

INTERNATIONAL LAW ASSOCIATION

NEW DELHI CONFERENCE (2002)

COMMITTEE ON DIPLOMATIC PROTECTION OF PERSONS AND PROPERTY

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Professor Torsten Stein (Germany)

SECOND REPORT

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I. INTRODUCTION: WORK OF THE COMMITTEE SINCE ITS FIRST REPORT

The Committee was established by the Executive Council of the ILA in late 1996. In proposing the creation of the Committee to the ILA Executive Council, Professor Crawford wrote:

“The importance of the topic is now even greater with the decision of the ILC in 1995 to resume work in this field. I believe we should establish a committee on the subject, focusing on at least some of the following issues:

- the extent of the specific obligation of States under modern international law with respect to the protection of foreign persons and property;
- the relation between these rules and the general law of human rights;
- the impact of bilateral and multilateral treaties for the protection of persons and property;
- the extent of changes in the procedural law applicable to the bringing of claims relating to the protection of persons and property.”

In its First Report, submitted at the ILA’s London Conference (2000), the Committee indicated that it had decided that its long-term goal should be to prepare a set of Draft Principles concerning the Diplomatic Protection of Persons and Property. To this end, the Co-Rapporteurs would take the leadership, and other members would contribute and participate, in preparing a series of studies of discrete topics – such as exhaustion of remedies, issues of dual nationality and so forth that the Chair and Co-Rapporteurs believed would not only be useful in themselves but would eventually deserve a place in any such set of Draft Principles. These studies should be relatively brief, but would attempt to summarize the customary and conventional law, practice and precedents (including recent institutional developments), policy considerations and scholarly comment relevant to the Committee’s consideration of that topic. These studies would be circulated within the Committee for collective comment, discussion and possible revision. At a later date, when the Committee had developed a sufficient number of these discrete studies, it would further discuss the possible preparation of a more comprehensive document, including the possible structure and content of such a set of draft Principles as a whole.

In accordance with this program, the Co-Rapporteurs and Committee completed and included in its First Report for the London Conference (2000) an Interim Report on “The Exhaustion of Local Remedies”, prepared by Professor Juliane Kokott, and an Interim Report on “The Changing Law of Nationality of Claims”, prepared by Professor Francisco Orrego Vicuna. These two Interim Reports were discussed during the London Conference (2000) at a well-attended July 7, 2000 Working Session, ably chaired by Judge Rosalyn Higgins, which produced a number of useful comments.

Since the London Conference, the Committee has continued with its planned program of developing further discrete studies relating to the Committee’s mandate. The following three further studies have now been completed and are included in this Second Report of the Committee:

- Interim Report on “Lump Sum Agreements and Diplomatic Protection”, by Professor David J. Bederman
- Interim Report on “The Role of Diplomatic Protection in the Field of the Protection of Foreign Investment”, by Professor Juliane Kokott
- Interim Report on “Diplomatic Protection Under the European Union Treaty”, by Professor Stein

Each of these has been circulated within the Committee for comment. The Committee will look forward to and welcome colleagues comments on these Reports at the Committee’s Working Session during the New Delhi 2002 Conference.

Following the London Conference (2000), one of the Co-Rapporteurs of the Committee, Professor Francisco Orrego Vicuna, asked to be relieved of his duties as Co-Rapporteur due to the press of his many other professional and other responsibilities. The Committee and Executive Council accepted his request with regret, and with thanks for his fine performance of his responsibilities as Co-Rapporteur, including his excellent Interim Report on “The Changing Law of Nationality of Claims”, included in the Committee’s First Report. The Committee is pleased that the Executive Council has appointed another member of the Committee, Professor David J. Bederman (USA), to replace Professor Orrego Vicuna as Co-Rapporteur, and who serves along with Professor Juliane Kokott, who continues as our able Co-Rapporteur. The Committee has also been pleased, since the London Conference (2000), to welcome Dr. Ruth Donner (Finland) and the Honorable Mr. Justice Dalveer Bhandari (India) as new members of the Committee.

II. INTERIM REPORT ON “LUMP SUM AGREEMENTS AND DIPLOMATIC PROTECTION”, BY PROFESSOR DAVID J. BEDERMAN¹

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This Report briefly surveys the place of lump sum agreements as a source of State Practice in the international law of diplomatic protection. It also examines recent practice in agreements concluded since 1975, to determine the substantive rules of eligibility for certain kinds of claims. After considering the continued vitality of the continuous nationality doctrine, this Report examines lump sum agreement provisions concerning individuals (including dual nationals), partnerships, corporations, shareholders, and other claimants.

A. The Continued Relevance of Lump Sum Agreements to Diplomatic Protection

Given that lump sum agreements had become, after World War II, the paramount means for settling international claims, it is surprising that in the first thirty years following the war, they received only scant notice by scholars and dubious recognition by jurists. Neither the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens² nor the American Law Institute's 1965 Restatement of the Foreign Relations Law of the United States³ gave much attention to them, and their use by the UN International Law Commission's first Special Rapporteur on State Responsibility during the period 1955-1961 was very selective.⁴

Indeed, even though by 1970 they numbered well over 100, with no significantly diminishing use of them in sight, the International Court of Justice, in its holding that year in the Barcelona Traction, Light & Power Co., Ltd. Case,⁵ gave them short shrift in just sixteen lines:

Before proceeding, however, to consider whether such circumstances exist in the present case, it will be advisable to refer to two specific cases involving encroachment upon the legal entity, instances of which have been cited by the Parties. These are: first, the treatment of enemy and allied property, during and after the First and Second World Wars, in peace treaties and other international instruments; secondly, the treatment of foreign property consequent upon the nationalizations carried out in recent years by many States.

