.

700 *Ibid.*, p. 21.

701 *Ibid.*, p. 24.

jurisdiction of different courts”.⁷⁰³ This new independent judicial organ could be established by the text of the amendment to the IMF’s Articles of Agreement, and would provide that its decisions “would not be subject to review by any of the IMF’s other organs and that, more generally, the judges appointed to this organ would not be subject to the interference or influence of the staff and management of the IMF, the Executive Board or any IMF member. [...] It should be emphasized that the role of this judicial organ—wherever it is located—would be a limited one. Specifically, the organ would have no authority to challenge decisions made by the Executive Board regarding, *inter alia*, the adequacy of a member’s policies or the sustainability of the member’s debt.”⁷⁰⁴

With regard to exchange controls, under the SDRM original proposal it was sought to limit the timing and scope of the controls that may be imposed on a sovereign debtor when it is confronted to a financial crisis, in circumstances linked to a capital flight, or a sudden depletion of its foreign exchange reserves. As regards timing, the question whether it would be appropriate to impose controls at an early stage of capital flight, or wait until resources are exhausted, should be considered. As regards the scope of the controls, in circumstances where the member has the institutional capacity to implement exchange controls, it was proposed that “it may be possible to arrest capital flight without an interruption in debt service and other contractual obligations”, and where it is necessary to interrupt debt service, it was suggested to put in place a framework for the eventual normalization of creditor relations by non-sovereign debtors, which would facilitate an “out-of-court mechanism operating in the shadow of domestic bankruptcy”, and a “specification of the minimum terms under which foreign exchange would be available to service restructured debts”, in order to minimize the long-term impact or corporations’ market access. And where litigation arises as a result of the imposition of such controls it suggested that, “[t]he legal protection that may *not* be provided by the controls [under the SDRM] would be protection against the enforcement of claims by non-residents with respect to a resident debtor’s assets that are located overseas. It is this latter category of protection [for creditors] that an SDRM could be designed to provide.” In this context, “the legal authority to approve a temporary stay [...] would

702 *Ibid.*, p. 34.

703 *Ibid.*

704 *Ibid.*, p. 35.

need to reside with the IMF.” In short, the SDRM original proposal leans in the direction of limiting further the sovereign debtors’ autonomy to impose exchange controls by defining (always in *soft law* language) when and how controls may be exercised under the SDRM.⁷⁰⁵

As of November 2002, the IMF issued another paper (the SDRM recent proposal),⁷⁰⁶ which introduced some important changes in relation to the original proposal. The new IMF paper re-stated briefly the rationale for the SDRM:⁷⁰⁷

— the “extraordinary lengths to avoid a restructuring before finally recognizing the need for a debt adjustment” (delays “magnify the costs, both in terms of losses in reserves and, more generally, in a decline in economic output”);

— the “interests of most creditors are also damaged by these delays” (the value of their claims would be better preserved if the debtor acted at an early stage, thereby helping to preserve the economic value of financial and non-financial corporations and the capacity of the economy to generate tax revenue. Asset values would also be better preserved if uncertainty over recovery values were to be secured”);

— “[c]ollective action difficulties, which result from incentives for individual creditors to hold out in the hope of obtaining more favourable terms, complicate the task of achieving broad participation in restructurings that may serve the interests of both the debtor and creditors as a group (by the same token, difficulties in achieving adequate inter-creditor equity may also inhibit creditors from accepting proposed restructurings, thereby prolonging the process. In some respects, collective action difficulties may be most acute prior to a default, where individual investors may decide not to participate in a restructuring in the hope of continuing to receive payments in line with the original terms of their claims”). For these reasons, it is proposed that the SDRM could constitute “a central element of a broader crisis resolution strategy.”

Summarizing: (1) delays in entering into a restructuring process are harmful to the interests of creditors; (2) there has emerged a *status quo*-disturbing factor: some

705 *Ibid.*, pp. 35-38.

706 IMF, *The Design of the Sovereign Debt Restructuring Mechanism—Further Considerations*, November 27, 2002, 76 p.

707 *Ibid.*, pp. 4-5.

individual creditors (mainly, funds of investment) resist to engage in collective actions with the other major creditors (*e.g.*, leading banks and other major investors) to restructure debt, because they have opted to sue for a money judgment and have shown to be able to enforce it, to the detriment of the creditors that have participated in the restructuring process (a detriment insofar as the “new money” provided does not come back to these primary creditors or investors, but is intercepted, for money judgment execution, in the mid-way by rapacious individual investors); and (3) these private creditors have become increasingly numerous, anonymous and difficult to coordinate for “collective action” purposes. This problem is exacerbated by the variety of debt instruments involved and the range of legal jurisdictions in which sovereign debt is issued.

The SDRM recent proposal also identified a number of “general principles” that could help guide the design of the mechanism. These are:⁷⁰⁸

- the mechanism should only be used to restructure debt that is judged to be unsustainable (it should neither increase the likelihood of restructuring nor encourage defaults);
- the mechanism should be designed to catalyse a rapid restructuring;
- interference with contractual relations should be limited to those measures that are needed to resolve the most important collective action problems (the merits of including any other measure that would interfere with contractual relations must be assessed in terms of (i) whether it resolves a critical collective action problem and (ii) whether it does so in a manner that minimizes interference with contractual rights and obligations);
- the framework should be designed in a manner that promotes greater transparency in the restructuring process (creditors should be enabled to have adequate access to information regarding the debtor’s general situation, including its overall debt and treatment of its creditors that may not be subject to the mechanism);
- the mechanism should encourage early and active creditor participation during the restructuring process (it should provide for a creditor vote on the terms of the restructuring, and include the formation of creditors’ committees);

708 *Ibid.*, pp. 6-8.

- the mechanism should not interfere with the sovereignty of the debtors, the mechanism could only be activated at the sovereign’s request;
- the framework should establish incentives for a negotiation, not a detailed blueprint for a restructuring (difficult substantive and procedural questions should be resolved through the give-and-take of the negotiations);
- the framework needs to be sufficiently flexible, and simple, to accommodate the operation and evolution of capital markets;
- since the framework is intended to fill a gap within the existing financial architecture, it should not displace existing statutory frameworks (for instance, it should be used to restructure the claims of public entities that are already subject to the domestic insolvency systems);
- the integrity of the decision making process under the mechanism should be safeguarded by an efficient and impartial dispute resolution process; and
- the formal role of the IMF under the SDRM should be limited (the Fund should catalyse early and effective dialogue between the debtor and creditors, and, to the extent that it can play a useful role this should be established through the use of its existing financial and surveillance powers, its existing organs should not be given any significant new legal powers).

Regarding the “core provision” in the SDRM original proposal for a stay on the enforcement of creditor’s rights, the SDRM recent proposal contains a new provision which reads as follows: “Activation would not automatically trigger any suspension of creditor rights. There would be no generalized stay on enforcement and no suspension of contractual provisions (including provisions relating to the accrual of interest).” The new provision does not preclude litigation, and individual creditors continue to be free to sue to recover through litigation. But the incentive to do so will be limited, because the SDRM recent proposal requires that “amounts recovered by a creditor through litigation would be deducted from its residual claim under that agreement in a manner that neutralizes any benefits of such litigation *vis-à-vis* other creditors.”⁷⁰⁹ The reasons given for such a change was that it had generated considerable controversy. For instance, the views of “market participants is that a generalized stay would constitute a significant erosion of contractual rights in an *environment where contractual rights*

⁷⁰⁹ *Ibid.*, p. 9.

against a sovereign are already quite fragile. While many of these participants have acknowledged that subjecting the activation of a stay to an affirmative vote of a qualified majority of creditors would be a preferable alternative, they are of the view that any generalized stay on enforcement would still be an unnecessary interference of contractual claims, particularly *given the limited history of sovereign litigation.*⁷¹⁰

Notwithstanding the various reasons given to justify that change, it will be noted, on the one hand, that, if the “core provision” for a stay on creditor enforcement during the restructuring negotiations is deleted (as, at present, it is the case), incentives for a debtor State with unsustainable debts to activate the SDRM are reduced substantially. So far, under domestic insolvency and corporate rehabilitation laws, a stay on creditor enforcement and a “standstill” (a temporary interruption on payments) seem to be the most important incentives for debtors to reorganize and develop their businesses more effectively (the filing of a petition in bankruptcy operates as an automatic stay against a variety of acts that could be taken against the debtor or its property). Without that possibility for a breathing space to reorganize, the bankruptcy system, which is one of “liquidation or survival”, turns into a “liquidation case”, and the disposal of debtors’ assets follows through the appointment of a trustee in bankruptcy by the bankruptcy court. For that reason, under domestic legal systems—which are by all accounts “advanced” legal systems—just as the law provides for the protection of the creditor’s interests, during the period of stay, the same law provides for a correlated protection for the debtors, who are also its concern. Under the SDRM, the deletion of this core provision seriously undermines the SDRM’s central objective of facilitating the “orderly, predictable, and rapid restructuring of unsustainable sovereign debt, while protecting asset values and creditor’s rights.” If not reconsidered, the SDRM would turn (as indeed it is already the case) close to a kind of “sovereign debtor liquidation mechanism” (SDLM), which objective would be to facilitate the “orderly, predictable, and rapid disposal of debtor States’ assets” for the benefit of their creditors.