Also distinct are the various arrangements made in respect of compensation for the nationalization of foreign property. Their rationale too, derived as it is from structural changes in a State's economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing

¹ This Report draws heavily on my recently published volume, Burns H. Weston, Richard B. Lillich & David J. Bederman, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975-1995* (Transnational Publishers, Inc. 1999). The note references to lump sum agreements are to that source.

² *Reprinted in* 55 Am. J. Int'l L. 548 (1961).

³ *See* Restatement (Second) of the Foreign Relations Law of the United States §§ 184-210 (1965).

⁴ *See* Garcia-Amador, (Fourth) Report on Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, 2 Y.B. Int'l L. Comm'n 1-36 (1959).

⁵ 1970 I.C.J. 3 (Second Phase) (Belg. v. Sp.) (Judgment of 5 February).

any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case.

Nevertheless, during the course of the proceedings both Parties relied on international instruments and judgments of international tribunals concerning these two specific areas. It should be clear that the developments in question have to be viewed as distinctive processes, arising out of circumstances peculiar to the respective situations. To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as *lex specialis* and hence to court error.⁶

The Court thus declared that far from reflecting (much less creating) international law, lump sum agreements were *sui generis*, prescribing no more than a *lex specialis*. The Court presumed lump sum agreements to have no legal effect beyond the unique circumstances giving rise to them, and thus not to be dignified as "sources" of general international law from which one might secure guidance in the regulation of international and transnational behavior.

The Barcelona Traction Court's dismissal of lump sum agreements as *lex specialis* is, of course, part of a wider phenomenon of selective treatment for various sources of the International Law of State Responsibility. For example, the decisions of the Iran-United States Claims Tribunal on matters of investment protection for foreign nationals have been subjected to a withering attack⁷ as being reflective of "merely" a *lex specialis* produced by the confluence of the Algiers Accords⁸ (creating the Tribunal) and the 1955 Treaty of Amity between the two parties⁹ (which established some of the relevant law the Tribunal used). Although this attempt to diminish the importance of the Iran Tribunal's jurisprudence has been rebuffed,¹⁰ a similar assault has been launched in reference to the United Nations Compensation Commission, established in the wake of Iraq's illegal invasion and occupation of Kuwait in 1991. Describing this phenomenon, Professors Lillich and Weston noted:

At worst, the Compensation Commission may be a jurisprudential shell, an elaborate scheme deciding cases under an exquisitely-developed *lex specialis*. There is, of course, nothing wrong with that. It may even contribute to an orderly disposition of claims. But such a system can cause mischief. First, there will be a perception that the UNCC is not applying legally objective rules of decision. Second, there will be a concern that both the Commission's Decisions and its Awards will not be worthy of precedential value in the subsequent development of the international law of State responsibility and claims settlement.¹¹

So the attack on the jurisprudential legitimacy of lump sum agreements is part of a larger pattern of criticism of the very structural underpinnings of the international law of State Responsibility.

In their 1975 treatise,¹² Professors Lillich and Weston sought to fill the gap in scholarly attention to lump sum agreements. Also, they devoted nearly an entire chapter to demonstrating that the International Court of Justice was incorrect in its approach to these agreements, unfortunately not to the satisfaction of all courts and commentators.¹³ They concluded:

first, that lump sum agreements fall squarely within the ambit of subparagraphs 1(a) and (b) of Article 38 of the Statute of the International Court of Justice; second, that as "sources" of "international

⁶ 1970 I.C.J. at 39-40.

⁷ See *Asante, International Law and Foreign Investment: a Reappraisal*, 37 ICLQ 588, 603 (1988). See, e.g., *INA Corporation and Islamic Republic of Iran*, Award No. 184-161-1 (Aug. 13, 1985), reprinted in 8 Iran-U.S. C.T.R. 373, 378, 390 (sep. op. Lagergren, arb.), 393-401 (sep. op. Holtzmann, arb.); *Phillips Petroleum Co. Iran and Islamic Republic of Iran*, Award No. 425-39-2, at ¶ 107 (June 29, 1989), reprinted in 21 Iran-U.S. C.T.R. 79, 120-21 (1989). See also Stewart, *International Decision*, 85 AJIL 184, 187-88 (1991) (for more on this point).

⁸ For the text of the key elements of the Algiers Accords -- the General Declaration and Claims Settlement Agreement -- as well as other ancillary documents, see 1 Iran-U.S. C.T.R. 3 (1981-82), and 81 Dep't State Bull. 1 (Feb. 1981).

⁹ Treaty of Amity, Economic Relations and Consular Rights, Aug. 8, 1955, U.S.-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93.

¹⁰ See, e.g., Daniel Barstow Magraw, *The Tribunal in Jurisprudential Perspective*, in *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* 25-29 (Richard B. Lillich, Daniel Barswtow Magraw, and David J. Bederman eds. 1998); John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AJIL 278, 299-303 (1989).

¹¹ David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. Int'l L. & Pol. 1, 35-40 (1994).

¹² Richard B. Lillich & Burns H. Weston, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (1975).

¹³ See *infra* text accompanying notes 15-48.

custom" they can and must be treated in the same manner as any other international prescription; third, that this treatment should be both contextual and policy-oriented in character; and, finally, that as a result of such treatment (but only after such treatment) they can be accorded binding, analogical, or no effect whatsoever. Continued adherence to a theory that would deny the validity of these conclusions by relegating the whole phenomenon of lump sum agreement-making to an inferior status within the pantheon of international [legal] prescription is . . . to deny a growing edge of international law. Worse, it is to misconceive the nature of law and legal process.¹⁴

Since the above statement was written, however, certain events have occurred that oblige one to acknowledge that, as an empirical matter, lump sum agreements have yet to be accorded full jurisprudential significance. For instance, the United States Court of Appeals for the Second Circuit, in its much-cited opinion in Banco Nacional de Cuba v. Chase Manhattan Bank,¹⁵ rejected the argument, advanced by Cuba's counsel,¹⁶ that lump sum agreements had contributed to the development of a partial compensation rule. In urging that Chase Manhattan had no right to more than partial (50 percent) compensation because past negotiated settlements had resulted in payment no greater than 40-60 percent of the value of the claims, Banco Nacional, Circuit Judge Kearsse asserted, was confusing adjudication with compromise. Judge Kearsse wrote:

Partial compensation inheres in the process of negotiation and compromise; we should no more look to the outcome of such a process to determine the rights and duties of the parties in expropriation matters than we would look to the results of settlements in ordinary tort or contract cases to determine the rules of damages to be applied. Were we to adopt the view pressed by Banco Nacional, either there would be no incentive for an expropriating state to negotiate a settlement, or, more likely, the prospect of a partial compensation award in a court would lead to the negotiation of a settlement at an even lower level. Carrying the process to its logical conclusion, the courts would then be asked to take into account these lower settlements in making the next adjudicated awards.¹⁷

"We are concerned with the parties' rights and duties," Judge Kearsse concluded, "and we do not believe that international law as to compensation is merely descriptive of their conciliatory actions."¹⁸

One need not take issue, of course, with one of Judge Kearsse's observations: the precise settlement amounts for lump sum claims do reflect a process of negotiation and conciliation. To that extent, they should only be taken as a cautious guide to State practice. But Judge Kearsse's ruling might be understood to mean that lump sum agreements lack any value in establishing other aspects of State practice in the law of international claims. The jurisprudential significance of lump sum settlements lies not in their discount of the face value of claims, but, rather, in the substantive rules they articulate for such matters as claimant eligibility, attribution of State conduct, the nature of compensable claims, and the general standard and modalities of prompt, adequate and effective compensation.

International arbitral tribunals, too, have weighed the jurisprudential importance of lump sum agreements and reached somewhat the same conclusion as the U.S. Second Circuit.¹⁹ For example, assessing the present state of customary international law on the question of compensation for nationalized property, the Iran-United States Claims Tribunal,²⁰ in Sedco, Inc. v. NIOC & Iran,²¹ found much State practice of questionable evidentiary value. The Tribunal pointedly referred to lump sum agreements between States and to compensation settlements negotiated between States and foreign companies. Both types of agreement, the Tribunal observed, are too inspired by "non-judicial" considerations to be of any value as evidence of custom accepted as law.²² The U.S. arbitrator, Charles N. Brower, in his Separate Opinion, agreed with "the reservations expressed in the Interlocutory Award in regard to lump sum settlement agreements between States."²³ He further observed "that where juridical concerns are more involved, as when the disputes are capable of being referred to enforceable arbitration, then settlements more closely approximate full co-

¹⁴ 1 Lillich & Weston ch. I, note 8, at 43.

¹⁵ 658 F.2d 875 (2d Cir. 1981). See Note, *International Law: An "Appropriate" Compensation Standard for Nationalized Property*: Banco Nacional de Cuba v. Chase Manhattan Bank, 66 Minn. L. Rev. 931 (1982).

¹⁶ See Rabinowitz, *The Impact of the Cuban Nationalizations on Compensation and Valuation Standards*, in 4 *The Valuation of Nationalized Property in International Law* 133, 143-44 (R. Lillich ed. & contrib. 1987).

¹⁷ 658 F.2d at 892.

¹⁸ *Id.*

¹⁹ *Cf., e.g.*, In the Matter of an Arbitration Between the Government of the State of Kuwait and the American Independent Oil Co. (AMINOIL), 21 I.L.M. 976, 1035-37 (1982).

²⁰ 10 Iran-U.S. C.T.R. 180 (1986-I).

²¹ *Id.* at 185, citing *Barcelona Traction* and AMINOIL.

²² *Id.* at 196. In a footnote he reiterates that "such settlements are suspect as guides to the substance of customary international law.

. . ." *Id.* at 196 n.16.