On the other hand, removal of the “core provision” for a stay on creditor enforcement is likely to generate a situation which gives ample room for inter-creditor litigation under the SDRM (given the very limited assets of the sovereign debtors), which is contrary to

710 *Ibid.*, p. 33 [emphasis added].

its real concern of bringing “inter-creditor equity”, or some sort of equality of treatment between creditors of a same group. But, more closely seen, the removal of the “core provision” for a stay on creditor enforcement does not but to make obvious that the incentive for debtor States to restructure their debts through the SDRM (by giving them some time to reorganize their finances with a view to enable them to continue to adjust and develop their economy, and in due course to repay their creditors, while treating them equitably) was not in fact a real concern of the proposed SDRM.

With regard to the role of the IMF, as with the SDRM original proposal, the SDRM recent proposal emphasizes that the IMF role should be a limited one. However, both proposals contain provisions empowering the IMF “to make key decisions” regarding the operation of the mechanism (*e.g.*, determination that the member’s debt is unsustainable), and “to sanction abuses” such as providing false information in the context of the claims registration and verification process, providing materially incorrect information to the Sovereign Debt Dispute Resolution Forum (SDDRF) regarding debt situation, and providing false certification regarding creditor/debtor State relationships. In these cases, the IMF’s Executive Board would be given authority to determine whether a member has breached its obligations and what sanctions should apply. Other forms of abuse would be general non-cooperation or inappropriate use of the framework, as a result of actions taken by the debtor or its creditors (*e.g.*, refusal to negotiate with a creditors’ committee, refusal to provide information to creditors or refusal to engage in collaborative dialogue). “Of course, the Fund would also be able to use its financial powers to address non-cooperation, and the exercise of these powers would not need to be formally recognized under the SDRM. In circumstances where a sovereign refuses to engage in a ‘good faith’ dialogue with its creditors during the restructuring process, the Fund could withhold financing, consistent with its existing lending into arrears policy. At the same time, however, where negotiations become stalled because creditors are requesting terms that are inconsistent with the adjustment and financing parameters established under the Fund-supported program, the Fund could decide to continue to support members, notwithstanding the lack of progress in negotiations.”⁷¹¹

711 *Ibid.*, pp. 54-55.

Here, we do not need to engage in a long discussion in order to show that the role and influence of the IMF, at all stages of the SDRM, will, in fact, be unlimited (contrary to what the SDRM original and recent proposals pretend: that its involvement would be limited to help to ensure that the framework is not abused). What is surprising, however, is the fact that, despite that the IMF has adopted *soft law* techniques for its processes of law creation and law application, under the SDRM, it intends to engage in *hard law* techniques (“sanctions”) for the process of law enforcement.

Regarding the SDRM original proposal to establish an independent judicial organ (a bankruptcy court for States) through an amendment of the IMF’s Articles of Agreement for the settlement of all disputes arising from the SDRM process, the SDRM recent proposal contains a provision for the creation of a “Sovereign Debt Dispute Resolution Forum” (SDDRF). This body would be established on the basis of the following general considerations:⁷¹²

- it would have limited powers to ensure the proper conduct of the proceedings, resolve disputes, and certify that a restructuring agreement has been approved, and it may also have the power to enjoin specific enforcement actions (at the request of the debtor and upon approval of the creditors, it would be empowered to issue an order that would require a court outside the territory of the sovereign to issue a stay on specific enforcement action brought by a creditor);
- recourse to it would only be available upon the activation of the SDRM by a debtor, and for the resolution of disputes involving claims against the particular debtor that has activated the SDRM;
- it would have exclusive jurisdiction over the conduct of the SDRM process and all disputes arising from that process (between the debtor and creditors on the one hand, and amongst creditors on the other hand);
- it would be an independent organ of the IMF, because it would operate independently of the Fund’s Executive Board, Board of Governors, management and staff, and any other body or persons (in addition, the Executive Board’s power to interpret the Fund’s Articles would not apply to the SDDRF’s interpretation of those provisions of the Articles that relate to the SDRM); and

⁷¹² *Ibid.*, pp. 57, 67, 68.

— it would be accountable and transparent with regard to its operations.

As to the application of a governing law,⁷¹³ (1) on substantive issues, the SDDRF would apply either the *lex contractus* for interpretation, or the sovereign debtor's law for a dispute on issues related to that law; and (2) on procedural issues, such as claims of undue influence on certain creditors or abuse of the voting process, it would apply "its own law" (the *lex fori*, or law of the place in which a case is heard, *i.e.*, New York law, the place where the proponents of the SDRM expect to situate the SDDRF).

With regard to the legal effect of its decisions, it is proposed that they would be limited to the administration of claims and the resolution of disputes. The decisions reached in one case would not bind subsequent cases, but "to enhance predictability and order, the SDDRF could, from time-to-time, meet en banc to establish general principles of law developed from the cases before it, which successive panels would generally be expected to follow."⁷¹⁴ In any case, it should not have authority to challenge decisions of the Executive Board, including on the adequacy of a member's policies or the sustainability of the member's debt for purposes of Fund financial assistance. Finally, the process of appointment of its "members" (*i.e.*, the individuals who would be panelists) would be guided by four basic principles: independence, competence, diversity and impartiality.

The question whether it would be appropriate that a member may impose exchange controls at an earlier or later stage during the SDRM has not been addressed by the SDRM recent proposal. The SDRM recent proposal has barely mentioned that Article VIII, Section 2(b) of the IMF's Articles of Agreement "already limits the rights of private creditors to enforce certain contractual claims when they would conflict with certain legitimate interests of a member as recognized by the Articles. In many respects, the SDRM would be the analogue to Article VIII, Section 2(b): while the latter provision addressed contractual enforcement in the context of the imposition of exchange controls by a member, the former would address contractual enforcement in the context of a sovereign default. Both are designed to enhance the ability of the sovereign to resolve its external difficulties in a manner that is in the collective interest

⁷¹³ *Ibid.*, p. 68.

of the membership.”⁷¹⁵ This means that the IMF will continue to deal with exchange control problems as a practical matter and on an *ad hoc* basis, by approving them only in connection with a rescheduling.

Overall, both IMF submissions can be viewed as amounting to a proposal for the establishment of an “IMF set of rules on State bankruptcy”. This, properly speaking, is a distinct subject of a law governing the rational recovery of State external debts. The difference may be illustrated by having recourse to the law of these subjects at domestic legal systems. In domestic legal systems both are subjected to different legal rules: while the latter is a system of rules governing the right of action, judgment and execution, and receipt of the monetary debt, by summary or ordinary proceedings in courts of justice, the former is a system of rules governing the debtors’ survival, or its liquidation after an agreement on the distribution of their assets has been reached, by their creditors, or by a bankruptcy court. Both methods share in common that, in the end, both seek to regulate and settle the collection of defaulted or non-performed monetary obligations arising from contract. The difference lies in the context: while the one takes place in a context of a simple default, the other takes place in a context of insolvency or general default, but both are methods of debt settlement. Therefore, at the international plane, the proposed SDRM can, in law and in practice, fairly be viewed as a new method of collection of State external debts (which also aims at becoming a new method for the collection of State “domestic” debts), and the IMF as an “agent promoting debt collection” through this new method of recovery invented and promoted by itself.

This, in turn, raises issues which have not been thoroughly (or at all) discussed: Is that (the protection of the interests of private lenders alone) a proper task for a public international financial and monetary institution? How exactly would the functioning of the SDRM achieve a benefit that really represents the “collective interest of the membership”? How can an institution which has failed to achieve all of its own “constitutional” purposes guarantee that the operation of the SDRM will not be abused

714 *Ibid.*

715 *Ibid.*, p. 71.

by creditors?⁷¹⁶ How can an institution which has proved, from the 1980's, to operate with "ideological fervor" guarantee that vested interests would not be created, as a result of the use of the SDRM, that would lead, at a later stage (*i.e.*, *post* SDRM process), for instance, to the imposition of foreign financial controls by creditors?

The debate is open. We will only add some considerations of law and policy on State bankruptcy. Under international law, States cannot be put into a liquidation or a somewhat similar procedure without putting in danger their own continuity and existence as sovereign entities. From this it follows that maintaining unbalanced and disadvantageous features for States in the proposed SDRM will result in "a serious encroachment on the debtor's sovereignty"⁷¹⁷ and economic autonomy. In terms of policy, as long as the proposed "IMF set of rules governing State bankruptcy" conceives the problem of collecting State debt by addressing the specific concern of priority lenders (namely, solving the "common pool problem", which arises from very diverse claims to very limited assets), it is clear that the SDRM will appear more as a process of State liquidation rather than a rehabilitation process (as it was originally intended).

Finally, bearing in mind (i) the latest developments in the law of recovery of State external debts, particularly with regard to the execution and seizure of debtor States' assets under domestic laws, (ii) the approach adopted and, particularly, the work achieved by the League of Nations in the fields of finance and money, and (iii) the critical necessities of the global capital markets and of the globally-integrated world economy for legal certainty, predictability, and stability, we believe that the IMF, by trying to impose a creditor-friendly bankruptcy approach, is swimming against the globalizing economic tide. For these reasons, and in light of recent developments in the field of international judicial organization inside the UN system, States and the international community should seriously address the possibility of creating an "integrated" all encompassing dispute settlement mechanism for financial and monetary matters, such as an International Financial and Monetary Court.

⁷¹⁶ "The IMF is a major creditor, and it is dominated by the creditor countries. A bankruptcy system in which the creditor or his representative is also the bankruptcy judge will never be accepted as fair." See STIGLITZ Joseph, *op. cit.*, p. 237.

⁷¹⁷ See GIANVITI François, "IMF and External Debt", *RCADI*, Tome 215, 1989-III, p. 242.

Chapter 4. State of Development and Legal Value of the Practice of Recovery of State External Debts

A. State of development and assessment of the main methods employed to recover State external debts

Throughout history various methods have been deployed by creditors, and their States, to recover and settle State external pecuniary debts.

We have seen that the following are the most important: diplomatic protection; the use of force or threat of its use; the control of the public finances of debtor States imposed by creditors and their States; the financial controls of the League of Nations; debt renegotiation through restructuring and rescheduling techniques and procedures; and recourse to arbitral and judicial jurisdictions. Despite the fact that it has not been approved (that is, it has not been created), by reason of the technical efforts carried out at economical, legal, political, and organizational levels, we have to add to that list the recently failed IMF proposal of sovereign debt restructuring mechanism (SDRM). In the main, these methods have sometimes been, and may be, used simultaneously, as substitutes, or one method opening the door for the use of the other, and *vice versa*.

As the use of these methods in international relations has largely been dependent on, and is still conditioned by several factors (*i.e.*, the state of organization of the international society; the means of relief at the disposal of the parties for the mitigation of their conflicts; the degree of organization of the parties such as the existence of bondholders' associations in the past, and creditors' cartels, in the form of clubs, as nowadays, or simply, the lack of debtors' cartels on the other side; and, the relatively intrinsic strength or weakness of the parties *vis-à-vis* an international system primarily based on power-politics), in this section we offer an assessment of these recovery methods taking into account the different grades of organization reached by the international society at a given period of time (debt recovery in the previous non-

organized, quasi-organized and organized international societies, and in the present globalized international society).

This factor is of particular importance because, as evidenced by the practice, it conditions the means of relief at the disposal of the parties for the mitigation of their conflicts. As they may be used alternatively, their availability, incipient development, or non-existence, at a given period of time, may generate the disappearance, accelerate their development, or simply facilitate the emergence of new methods of recovery, at another period of time (as indicated, depending of the degree of organization of international society, and of their intrinsic value). In short, these methods are inextricably interlinked.

a) Recovery methods in a non-organized international society. In a disorganized international society entirely based on States' coexistence, self-help order, and power politics, such as the one prior to World War I, States' debt repayment and debt settlement were above all a question of "honour" and/or "good faith", and its recovery, in the event of non-fulfilment, was "entirely a question of discretion and by no means a question of International Right", as put forward by Lord Palmerston.⁷¹⁸ Hence, in absence of effective arbitral and judicial means of recovery (because, at that period of time, equally absent were international conventional law, and the institutional devices on conflict solution of international organizations), diplomatic negotiation, and the use of force or threat of its use were, as a result, expected responses in international relations before the non-fulfilment of an external pecuniary obligation by a debtor State.

That practice, which at the beginning was "moderate", found substantiation in the recourse to the legal doctrine of diplomatic protection. Under this doctrine (of European origin), as originally stated by Vattel, "[w]hoever ill-treats a citizen indirectly injures the State, which must protect that citizen", but Vattel also argued that "[t]he sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection."⁷¹⁹ Dr. Luis Drago, who witnessed the ramifications of this doctrinal development in Latin America, sought to delimit it by

⁷¹⁸ PHILLIMORE Sir Robert, *op. cit.*, p. 10. [*infra*, footnote 234]

leading the opposing doctrine, under which “the public debt can not occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.”⁷²⁰

The solution came with the Second Hague Peace Conference of 1907, which brought to an end, at treaty law level, the use of force as a method of debt collection and debt settlement, save for cases in which “the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, after the arbitration, fails to submit to the award.”⁷²¹ Despite these limitations in the scope of the resulting Convention (II) Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, as adopted by the Conference, the subsequent evolution in the *jus ad bellum* banned this method of recovery at *jus cogens* level (*i.e.*, the group of peremptory norms which does not admit derogation, which includes the general prohibition of threat or use of force—Article 2(4) of the UN Charter) within the realm of general international law norms. The effect of this evolution is that the sole idea of having recourse to it as a *casus belli* for the recovery of State external pecuniary debts will at all rates be considered not only unlawful, but a serious aggression to the international community of States as a whole, and that no exemptions are permitted.

Another method characteristic of this stage of development of international society was the control of the public finances of debtor States. Likewise, in absence of effective arbitral and judicial means of recovery (in absence, as well, of related international conventional law, and international institutional devices on conflict resolution) these compulsory methods of debt recovery and debt settlement carried out (whether directly, or by indirect means) jointly by the creditors and/or their States themselves were, nonetheless, alternative responses in international relations before the non-fulfilment of the international pecuniary obligations by debtor States.

719 DE VATTEL Emeric, *op. cit.*, p. 136. [*infra*, footnote 243]

720 Note of Señor Luis M. Drago, Minister of Foreign Relations of the Argentine Republic, to the Minister of the Argentine Republic to the United States, Buenos Aires, December 29, 1902, *AJIL*, Vol. I, Supplement No. 1, January 1907, p. 4. [*infra*, footnote 257]

721 *The Hague Convention (II) of 1907*, Pamphlet No. 11, 1915, pp. 1-3. [*infra*, footnote 267]

Despite that some authors, in seeking to justify these controls, proclaimed that they were consensual (that is, voluntarily accepted by debtor States), it must be noted, however, that by reason of the manner in which they were concluded and further executed (most of the times under blockades, effective occupation or threat of occupation), we assume that they were imposed (therefore they were null and void). Probably they were consensual in form, but given that foreign controls of this kind normally encroach upon the economic autonomy, independence and political sovereignty of the concerned State (*i.e.*, the cornerstones of the international system) in reality they were imposed. These controls, which subsisted after World War I, have not been employed since then and have become obsolete. And, just as with happens with the method of the use of force, or threat of its use, the sole idea of having recourse to them would at all rates be considered illegal at public international law.