²³ *Id.* at 196-77, citing Seidl-Hohenveldern, *Austrian Practice on Lump Sum Compensation by Treaty*, 70 AJIL 763, 766-67 (1976), who made this point in connection with the Austrian-Italian Agreement of 1971, [1973] BGBl 635, reprinted in 1 Lillich & Weston at 319.

pensation."²⁴

Other U.S. arbitrators, in Separate Opinions to the Tribunal's awards, also have discussed and downplayed the juridical impact of lump sum agreements. Thus Howard M. Holtzmann, in *INA Corp. v. Iran*,²⁵ was critical of publicists who, he contended, demonstrate "an almost exclusive reliance" on lump sum settlements in deriving contemporary State practice²⁶ because, he said, such settlements "are not motivated by *opinio juris*, but rather are generally products of the particular prevailing social, economic, and political constraints bearing on the parties."²⁷ Similarly, but more categorically, in his Separate Opinion in *American International Group, Inc. v. Iran*,²⁸ Richard M. Mosk stated that

[p]ost World War II settlement practice has not modified international custom regarding promptness of compensation. Such settlements do not reflect legal determinations, but rather are negotiated resolutions of claims that obligations were breached. Each settlement agreement should be deemed *sui generis*. See *Barcelona Traction Case*, 1970 I.C.J. 3, 40 (Judgment of 5 February).²⁹

Arbitrator Mosk added: "Certainly the lengthy negotiation process leading to lump sum settlements has no bearing on the appropriate time for the payment of compensation."³⁰

But a number of Tribunal awards have recognized that, while lump sum agreements may not reflect State practice on the issue of full compensation for expropriations of foreign-owned property, they most assuredly do in respect to other rules of international claims practice. For example, in the significant *A/18 Decision*,³¹ concerning the eligibility of dual nationals of Iran and the United States to bring a claim before the Tribunal, both the majority and dissenting opinions relied on lump sum settlement practice to marshal arguments on this point. The majority award relied on our earlier work in summarizing the relevant treatment of dual national claims in lump sum agreements.³² The dissenting opinion of the Iranian arbitrators made use of lump sum settlements in their observations concerning the definition of the word "nationals" in the Claims Settlement Declaration:

The term "national", as it has been employed in the Algiers Declarations, refers to the normal status of nationality, namely, individuals who are exclusively Iranian or exclusively American. That conclusion is confirmed by the provisions of a lump sum agreement concluded between the Governments of Egypt and the United States on May 1, 1976, the purpose of which was to settle claims of United States nationals against the Egyptian Government.³³

International arbitral institutions are thus prepared to use lump sum agreements as evidence of State practice in relation to precise rules for international claims practice.

²⁴ 8 Iran-U.S. C.T.R. 373, 391 (1985-I) (Holtzmann, J., concurring).

²⁵ *Id.* at 39, citing in particular, Oscar Schachter, *Compensation for Expropriation*, 78 AJIL 121, 124 (1984). Also the target of Judge Holtzmann's criticism, and for the same reason, are: Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 Am. J. Int'l L. 553 (1981); Rosalynn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 Recueil des Cours (Hague Academy of International Law) 259 (1982-III); and Burns Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AJIL 437 (1981).

²⁶ 8 Iran-U.S. C.T.R. at 399, citing and quoting *Barcelona Traction*, AMINOIL and *Chase Manhattan Bank*.

²⁷ Case No. 2, December 19, 1983, 4 Iran-U.S. C.T.R. 96, 111 (1983-III) (Mosk, J., concurring).

²⁸ *Id.* at 116 n.1.

²⁹ *Id.* See also Ebrahimi and Islamic Republic of Iran, Award No. 560-44/46/47-3 (Oct. 12, 1994), where Richard Allison, in dissent noted that:

It is sometimes argued that lump sum agreements are evidence of state practice accepting compensation falling short of full value. But the International Court of Justice and this Tribunal have rejected such settlements as evidence of custom. See *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J.Rep. 4, 40 (5 Feb. 1970) (holding that such arrangements are *sui generis* and provide no guide in other cases); *Sedco, Inc. and National Iranian Oil Company, et al., Interlocutory Award No. ITL 59-129-3* (27 Mar. 1986), reprinted in 10 Iran-U.S. C.T.R. 180, 185 (hereinafter "Sedco I") (noting that lump sum settlement agreements can be so greatly inspired by non-judicial considerations that it is extremely difficult to draw from them conclusions as to *opinio juris*).

³⁰ For more on which, see David J. Bederman, *Eligible Claimants Before the Iran-United States Claims Tribunal*, in *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* 47, 65-68 (Richard B. Lillich, Daniel Barstow Magraw & David J. Bederman eds. 1998).

³¹ *A/18 Decision*, 5 Iran-U.S. C.T.R. 251, 272 (1984 - I) (Mosk, arb., concurring) (citing I Lillich & Weston 57-60)

³² *Id.* at 283 (Iranian arbs., dissenting). See also *Agrostruct International, Inc. and Iran State Cereals Organization*, Award No. 358-195-1 (Apr. 15, 1988), 18 Iran-U.S. C.T.R. 180, 223 n.38 (1988 - I) (Noori, arb., dissenting) (citing lump sum agreements on the propriety of counterclaims for owed taxes and social security contributions).