As to diplomatic protection as a method of recovery, this was, in the main, effective, but its use generated unbearable problems to the creditor/debtor State legal relationship. Apart from the fact that, by exercising diplomatic protection creditors' States clothed themselves with functions of debt collectors, or agents facilitating debt collection, this method did not show the qualities of an ideal method of recovery between materially unequal parties, because in a system primarily based on self-help and power-politics, unequal parties, holding diametrically opposed bargaining power, increase their relatively intrinsic strengths or weaknesses, respectively, thus opening the door for abuse. That was very often the case.

b) Recovery methods in a quasi-organized international society. In a semi-organized international society, such as the one corresponding to the League of Nations (or period in between the two World Wars), based not only on States' coexistence, self-help order and power-politics, but also on developing international cooperation, debt recovery and debt settlement were for the first time treated in a multilateral institutional context (namely, the League of Nations), within which some institutional devices produced officially called for the formation of international conventional law on the matter (*e.g.*, the creation of an International Loans Tribunal, via treaty law).

Among the mechanisms used by the League of Nations (in its more general task of alleviating the economies of the war-impooverished countries) was the institution of

financial controls intended to ensure the repayment of certain loans operations issued under its auspices. These controls were not exercised by the creditors and/or their governments, but by collective organs representing the interests of the creditors as well as those of the international community at large. This new type of financial control was pursued at the request of the country to be assisted, which was itself a member of the collective body in whose name and under whose authority the control was exercised. These controls were the least intrusive as possible, and respected the independence and sovereignty of the assisted States. The work of the League of Nations on the subject of State loans and financial controls, despite its intrinsic value, has not been taken into account by the subsequent multilateral institutional arrangements.

Likewise, in view of the uncertainty of the competence of municipal courts to solve disputes between the lenders and the borrower States, the League of Nations 1) officially concluded that a final solution to that problem would require an international convention embodying a code of rules which would remove such loans from the field of municipal law into that of international law; and, to that end, 2) it officially proposed the creation of an International Loans Tribunal for the settlement of legal disputes as to the rights and obligations arising from all loan contracts.

Among the provisions of the draft convention on the International Loans Tribunal, article (vii) recognized the supremacy of international law under these terms: “The Tribunal shall adjudicate on the basis of the contracts concluded and of the laws which are applicable, *provided that these are not contrary to international law, as well as on the basis of the general principles of law.*” [emphasis added] The League of Nations made an invaluable contribution on the subject of State loans, loans contracts, and dispute settlement.

As regards the other methods of debt recovery and debt settlement, in absence of effective arbitral and judicial means of recovery at international and domestic law levels, as well as international conventional law on the matter, diplomatic protection continued to be an alternative response in international relations and was resorted to on a regular basis before the non-fulfilment of an external pecuniary obligation by debtor States.

c) Recovery methods in an organized international society. After World War II, with the disappearance of the League of Nations' Economic and Financial Committees and its replacement by the Bretton Woods institutions, the collective efforts, carried out by an accepted neutral/institutional third party on the floatation of loans, implementation of programmes of financial reconstruction, and collection of State external monetary obligations, were not pursued.

In its place, some techniques of collective negotiation surfaced and were adopted by the creditors' cartels. Since 1956, restructuring and rescheduling techniques were thus used within informal mechanisms adopted by creditors in general, at the Paris and London Clubs; and, after the debt crisis of the 1980's, these mechanisms were further reinforced by the intervention of the IMF, which became involved as a third party player in the maintenance of these politically-based mechanisms of debt collection and debt settlement.

As regards to other alternative methods, in absence of effective international arbitral and judicial means of recovery, and of international conventional law on the matter, recourse to diplomatic protection apparently decreased (or it was used in a more discrete way) as a result of the increase to recourse to these new techniques and mechanisms.

As to recourse to domestic courts, contrary to what is still frequently asserted (in general, that sovereign debt litigation is almost inexistent), they were resorted to on a regular basis in New York, especially following the 1982 international debt crisis. Hence, from the 1980's the recovery of State external monetary debts by judicial means at municipal law showed new trends: (1) an increase in sovereign debt litigation in the jurisdiction of New York resulting from domestic law interferences in the form of currency measures in debtor States (themselves a result of international debt crisis), and the consequent choice of New York law in nearly all international loan contracts; (2) emergence of new judicial doctrines and theories at domestic law level in creditor countries; and, (3) most notably, towards the beginning of the next international society period, domestic courts in creditors countries have cleared the way to levy execution on States' assets.

Hence, during this period (based more on enhanced international cooperation than on self-help), which started with the creation of the Bretton Woods institutions, debt recovery and debt settlement undertook *soft law* forms at the international plane with the creation of the new politically-based techniques and mechanisms, while at the domestic law level it has taken a *hard law* form in the main creditors' countries jurisdictions, as it can be illustrated with the recent possibility of execution and seizure of debtor States' assets.

d) Recovery methods in a globalized international society. In an international society, so far, partially based on power-politics and on enhanced international cooperation between States, and partially based on a more strict application of the rule of law (thus far, only for certain *de jure*-integrated economic sectors and activities of the global economy, such as trade and trade-related matters, since 1995), among the various methods of recovery of State external monetary obligations, judicial recovery seems to have attained the stage of enforceability, *i.e.*, the stage of compulsory execution, but to date this is true only with respect to debt recovery before domestic courts in creditor countries.

This development suggests that something peculiar has occurred at this stage of development of international society with regard to the evolution of the law of the recovery of State external monetary obligations. This may be explained as follows: as a result of the globalization of secondary markets of State external monetary obligations, and the possibilities created (so far, in New York) for summary execution of these traded obligations in the domestic jurisdictions of creditor countries, the sophisticated techniques of restructuring and rescheduling, and their settlement procedures, have been upset. This in turn has upset the *status quo* (exemplified by the "vicious circle" of lending "new money" that serves to repay lenders' own existing claims) prevalent since the 1980's, after the international debt crisis, in the field of international financial and monetary relations, especially at the level of inter-creditor relations where traditional creditors (large banks) are now disturbed by new "rapacious" small investment funds.

Then, in absence of effective international arbitral and judicial means of recovery and settlement, and of international conventional law on the matter, some international institutional devices on conflict resolution have tried to emerge as a response to the non-

fulfilment of certain external pecuniary obligations by debtor States provoked by the deviation of funds (resulting from the enforcement of money judgments), that were programmed to the repayment of old debts to the same creditors after a restructuring agreement. These were the cases of devices such as the sovereign debt restructuring mechanism (SDRM) and the sovereign debt dispute resolution forum (SDDRF), put forward, unsuccessfully, by the IMF as a response to the present developments in international economic relations (clearly advancing the sectorial interest of the traditional group of creditors).

With regard to the other alternative methods, in absence of effective international arbitral and judicial means of recovery, and of failure of the proposed State bankruptcy tribunal (*i.e.*, the IMF's SDDRF), diplomatic pressure for debt collection and/or debt settlement continues to play an effective role. A recent illustration of diplomatic pressure in the field of State external debts is the much publicised United States' intervention on behalf of occupied-Iraq, where former secretary of State, James Baker, has recently obtained the assurances of the main creditors (*inter alia*, France, Germany, Saudi Arabia) that the Iraqi debt will be substantially reduced.

In general, the current state of affairs raises another set of questions; most notably: Why recourse to international arbitral tribunals and international judicial jurisdictions on the recovery of States external debts seems to be discouraged, while recourse to national courts of creditor countries, and the use of the other alternative methods of recovery (especially those politically-based), are privileged? Why recourse to international arbitral tribunals and international judicial jurisdictions on States external debt recovery is neglected, whereas developments taking place in other fields of international economic law (*e.g.*, international trade and trade-related matters) suggests that the use of international dispute settlement procedures can be very effective and beneficial for both creditors and debtor States?

This state of affairs is quite more surprising if the following additional presumptions are considered:

- 1) that, to an advanced stage of development of international society corresponds a highly developed international dispute settlement system;

2) that, to an integrated sector of economic activity corresponds an equally integrated dispute settlement machinery;

3) that, by reason of the potential role of an advanced dispute settlement mechanism in setting global standards of lawfulness in relation to the repayment of State debts and other State external pecuniary obligations, setting it up may benefit not only creditors and debtor States, but also the globalized international society; and, last but not least

4) that, the emergence of a dispute settlement mechanism in the fields of international finance and money would contribute to upgrade our partially rules-based international society into one fully based on the rule of law (which means, proscribing, gradually, discretionality and power-politics from the whole range of international economic activities).

B. Recourse to arbitral tribunals and judicial jurisdictions: problems, recent developments, and state of evolution

Having examined, the general aspects, complementarities and interactions between these means of recovery of State external pecuniary debts; having shown that, the state of organization of international society is the main factor conditioning the means of relief at the disposal of the parties for the mitigation of their conflicts; and, that the present state of affairs is far away from being satisfactory for the parties in a globalized international system, we now turn to the study of the specific trends undergone by recourse to arbitral and judicial means, the real subject-matter of our focus.

Here the classical distinction between recourse to international arbitral and judicial jurisdictions, and recourse to domestic courts, will not be made notwithstanding that debt recovery has evolved simultaneously in municipal and international jurisdictions, and despite that they have progressively developed somewhat different types of remedies for the mitigation of conflicts (in this regard, it will be noted that recourse to domestic courts has evolved toward the stage of execution, while recourse to international arbitral and judicial jurisdictions has collapsed), because, at both levels, creditors have faced basically the same “horizontal” problems, which makes it possible to treat the general subject of recovery of State external pecuniary debts without making such a technical distinction.

a) Initial problems: lack of judicial remedies, specific legal procedures, and impossibility of execution to recover State external debts. Almost all cases brought before domestic courts in creditor's countries in the 18th and 19th centuries illustrate the assertion by which, in the event of default by a debtor State, it was not possible for a creditor to sue and obtain judgment against a debtor State, and, if the suit was entertained, no judicial remedies were available since property of foreign States was not liable to seizure.

The leading cases of these centuries point to the fact that municipal courts refrained from exercising jurisdiction over foreign States because, it was generally accepted that, according to international law, sovereigns were not subjects to the process of municipal courts. For instance, in *Gouvernement Espagnol c. Lambège et Pujol*,⁷²² the Court of Cassation, confirming earlier judgment by the Civil Tribunal of the Seine in *Solon c. Gouvernement Egyptien*, held that French courts had no jurisdiction over foreign governments, that the reciprocal independence of States was one of the most universally recognized principles of international law, and that no government could be subjected against its will to the other jurisdiction of a foreign State since the right of jurisdiction was inherent in its sovereignty. In *Smith v. Weguelin*,⁷²³ the Chancery Court found that the Peruvian Government was not amenable to English jurisdictions, and that if the Court makes such an attempt it would fall into a dilemma: "either it would simply make itself ridiculous in attempting what is impossible, or if it could assume that the foreign Government was answerable to this Court, and bound to pay according to its decrees, and then found property belonging to the foreign Government in this country, it might alter the relation between the two countries, and enable a bondholder by the aid of the Court of Chancery practically to declare war against a foreign country". In *Twycross v. Dreyfus*,⁷²⁴ the Court of Appeal stated that "the case of a foreign government contracting a loan is one which apparently cannot be properly the subject of an action at all", and that suing them "would be a monstrous usurpation of jurisdiction". The

⁷²² *Gouvernement Espagnol c. Lambège et Pujol*, Cour cass., January 22, 1842, *Dalloz R.P.*, 1849, p. 5.

⁷²³ *Smith v. Weguelin*, [1869] L.R. 8 Equity Cases 198.

⁷²⁴ *Twycross v. Dreyfus*, [1877] L.R. 5 Ch.D. 605.

Supreme Court of the United States, despite that, previously, in *Chisholm v. Georgia*,⁷²⁵ had held that a State may be sued by any individual citizen of another State and that judgment may be entered in default of appearance, held, however, in *Cohens v. Virginia*,⁷²⁶ that the “universally received opinion is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits”. Subsequently, in *Beers v. State of Arkansas*,⁷²⁷ it held that “[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state”. Later on, in *Underhill v. Hernandez*,⁷²⁸ held that “every sovereign is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Still later on, the Supreme Court of New York, in *Hassard v. United States of Mexico*,⁷²⁹ confirmed that “States courts have no jurisdiction against a foreign sovereign State or a political subdivision thereof.”

The leading cases of these centuries also corroborate the rule by which State consent was a *sine qua non* requirement for a State to be sued. This was clearly established in *Crouch v. Crédit Foncier of England*,⁷³⁰ where the Queen’s Bench held that bonds payable to bearer, issued by a foreign government, cannot be enforced by any foreign tribunal, nor by tribunal of the borrowing State itself, “unless with the consent of its government”. Subsequently, the rule was clarified in *The Corporation of Foreign Bondholders v. Pastor*,⁷³¹ where the Court of Chancery held that the rule was not that a foreign government could in no case be sued, but that it could not be sued unless it consented to submit to the jurisdiction. A further refinement came with *Strousberg v. Republic of Costa Rica*,⁷³² where the Court of Appeal confirmed that the only

725 *Chisholm v. Georgia*, 2 Dall. 419.

726 *Cohens v. Virginia*, 6 Wheat. 264.

727 *Beers v. State of Arkansas*, 20 How. 527.

728 *Underhill v. Hernandez*, 168 U.S. 250.

729 *Hassard v. Mexico*, 61 N.Y. Supp. 939.

730 *Crouch v. Credit Foncier of England*, [1873] L.R. VIII Q.B. 375.

731 *The Corporation of Foreign Bondholders v. Pastor*, (1874) 23 W.R. 109; see *BIL Cases*, Vol. 3, 1965, pp. 512-513.

732 *Strousberg v. Republic of Costa Rica*, (1881) 44 L.T. (N.S.) 199; see *BIL Cases*, Vol. 3, 1965, pp. 527-531.

exceptions to the rule that foreign States cannot be sued in English jurisdictions were: 1) a waiver of the privilege that the foreign sovereign possess, and 2) if the moneys over which a foreign sovereign may have a claim are in the hands of third parties or a trustee over whom the English courts have jurisdiction. Likewise, in *Hassard v. United States of Mexico*,⁷³³ the Supreme Court of New York held that “[i]t is an axiom of international law of long-established and general recognition that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission.”

In cases where the State consented to be sued in a given jurisdiction, as in *Rochaid-Dahdah c. Gouvernement tunisien*,⁷³⁴ such jurisdiction remained obligatory upon the parties. In *Gouvernement Ottoman c. Comptoir d’escompte et consorts*,⁷³⁵ the Civil Tribunal of the Seine held that a foreign State was not entitled to the benefits of the laws of France if it has bound itself to a contrary agreement. In *Héritiers Ben Aïad c. le Bey de Tunis*,⁷³⁶ it was held that the submission of an issue to a French arbitrator implied submission to the French judiciary of all questions connected with the execution of an award. In *United States v. North Carolina*,⁷³⁷ the U.S. Supreme Court confirmed the common law rule that a State is not liable to pay interest on its debts, unless its consent to do so has been manifest by an act of its legislature, or by a lawful contract of its executive officers.

Considerations regarding the nature of these obligations, in a few but instructive cases, lead municipal courts to interpret that State external pecuniary debts were merely “debts of honour”, that is to say, debts binding only in equity. For instance, in *Twycross v. Dreyfus* the Court of Appeal declared that “these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are no contracts enforceable before the ordinary tribunals of any foreign country”. In *Crouch v. Crédit Foncier of England*,⁷³⁸ the

⁷³³ *Hassard v. Mexico*, 61 N.Y. Supp. 939.

⁷³⁴ *Rochaid-Dahdah c. Gouvernement tunisien*, Trib. civ. de la Seine, April 10, 1888, *Jdip et jc (Clunet)*, Tome 15, 1888, p. 670.

⁷³⁵ *Gouvernement Ottoman c. Comptoir d’escompte et consorts*, Trib. civ. de la Seine, March 3, 1875, *Sirey*, 1877, p. 25.

⁷³⁶ *Héritiers Ben Aïad c. le Bey de Tunis*, Trib. civ. de la Seine, June 30, 1891, *Jdip et jc (Clunet)*, Tome 19, 1892, p. 952.

⁷³⁷ *United States v. North Carolina*, 136 U.S. 211.

⁷³⁸ *Crouch v. Credit Foncier of England*, [1873] L.R. VIII Q.B. 375.