³³ *Id.*

B. Eligible Claimants Under Recent Lump Sum Agreements

Consistent with their pre-1975 counterparts, most of the post-1975 Settlement Agreements state expressly that the distribution of the negotiated lump sum falls within the "exclusive,"³⁴ or occasionally "sole,"³⁵ jurisdiction of the claimant State;³⁶ the balance, except in the rare instance that the lump sum is required to be distributed pursuant to mutually agreed upon procedures set forth in ancillary agreements³⁷ or is the subject of joint determination by the respective State Parties,³⁸ clearly carry that implication.³⁹ This apparent broad discretion, which of course extends to matters other than claimant eligibility, is not absolute, however, and is another way in which the post-1975 Settlement Agreements resemble their pre-1975 counterparts. Sometimes all or part of the lump sum distribution is restricted to claimants specifically identified in appended annexes⁴⁰ -- thus obviating the necessity of inquiring into the eligibility of the claimants involved -- and on one occasion it is qualified by an express respondent State entitlement to any funds remaining after the completion of the distribution process.⁴¹ Most typically, however, the claimant State's distributive discretion is conditioned only by the requirement that the claimant, to be eligible to share in the lump sum distribution, bear the nationality of the claimant State.⁴² Indeed, while not the sole test of claimant eligibility,⁴³ possession of claimant State nationality may well be considered the most important condi-

³⁴ See Article 5 of the Italian-Bulgarian Agreement (7); Article 5(1) of the Canadian-Bulgarian Agreement (9); Article 5 of the Canadian-Hungarian Agreement (13); Article 5 of the Danish-Hungarian Agreement (15); Article 5 of the Canadian-Polish Agreement (19); Article 5 of the Canadian-Czech Agreement (24); Article 6 of the Italian-Hungarian Agreement (25); Article 3 of the United States-Peruvian Agreement (27); Article 8 of the Austrian-Czech Agreement (29); Article 6 of the British-Romanian Agreement (31); Article 4 of the United States-Egyptian Agreement (34); Article 5 of the Swiss-Moroccan Agreement (38); Article 4 of the United States-Chinese Agreement (40); Article 5 of the Austrian-Yugoslav Agreement (41); Article 6 of the Swiss-Zairean Agreement (42); Article 5 of the Canadian-Cuban Agreement (43); Article 3 of the United States-Czech Agreement (46); Article 4 of the United States-Ethiopian Agreement (55); and Article 6 of the Austrian-East German Agreement (59); Article 2(9) of the United States-German Agreement (64); Article 2(2) of the United States-Cambodian Agreement (66); Article 2(2) of the United States-Vietnamese Agreement (67); Article 5 of the United States-Albanian Agreement (68). For earlier equivalents, see 1 Lillich & Weston at 45 n.8. For insistence on adherence to the "exclusive competence" standard in practice in regard to Peru, see 1974 Digest of United States Practice in Int'l Law 419, 421-22.

³⁵ See Article 4 of the Dutch-Italian Agreement (21); Article 4 of the British-U.S.S.R. Agreement (56); Article 3 of the French-Zairean Agreement (61); and Article 3 of the United States-Iranian Agreement (63). For earlier equivalents, see 1 Lillich & Weston at 45 n. 7.

³⁶ Article 1(1) of the West German-Danish Agreement (1) (distribution "according to discretion"); Article 1 West German-Greek Agreement (2) (same); Article 1(2) of the West German-Italian Agreement (4); Article 5 of the Canadian-Czech Agreement (24); and Article 5 of the Canadian-Cuban Agreement (43) *additionally* provide that "[t]he distribution of the sum paid . . . shall be at the exclusive discretion . . . of the Government of Canada." To similar effect, see Article 4 of the United States-Ethiopian Agreement (55). For earlier supplementary expression of this kind, see 1 Lillich & Weston at 46 n.11. By way of contrast, Article 6 of the British-Chinese Agreement (58), which invokes neither the word "exclusive" nor the word "sole," states simply that the two governments "shall be responsible for the settlement of claims and for any distribution to natural and juridical persons of their respective countries . . . without any responsibility arising therefrom for the other Government."

³⁷ See Article 5 of the Belgian-West German Agreement (26) and Article 1(2) of the West German-Polish Agreement (30).

³⁸ See Article 4(3) of the Canadian-Bulgarian Agreement (48). See also Article 4 of the United States-Filipino Agreement (10); Article 2 of the Swiss-Yugoslav Agreement (11); and the Agreed Minute to the United States-Albanian Agreement (68).

³⁹ See Article 1 of the Swiss-West German Agreement (5); Article 5 of the Swiss-Hungarian Agreement (23); Article 3 of the West German-Greek Agreement (28); Article 2 of the French-Guinean Agreement (37); Article 4 of the British-Czech Agreement (45); Paragraph 3 of the British-Mauritiusan Agreement (49); Article 1(2) of the Finnish-East German Agreement (52); and Article 1(1) of the Swedish-East German Agreement (57). See also the Danish-Norwegian Agreement (14); the Canadian-Chinese Agreement (44); and the Italian-Moroccan Agreement (47), the general language of which may be read to infer broad claimant State discretion relative to distributive jurisdiction.

⁴⁰ See Article 1 of the Italian-Bulgarian Agreement (7); Article 1(b) of the United States-Peruvian Agreement (27); Article 2 of the Austrian-Czech Agreement (29); Articles 1 and 3 of the British-Romanian Agreement (31); Article 3 of the United States-Egyptian Agreement (34); Paragraphs 2 and 4 of the British-Cuban Agreement (39); Article 4 and Annex of the Italian-Yugoslav Agreement (50); Article 1 of the French-Zairean Agreement (61). See also Preamble to the United States-Peruvian Agreement (36) (limiting eligibility to one corporation).