Queen's Bench held that bonds payable to bearer, issued by a foreign government, "only create a debt in the nature of a debt of honour which cannot be enforced by any foreign tribunal, nor by tribunal of the borrowing State itself, unless with the consent of its government. [...] There can hardly properly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government". The assumption that State debts were merely "debts of honour" was a corollary of a then regarded as an established legal principle by which State loan contracts were "sovereign contracts" governed solely by the law of the State in question (as held by the Civil Tribunal of Brussels in *Croenenbergh c. Strauch*,⁷³⁹ and later by the Court of Appeal of Brussels in *Feldman c. Etat de Bahia*).⁷⁴⁰

In a number of cases, the principle of sovereign immunity was extended to protect the agents of the foreign government in question. In *Gladstone v. Ottoman Bank*,⁷⁴¹ it was held that "inasmuch as the Court of Chancery had no jurisdiction on the contract as against the Sultan of Turkey it had none against the Ottoman Bank and its directors". In *Smith v. Weguelin*, the same court held that it had no jurisdiction to compel the agents of the Peruvian Government to apply the proceeds of the guano, in the hands of the agents in England, to the redemption of a loan contract. In *Larivière v. Morgan*,⁷⁴² still the same court confirmed that because no foreign government could be sued in an English court, "nor could the agents of a foreign government be sued". In *Twycross v. Dreyfus*, the Court of Appeal affirmed the previous decisions and stated that "in an action against a foreign government for arrears of interest on bond issued by that government, the agents, who have issued the bonds in England, cannot be sued in the absence of the principal". In *Bernet et autres c. Herran, Dreyfus-Scheyer et autres*,⁷⁴³ the Court of Appeal of Paris rejected the contention that several agent banks were liable toward the plaintiffs for a series of acts amounting to a deceit at the time of issuing the bonds.

739 *Croenenbergh c. Strauch*, Trib. civ. Bruxelles, December 9, 1893, *Pasicrisie Belge*, 1896, p. 32.

740 *Feldman c. Etat de Bahia*, C.A. de Bruxelles, November 22, 1907, *Pasicrisie Belge*, 1908, p. 55. See also: *Jdip et jc (Clunet)*, Tome 35, 1908, p. 210.

741 *Gladstone v. Ottoman Bank*, (1863) 1 H. & M. 505: see *BIL Cases*, Vol. 3, 1965, pp. 482-486.

742 *Larivière v. Morgan*, (1872) L.R. 7 Ch. App. 550: see *BIL Cases*, Vol. 3, 1965, pp. 497-503.

743 *Bernet et autres c. Herran, Dreyfus-Scheyer et autres*, Cour cass., 21 April, 1886, *Dalloz R.P.*, 1886, p. 393.

Not only the incompetence of municipal courts to review actions brought against foreign States was an established principle of international law, but also its corollary, that property of foreign States were not liable to seizure. This was illustrated in a few cases, *inter alia*, in *Balguerie c. Gouvernement Espagnol*,⁷⁴⁴ in *Blanchet c. République d'Haïti*,⁷⁴⁵ in *Ternaux-Gandolphe c. République d'Haïti*,⁷⁴⁶ and in *Solon c. Gouvernement Egyptien*,⁷⁴⁷ where the garnishee orders and attachments were declared null and void, as a consequence of the general incompetence of national courts before foreign governments for the engagements to which they were a party. In *Braive c. Gouvernement Ottoman et Carathéodory*,⁷⁴⁸ the Tribunal of the Peace of Brussels recognized that if the competence of the court was admitted its decision could result in an empty judgment, a command without a sanction, an injunction without coercive force, which would be neither reasonable nor conformable with the dignity of the judiciary.

In the group of cases in which a judgment was obtained, it was however not possible to resort to coercive measures to compel the execution of the judgment because the courts interpreted the general consent of the States to be sued as not including a consent to have the judgment executed against them by coercive means. In *Caratier-Terrasson c. Chemins de fer d'Alsace-Lorraine*,⁷⁴⁹ the Court of Cassation confirmed a judgment of the Court of Appeal at Nancy, which held that the revenues and other belongings of the German Empire could not be subject to seizure, that “it was inadmissible that certain tribunals authorise measures of execution, which constitute a violation of the independence of States”, and that “it was inadmissible that in France third parties may seize, in order to ensure the execution of a judgment, revenues and properties of a State, having a public destination”. In *Meriwether v. Garrett*,⁷⁵⁰ the U.S. Supreme Court also

⁷⁴⁴ *Balguerie c. Gouvernement Espagnol*, C. de Paris, January 7, 1825, *Dalloz R.P.*, 1849, note at p. 5.

⁷⁴⁵ *Blanchet c. République d'Haïti*, Trib. civ. du Havre, May 25, 1827, *Dalloz R.P.*, 1849, note at p. 6.

⁷⁴⁶ *Ternaux-Gandolphe c. République d'Haïti*, Trib. civ. de la Seine, Mai 28, 1828, *Dalloz R.P.*, 1849, note at p. 6.

⁷⁴⁷ *Solon c. Gouvernement Egyptien*, Trib. civ. de la Seine, April 16, 1847, *Dalloz R.P.*, 1849, note at p. 7.

⁷⁴⁸ *Braive c. Gouvernement Ottoman et Carathéodory*, Trib. de paix de Bruxelles, April 28, 1902, *Pasicrisie Belge*, 1902, p. 240.

⁷⁴⁹ *Caratier-Terrasson c. Chemins de fer d'Alsace-Lorraine*, Cour cass., 5 May, 1885, *Dalloz R.P.*, 1885, p. 341.

⁷⁵⁰ *Meriwether v. Garrett*, 102 U.S. 472.

declared that “generally everything held for governmental purposes, cannot be subjected for the payment of the debts of the city. That its public character forbids such an appropriation”.

However, in *Virginia v. West Virginia*,⁷⁵¹ an important change took place in relation to the then quasi-sovereign States of the United States. The Supreme Court of that country, when it was faced with the question of its inability to enforce a debt judgment rendered against a State, declared that its authority to enforce it “is the essence of the judicial power”, and that it may enforce it by using the appropriate remedial processes. This case raised the very important question of the ability of the courts to enforce debt judgments rendered against States, because, until then, it was well settled that a judgment was not susceptible to being enforced against a State (whether foreign or a State of the Union). After that case, in the United States jurisdictions, only foreign States remained immune from execution, as it is shown in *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*,⁷⁵² where the Court of Appeals, on the question of immunity of execution of the Swedish Government, held that “consenting to be sued does not give consent to a seizure or attachment of a sovereign government [...] even though a valid judgment has been entered”. This was the rule until *Elliott Associates v. Banco de la Nacion and Peru*.⁷⁵³ In *Elliott*, the Court of Appeals of the Second Circuit held that the purchasing of debt instruments for the primary purpose of enforcing it, with the intent to resort to litigation to the extent necessary to accomplish the enforcement, did not violate Section 489 of the New York Judiciary Law, because intent to litigate was merely incidental and contingent.

The situation of creditors before arbitral tribunals was to some extent better than before domestic courts, insofar as the *compromis* of arbitration solved from the outset the fundamental problem of lack of jurisdiction of domestic courts over a debtor State. However, other kind of difficulties arose in arbitral jurisdictions which were similar to that before domestic courts. They concerned mainly the lack of judicial remedies, and lack of authoritative or binding jurisprudence on debt recovery. In the *Florida Bond*

⁷⁵¹ *Virginia v. West Virginia*, 238 U.S. 202; 241 U.S. 532; 246 U.S. 565.

⁷⁵² *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930): see *AIL Cases*, Vol. 5, 1973, pp. 492-496.

⁷⁵³ *Elliott Associates v. Banco de la Nacion and Peru*, 194 F.3d 363 (2nd. Cir. 1999).

Cases,⁷⁵⁴ the creditors' claims were dismissed on the grounds that 1) they were transactions with the Independent Republic of Florida, 2) they were just claims, but claims under a "well-known" disadvantage: they cannot sue the State, and 3) the State was bound only by every principle of honour, which meant that the debtor State could not be called "respectable" if it cannot honourably fulfil its engagements. In the *Colombian Bond Cases*,⁷⁵⁵ and in the *Mexican Coupons Case*,⁷⁵⁶ the commissioners were of the view that, as a matter of right, claims arising from "hazardous loan contracts" do not entitle their holders to the same support in recovering as in the cases of claims arising from violation of "ordinary contracts", or from direct acts of injustice or violence. However in the *Venezuelan Bond Cases*,⁷⁵⁷ the commissioners endorsed the view that these claims could not escape from the scope of the treaty, which in express language referred to *all* claims.

Therefore, at the beginning, neither arbitral nor judicial remedies were available, and creditors faced an almost insurmountable barrier: State immunity (from suits and execution). Also, at the beginning, municipal courts, especially in Belgium, started to distinguish between acts *juri imperii* and acts *juri gestionis* of a sovereign, in order to issue money judgments against debtor States (see for instance, *Rau c. Duruty*,⁷⁵⁸ and *Société des chemins de fer Liégeois-Luxembourgeois c. Etat Néerlandais*).⁷⁵⁹ Afterwards, the advancement of this important judicial distinction, coupled with a strong support from the doctrine, and with intensive action, at organizational and political levels, on the part of bondholders acting through powerful associations in creditor countries, finally paved the way for major changes in the creditor/debtor State relationship (namely, the restrictive theories of sovereign immunity subsequently adopted by the national legal systems of the creditor countries and later on universally acknowledged).

754 *Florida Bond Cases*, Umpire, September 14, 1854, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, p. 3594.

755 *Colombian Bond Cases*, Mixed Commission, treaty between Colombia and the United States of February 10, 1864, Sir F. Bruce, Umpire, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, 1898, p. 3512.

756 *Mexican Coupons Case*, Mixed Commission, convention between Mexico and the United States of July 4, 1868, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, 1898, p. 3616.

757 *Venezuelan Bond Cases*, Claims Commission, convention between the United States and Venezuela of December 5, 1885, *International Arbitrations* (ed. by J.B. Moore), Vol. IV, 1898, p. 3616.

758 *Rau c. Duruty*, C.A. de Gand, March 14, 1879, *Jdip et jc (Clunet)*, Tome 8, 1881, pp. 82-83.

Further explanation may be given to clarify why recourse to dispute settlement procedures for debt collection has evolved more in domestic than in international arbitral and judicial jurisdictions:

- 1) international judicial jurisdictions were inexistent, and recourse to domestic courts of creditor countries were the only judicial means of relief available to bondholders—it has thus twisted a “first choice” option (it also may be observed that, to a great extent this also explains why recourse to the other means of recovery, for instance, diplomatic protection or recourse to the use of force, was frequently made);
- 2) international arbitral jurisdictions could not offer the means of relief that could potentially be offered by the domestic judicial jurisdictions of creditor countries (here it may be observed that a *compromis* was not easy to obtain, indeed, it was rather very problematic to achieve);
- 3) the means of relief offered by the judicial jurisdictions of debtor States have always been, broadly speaking, regarded by creditors as insufficient to guarantee the legal security sought for these financial operations.

b) Permanent problems: lack of international conventional law, and of international institutions addressing the subject of recovery of State external debts.

Both questions are a kind of “horizontal” problems, faced by creditors and debtor States, since the beginning of the practice of debt recovery. They are self-evident and permanent as far as they continue to be special features of the law relating to the recovery of State external pecuniary debts (hence, a law without written legal rules and international institutions, a law entirely relying on arbitral and judicial practice before domestic and international courts).

So far, the only convention agreed on the matter is the Convention (II) Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts,⁷⁶⁰ adopted by the Second Hague Conference of 1907, but, as noted before, this Convention regulated, at treaty law level, the use of force as a method of debt collection and debt

⁷⁵⁹ *Société des chemins de fer Liégeois-Luxembourgeois c. Etat Néerlandais*, Cour cass., June 11, 1903, *Pasicrisie Belge*, 1903, p. 294.

⁷⁶⁰ *The Hague Convention (II) of 1907*, Pamphlet No. 11, 1915, pp. 1-3. [*infra*, footnote 267]

settlement, and not, properly speaking, recourse to arbitral and judicial jurisdictions for debt settlement. In the *Case of Certain Norwegian Loans*,⁷⁶¹ the French Government raised this issue and argued, *inter alia*, that, according to the Second Hague Conference of 1907, its claim was a case of recovery of contract debts within the meaning of Article I of the Convention (which provided that “The contracting Powers agree not to have recourse to armed forces for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals”), and was therefore within the competence of the Court. But the ICJ held that the Convention did not fall under consideration in that case, because its only aim was to impose an obligation by which the intervening Power must not have recourse to force before it has tried arbitration. The ICJ so decided despite that Article II of the Convention contained a provision indicating that the agreed arbitration “shall be subject to the procedure laid down in Part IV, Chapter III, of the Hague Convention for the Pacific Settlement of Disputes.” The Court further clarified that “[t]he award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment.”

As regards international institutions, save the mechanisms put in place by the League of Nations (*e.g.*, programmes of financial reconstruction and the proposed International Loans Tribunal), which were qualified by the legal literature of its time as unbiased, a rather partial and unfocused response to this state of affairs was recently given by the IMF’s proposal for the creation of a permanent “sovereign debt dispute resolution forum”, contained in its proposal for the creation of a permanent “sovereign debt rescheduling mechanism”.⁷⁶² The proposed mechanism was incomplete, as its coverage was restricted to the settlement of only “unsustainable” sovereign debts, and, unfocused, because if instituted as it was finally designed it would have addressed primarily inter-creditor pool problems rather than the economic rehabilitation of debtor States.

This state of affairs has been the same since the beginning of the modern loans and financial operations in the 19th century: public international law and international organizations do not offer adequate international economic regulation nor functional

⁷⁶¹ *Case of Certain Norwegian Loans*, Judgment of July 6, 1957, *ICJ Reports*, 1957, p. 9.

⁷⁶² IMF, *The Design of the Sovereign Debt Restructuring Mechanism—Further Considerations*, November 27, 2002, 76 p.

institutions and mechanisms for the mitigation of conflicts between creditors and debtor States arising from the default or non-performance of State external pecuniary debts. International actors have responded to these problems basically by giving *ad hoc* responses, on a case-by-case basis, for instance, through the institution of *ad hoc* claims commissions or supporting creditor-friendly mechanisms of debt collection and debt settlement.

c) Recent developments: possibility of enforcing money judgments in foreign courts. As seen, in relation to the subject of recovery of State external pecuniary debts, until *Virginia v. West Virginia*, “judgment” and “execution” were two complete different things, that is, the obtaining of a judgment rendered against a State did not include the means of its execution. This was a valid rule in suits not only against foreign States, but also against States of the then quasi-sovereign States of the United States. However, after *Virginia v. West Virginia*, in the United States jurisdictions, only foreign States remained out of the reach of the courts for execution purposes—as shown in *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*.

This state of affairs has changed in the United States and other creditor countries by the statutory adoption of the restrictive theory of State immunity, which included complex schemes of restrictive measures for non-jurisdictional attachments and the execution of judgments. And, today, that which did not exist for almost two centuries exists as inherent in the judgments. More precisely, the New York courts have recently cleared the way for the execution of judgments rendered against debtor States.

In *Elliott Associates v. Banco de la Nacion and Peru*, the Court of Appeals of the Second Circuit held that the purchasing of debt instruments for the primary purpose of enforcing it, with the intent to resort to litigation to the extent necessary to accomplish the enforcement, did not violate Section 489 of the New York Judiciary Law, because intent to litigate was merely incidental and contingent. The case was remanded to the Federal District Court, which in June 2000 awarded Elliott a judgment of \$55.7 million, representing principal and past-due interest on the bank claims. To enforce this judgment Elliott sought to attach the September 7, 2000, coupon payment that was to be made to the creditors that had participated in the Brady exchange. Elliott obtained a restraining order to prevent the New York fiscal agent for the Brady bonds from making

the coupon payment, and tried to obtain a similar order in the Belgian courts, where it was finally granted the restraining order on appeal on October 5, 2000, without Peru's attorneys present. As Peru was close to default on the Brady bonds, it preferred to settle with Elliott by paying the firm \$56.3 million (the amount of the judgment plus interest).