⁴¹ The third paragraph of the Polish-British Agreement (33) reads: "It is understood that sums in sterling transferred to the Government of the Polish People's Republic by the Government of the United Kingdom . . . shall be repaid to the Government of the United Kingdom in all cases where the sums are found not to have been due to Polish persons."

It is not surprising that only one of the post-1975 Settlement Agreements contains such a reverter clause nor that this one appears in defense of a capital-exporting country, the United Kingdom. As the authors noted in their 1975 study, "[w]hen it became apparent that the funds available under postwar lump sum settlements would not cover the value of the claims, as determined by the claimant States, such clauses lost their appeal and disappeared from the agreements." 1 Lillich & Weston at 45 n.9.

⁴² See e.g., Article 1 of the Danish-Hungarian Agreement (15). See also Article 5(a) of the United Kingdom-Bulgarian Agreement (60) (requiring that redeeming bond-holders show their U.K. nationality).

⁴³ More or less explicit in all the Settlement Agreements is, for example, the patently rudimentary requirement that no claimant should have the right to share in the lump sum distributions without ownership of the claim in question or without delegated au-

tion precedent to compensatory eligibility.⁴⁴

Thus, like their pre-1975 counterparts, the post-1975 Settlement Agreements reiterate almost unanimously the traditional international law rule -- less an expression of principle, perhaps, than a recognition of the demands of practicality and the limitations of power -- that only nationals of the claimant State are entitled to benefit from claimant State diplomatic protection,⁴⁵ hence to share in the distribution of the lump sum. In respect of only six more or less exceptional categories of claimants have different results been authorized:

. "[w]ar victims in the Belgian areas subject to German internal legislation during the war of 1940-1945," eligible in principle under Article 1 of the Belgian-West German Agreement (26);

. "judicial persons which . . . had their seat in the territory of the Republic of Austria," eligible in principle under Article 2 of the Austrian-Czech Agreement (29);⁴⁶

. "corporations and unincorporated associations constituted under the laws in force . . . in any territory for the international relations of which the United Kingdom Government are . . . responsible," eligible in principle under Article 2(1)(a)(ii) and 2(1)(b)(ii) of the British-Romanian Agreement (31);

. "a natural person . . . who owes permanent allegiance to the United States," eligible in principle under Article 3 of the United States-Egyptian Agreement (34);⁴⁷

. "all corporations or other legal entities for which the United States may, according to its laws, assert international responsibility," eligible in principle under Article 2 of the United States-Czech Agreement (46); and

. "individuals, companies, firms or associations whose money or property have been subjected to special measures in consequence of the Enemy Occupation of Czechoslovakia," eligible in principle under Articles 2 and 3 of the British-Czech Agreement (45).

Otherwise, whether the claimant be a natural or juridical person, the general rule (requiring nationality of the claimant State) is unmistakable and the same.⁴⁸

Of course, to condition eligibility upon proof of claimant State nationality presupposes that claimants must satisfy some definition or test of claimant State nationality. Like their pre-1975 counterparts, however, the post-1975 Settlement Agreements have been almost completely silent in this regard. Beyond the somewhat vague requirement of the Nottebohm Case that a person must have some "genuine connection" with a claimant State before having the right to be considered a claimant State national for international claims purposes,⁴⁹ generally post-1975 Agreements have left the claimant States free to determine, in accordance with their own nationality laws, who they shall consider to be

thority to petition on the owner's behalf.

⁴⁴ All 69 of the post-1975 Settlement Agreements expressly or implicitly make claimant State nationality a condition precedent to compensatory eligibility. *See also* Article 4(3) of the Italian-Egyptian Agreement (6) (providing for eligibility of Italians in Egypt, provided they have non-resident status); Article 3(1)(ii) of the Canadian-Hungarian Agreement (13) (claimant eligibility also based on the Treaty of Peace with Hungary); and Article 2 of the Belgian-Zairean Agreement (32) (Agreement "not applicable to Belgian nationals residing in Zaire who have accepted the benefit of the right to recover their property.").

⁴⁵ *See, e.g., the Panevezys-Saldutiskis Railway Case*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16: "[I]t is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection." *See also* 2 D. O'Connell, *International Law* 1032 (2d ed. 1970). Traceable to Vattel, the doctrine was once famously justified by Umpire Parker of the United States-German Mixed Claims Commission on the grounds that:

"[a]ny other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization law for the purpose of procuring its espousal of their claims." Administrative Decision No. V, 7 R. Int'l Arb. Awards 199, 141 (1924).

⁴⁶ For almost identical language, *see also* Article 2(2) of the Austrian-Yugoslav Agreement (41) and Article 4(1) of the Austrian-East German Agreement (59). For pertinent related discussion, *see infra* note 139 and accompanying text.

⁴⁷ For related pertinent discussion, *see infra* note 75 and accompanying text.

⁴⁸ Sometimes the term "citizen" or "citizens" is used in lieu of the term "national" or "nationals." *See* Article 2(1) of the Canadian-Czech Agreement (24); Article 2 of the Italian-Hungarian Agreement (25); Article 1 of the Canadian-Cuban Agreement (43); Article 1 of the Canadian-Chinese Agreement (44); Article 2 of the Finnish-East German Agreement (52); and Article 1 of the Austrian-East German Agreement (59). The different usage appears to have only stylistic -- not legal -- significance, however, as perhaps evidenced by, for example, the United States-Egyptian Agreement (34), Article 3 of which defines "national of the United States" to mean, *inter alia*, "a natural person who is a citizen of the United States." For identical language, *see also* Article 1 of the United States-Ethiopian Agreement (55).