The ruling in *Elliott* has had as a consequence encouraging the emergence of firms whose business is investing in litigation against debtor States. At public international law, however, no response has been made to this important development with regard to the condition of States at foreign jurisdictions.

d) Final result of this evolution: materialization of a discipline of law relating to arbitral and judicial practice of recovery of State external debts. Abstraction made from the fact that recovery of State external monetary debts evolved, in the past, in a “fragmented” way, that is, with different claims subject to the jurisdiction of different courts, and that, more recently, it has practically been fixed in one jurisdiction only (namely, New York), in light of the surveyed case law spread over several domestic and international jurisdictions, for more than two centuries, we consider that there is sufficient basis to argue that a discipline of international law relating to recovery of State external pecuniary debts has materialized and that there may be evidence of a *corpus juris* relating to the recovery of State external monetary debts.

A field of law relating to the recovery of State external monetary debts, as already stated, has gradually emerged containing a *corpus juris* composed (of substantive and procedural law) of the practice of the courts and tribunals, their legal decisions and statements, and the legal positions assumed by the interested parties (*i.e.*, both creditors and debtor States) before these jurisdictions. Its origins can be traced as early as the end of the 18th century, having evolved through the 19th and 20th centuries, principally under different domestic than international jurisdictions, until the present period, in which it evolves largely in one domestic jurisdiction only.

e) The permanent feature: a continual battle at law-making level between debtor States and their creditors. Since the beginning, major problems in this specific area of international economic relations have been the questions of putting forward accepted international minimum standards of justice to decide on the claims made by creditors

against debtor States, and of laying down international legal norms on the recovery of State external pecuniary debts.

Given the absence, on the matter, 1) of international conventional law, 2) of a competent authority or neutral party in charge of laying down applicable rules for conflict resolution, and 3) of accepted rules based on judicial precedents applicable to the recovery of State external pecuniary debts, much of the problem so far has consisted of trying to lay down these rules from both creditors and debtor States sides. In this regard, from the creditors' side, it can be said that activism has been intensive and especially organized, for since the beginning creditors have always tried to avoid the application at the international plane of the *caveat emptor* principle, by which without a warranty lenders should normally take upon themselves the risks inherent to any lending operation (namely, that of getting only a partial satisfaction of their claims, or not being paid at all in the end), a principle of law binding, if not in all, at least in the vast majority of national legal systems of the world. This practice of avoiding the *caveat emptor* rule on the part of creditor countries is shown today with especial emphasis in the field of protection of investments.

Thus, legal history on this matter shows a constant feature that has emerged at all times: a battle in which both creditors and debtor States are engaged continually given the absence of an international authority competent to set up neutral rules on the activity of recovering money from debtor States. This permanent conflict has never ceased since the first suits brought against debtor States.

f) *De lege ferendae*: the necessity of a proper jurisdiction, specific legal remedies, proper proceedings, and international legal doctrines for this new field of international law. In view of the current state of affairs (fundamentally, unbalanced development of this area of law, and tendency to overprotect creditor's rights at the expense of the public interests of debtor States) it has emerged the necessity of setting standards of lawfulness for the settlement of all pecuniary claims against States, including State external debts, through the courts, for the benefit of economic operators and the public in general, by means of the creation of a dynamic dispute settlement mechanism similar to that being implemented for the resolution of conflicts in international trade and trade-related matters. Just as in the procedures of debt recovery

in municipal legal systems, this mechanism should check and balance the rights and obligations of creditors and debtor States in a flexible and rational way, and by that means provide for a stable and secure legal system that contributes to the gradual elimination of discretionality and power-politics from the fields of international finance and money.

Moreover, the creation of a dispute settlement mechanism of this kind will not only increase legal certainty in loan contracts, but will also diminish the risks in loan recovery as a result of the instauration of an effective legal mechanism of recovery, which in turn most likely will diminish loan interest rates (for, the existence of high interest rates in international lending is a direct consequence of the high risks involved in foreign lending).

Concluding Remarks

As seen, much of the problem with the “external debt” lies in the misperception of its legal dimension.

Currently the perception of its legal aspects concentrates mainly on the contractual aspects of State loans, on private international law related-issues, and on the economical and political aspects, while little research has been consecrated, for instance, to the role that international courts and tribunals may have in setting the standards of lawfulness in the development of a body of law and general principles relating to the subject of recovery of State debts by arbitral and judicial means.

Responsible of this state of affairs, to a great extent, is the prevailing idea that “sovereign debt litigation” is almost inexistent or limited (an idea widely disseminated on the literature on the external debt subject, and endorsed by the IMF). This research shows that this primary assumption is false.

By showing evidence of a critical mass of case-law on sovereign debt litigation this work hopes to bring a fresh perspective for further research on the legal dimension of the external debt problem. This new dimension shall consider the external debt as:

- 1) a subject of judicial cognizance and of justiciable nature;
- 2) a subject which can help to review the different aspects of the external debt from a new perspective (because, at present, international financial and monetary operations in general, including international lending operations, are borderless operations, and because of the present trends toward the judicialization of international economic relations inside the globally-integrated world economy);
- 3) a subject which can increase the legal value and outcomes of the method of judicial recovery, and its special role in providing legal certainty and predictability to the international economic transactions; and

4) a subject which seeks to bring about a positive change in its development (for instance, through the setting up of an international court for conflict resolution on financial and monetary matters) in light of the new expectations.

As a result of this main finding affecting the primary working assumptions of the legal aspects of the external debt problem, two other major conclusions can also be drawn from what has been developed in this research work.

Firstly, a specific field of international law has surfaced as a consequence of this longstanding practice of suing sovereigns before foreign municipal and international courts and tribunals for the repayment of their external pecuniary liabilities. This subject is composed of the arbitral and judicial decisions and statements, and the legal positions assumed by the interested parties (creditors and debtor States) before these different jurisdictions. It has a comprehensive coverage: it includes the rights of action and counterclaim, the defences, the proceedings before and after judgment, and the execution in courts of justice. Thus, just as what happens in the national legal systems with regard to the recovery of individuals and corporations' financial obligations, the subject of the judicial recovery of State debts operates from the commencement of the suit for remedy, until the receipt of the money or a final debt settlement. Finally, despite that it looks a new area of law, it is however apparent that it has always existed: its origins can be traced as early as the end of the 18th century, having evolved in a fragmented way through the 19th and 20th centuries, principally under different domestic rather than international jurisdictions, until the present period in which it is evolving mainly in one jurisdiction (namely, New York).

As matters stand however (and mainly for the reason that it is evolving largely in one jurisdiction only), this discipline of law cannot be viewed as a neutral source of general principles, doctrines, rules and disciplines of international law, insofar as these have not yet been recognized by, and incorporated into, evolving public international law. For, as any other field of public international law, it aims at being applied before a proper fora: an international permanent judicial jurisdiction for the resolution of all State international financial and monetary disputes, and, as any other discipline of law, it aims at evolving into a balanced and rational direction.

Secondly, as regards the use in general of the different methods of debt collection and debt settlement so far applied in international relations, this work reveals that the use of them have largely been dependent on, and still are conditioned by a number of external factors, from which the following is the most significant: the means of relief at the disposal of the parties for the mitigation of conflicts between creditors and debtor States varies according to the stage of development of international society. The lower was the stage of development of international society the more primitive have been the means employed for debt recovery and debt settlement (*e.g.*, the use of force or threat of its use, and the financial controls of debtor States by the creditors and their States). Likewise, the more advanced is the integration stage of international society the more sophisticated are the means employed for debt recovery and debt settlement (*e.g.*, debt renegotiation through restructuring and rescheduling techniques and procedures, and proposals of sovereign debt restructuring mechanisms to solve inter-creditor problems).

However, in light of the past and present state of affairs (*inter alia*: unsatisfactory judicial outcomes, in the beginning, for creditors, and later, for debtor States; lack of international conventional law on the matter; overprotection of creditors and their interest; chronic systemic disfunctions affecting externally, but directly and adversely, the discharge and performance of the pecuniary liabilities contracted by debtor States), concerning the quality, in general, of the factual and legal outcomes of the different methods of recovery, it does not follow that a more advanced and integrated international society, such as ours, has already brought a fair and unbiased method of recovery of State debts. Evidence shows that their functioning are far from be considered sensible to the public interest of debtor States. But given that it is a legitimate aspiration of any modern international society to have fair and balanced methods of debt recovery and debt settlement, including an equally advanced dispute settlement mechanism for conflict solution on the matter, we hope that the contemporary international society will strive toward a positive change, fundamentally, finding the means to develop into a balanced and rational direction.

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