⁴⁹ 1955 I.C.J. at 23.

their nationals when distributing a lump sum.⁵⁰ Save to acknowledge the six more or less exceptional categories of claimants mentioned in the preceding paragraph plus two further exceptions concerning certain dual nationals⁵¹ and corporate claimants,⁵² it needs only to be observed that, in applying their nationality laws, claimant States have adopted a fairly restrictive attitude toward the determination of nationality.⁵³

To condition eligibility upon proof of claimant State nationality presupposes also that claimants shall have established such nationality at some material time. But unlike their pre-1975 counterparts, however, the post-1975 Settlement Agreements appear less favorably disposed to the traditional eligibility requirement of continuous nationality. This was heretofore thought to be a rule of customary international law, stipulating that a claim be continuously owned from the date of claim (really grievance) accrual to the date of State-espousal or final settlement of the claim.⁵⁴ Only six of the 69 post-1975 Settlement Agreements insist upon the continuous nationality rule unambiguously⁵⁵ and only twelve more approximate its impact by requiring claimant State nationality both on the date of claim accrual (or its equivalent) and on the date of signature or entry into force of the Settlement Agreement (although not necessarily continuously in between).⁵⁶ The great majority, to the extent they address the time-of-nationality issue at all,⁵⁷ require

⁵⁰ "The problem of which persons a State can regard as its nationals is . . . solved in international law by reference to the municipal legal systems, which in this respect have a free hand, providing only that the person in question has some qualified connexion with the State, and the State does not abuse its powers to grant citizenship with the object of evading rules of international law concerning the rights of aliens." I. Foighel, *Nationalization and Compensation* 229 (1964).

⁵¹ See *infra* § A.

⁵² See *infra* § C.

⁵³ See, e.g., Weston, at 80-81. For an explanation of U.S. policy on determining nationality, see 1975 Digest of United States Practice in International Law 484-85. For examples of U.S. practice in requiring continuous nationality, see Claim of Erik K. Petschek and Ruth Petschek Stein, Czech Claims Program, 1983 FCSC Ann. Rep. 8; Claim of Mia Foster, Czech Claims Program, FCSC Dec. & Ann. 381.

⁵⁴ See, e.g., 2 D. O'Connell, *International Law* 1033-39 (2d ed. 1970); 1 L. Oppenheim, *International Law* § 155b (8th ed. H. Lauterpacht 1955); 8 M. Whiteman, *Digest of International Law* 1241 (1967). For a critique of the traditional continuous nationality rule, see Freidberg, *Unjust and Outmoded — the Doctrine of Continuous Nationality in International Claims*, 4 Int'l Law. 835 (1970).

⁵⁵ See Article 1(2) of the Italian-Egyptian Agreement (6); Article 3 of the Canadian-Bulgarian Agreement (9); Article 1(2) of the Swedish-Egyptian Agreement (20); Article 2(1)(b) of the British-Czech Agreement (45); Article 2 of the United States-Czech Agreement (46); and Article 2 of the United States-Ethiopian Agreement (55). Failure to establish U. S. nationality on the first leg of the continuous nationality rule propounded in the United States-Czech Agreement (46), *i.e.*, the date of claim accrual ("nationalization or other taking"), prevented an award in the Claim of Eric K. Petschek and Ruth Petschek Stein, Czech Claims Program, 1983 FCSC Ann. Rep. 8.

It is probable that Article 1 of the Swiss-Hungarian Agreement (23) imposes the requirement of continuous nationality though its language is ambiguous, declaring "Swiss property, rights, interests and claims" eligible not if they were Swiss from the time of claim accrual to the time of settlement but if "[they] have, up to the date of signature of the present Agreement, *been affected* by a Hungarian nationalization measure . . ." (Emphasis added.) According to the leading authority on postwar Swiss claims practice, "nothing suggests [as of 1982] that the Swiss authorities are prepared to depart from the rule of continuous nationality, despite the shaky theoretical foundations of that rule." Caflisch, *International Claims: Contemporary Swiss Practice*, in *Contemporary European Practice*, at 142.

To like effect, see Article 1 of the Canadian-Cuban Agreement (43) declaring Canadian natural and juridical persons to be eligible if they "*were affected* by the laws, legal provisions and measures adopted by the Government of the Republic of Cuba on or after the first day of January, nineteen hundred and fifty-nine, until the date of the signature of the present Agreement inclusive" (emphasis added).

⁵⁶ See Article 1 of the Danish-Hungarian Agreement (15) (date of signature); Article 2 of the Canadian-Romanian Agreement (16) (date of signature); Article 1(2)(a) & (b) of the United Kingdom-Egyptian Agreement (18) (date of signature); Article 2(1) & (2) of the Canadian-Polish Agreement (19) (date of entry into force); Article 2 (1) & (2) of the Canadian-Czech Agreement (24) (date of entry into force); Article 2 of the Italian-Hungarian Agreement (25); Article 2(1) of the Austrian-Yugoslav Agreement (41) (date of signature); and Article 1 of the French-Zairean Agreement (61). For modified "two-pronged" provisions, requiring claimant State nationality on or about the collapse of Nazi power following World War II and on the date of signature of the lump sum agreement, see Article 2(1) of the Austrian-Czech Agreement (29) (date of signature); Article 2(1) of the Finnish-East German Agreement (52) (date of entry into force); and Article 4(1) of the Austrian-East German Agreement (59).

It is possible, of course, that the two-pronged test might permit some awards that, as traditionally defined, the continuous nationality rule would bar. Judging from the decisions of national claims commissions, however, this is not likely to occur frequently. For illustration and discussion see 1 Lillich & Weston at 53-55. For an example of the denial of a claim not continuously held by a claimant state national, see Claims of AOFC, Inc., Cuban Claims Program, 1972 FCSC Ann. Rep. 127.

⁵⁷ Usually because of the nature of the claims or claimants involved or some other perfectly understandable reason, the following agreements are silent about the date or dates upon which claimant State nationality must be established (if at all): the Swiss-West German Agreement (5); the Dutch-Italian Agreement (21); the Belgian-West German Agreement (26); the West German-Greek Agreement (28); the West German-Polish Agreement (30); the Polish-British Agreement (33); the French-Guinean Agreement (37); the British-Cuban Agreement (39); the Italian-Moroccan Agreement (47); the Canadian-Bulgarian Agreement (48).

claimant State nationality only on the date of claim accrual,⁵⁸ sometimes only on the date of signature or entry into force of the Settlement Agreement.⁵⁹ In contrast, the vast majority of the pre-1975 Settlement Agreements favored the continuous nationality rule either *stricto sensu* or in its two-pronged approximating form.⁶⁰

It is of course possible that this shift away from the continuous nationality rule in its pure and hybrid forms is not as pronounced as at first it might seem from a reading of the post-1975 Settlement Agreements. The United States Foreign Claims Settlement Commission, for example, has on at least one occasion insisted upon the continuous nationality rule even in the face of an agreement requiring claimant State nationality only on the date of claim accrual.⁶¹ The Commission has also invoked the rule to deny claims when the claimant was not a U.S. national on the date of claim-accrual.⁶² For the adjudication of claims settled under the Agreement between Iran and the United States (63), the FCSC was obliged to follow the earlier provision of the Algiers Accords requiring continuous nationality,⁶³ and, as a consequence, did dismiss claims for that reason.⁶⁴ It is noteworthy, however, that Canada, Great Britain, Switzerland, and the United States — all claimant States that in their pre-1975 lump sum agreement-making tended to embrace the continuous nationality rule -- appear now, in the years since 1975, to forgo it in favor of nationality on the date of claim accrual or settlement only.⁶⁵

⁵⁸ See Article 3(1)(ii) of the Canadian-Hungarian Agreement (13); Article 2 (1)(b) of the British-Romanian Agreement (31); Article 1(2) of the Belgian-Zairean Agreement (32); Article 2 of the Swiss-Moroccan Agreement (38); and Article 2 of the United States-Ethiopian Agreement (55). See also the following agreements which, though not explicit in requiring claimant State nationality on the date of accrual, nonetheless imply as much: the United States-Peruvian Agreement (27); the United States-Egyptian Agreement (34); the United States-Chinese Agreement (40); the Swiss-Zairean Agreement (42); the Canadian-Chinese Agreement (44); the British-Mauritius Agreement (49); the British-Vanuatu Agreement (51); and the British-U.S.S.R. Agreement (56); the United States-German Agreement (69). This implication is confirmed in respect of the United States-Chinese Agreement (40) in Nash, *Contemporary Practice of the United States Relating to International Law*, 73 Am. J. Int'l L. 476, 488-89 (1979). The Commission, however, insisted upon the continuous nationality rule in denying a claim that arose in favor of an American corporation but was temporarily held by a Canadian corporation. Claims of AOFI, Inc., Cuban Claims Program, 1972 FCSC Ann. Rep. 127.

⁵⁹ See Article 2 of the Italian-Czech Agreement (8) (entry into force); Article 2 of the Italian-Romanian Agreement (12) (date of signature); Article 2(1)(a) of the British-Romanian Agreement (31) (date of signature); Article 7 of the United Kingdom-Bulgarian Agreement (60) (entry into force).

⁶⁰ See 1 Lillich & Weston at 48-52.

⁶¹ See *Id.* at 49. The Commission has stated that nationality requirements are met if the property taken was owned by a U. S. national at the time of taking and the claim was continuously owned by that national until the claim was filed with the Commission. Claim of Amparo Rodriguez, Cuban Claims Program, 1970 FCSC Ann. Rep. 69.

⁶² See Claim of Eric K. Petschek and Ruth Petschek Stein, Czech Claims Program, 1983 FCSC 8; Claim of Mia Foster, Czech Claims Program, FCSC Dec. & Ann. 381 (both denying claims when claimant was not a U.S. national on the date of claim accrual or on the date for naturalization set by statute).

⁶³ See Claims Settlement Declaration, art. VII(2), reprinted in 1 Iran-U.S. C.T.R. at 11. The express terms of the FCSC's grant of jurisdiction over the Iran claims required that the Commission apply "the relevant provisions of the [Claims Settlement Declaration], giving consideration to interpretations thereof by the Iran-United States Claims Tribunal." Foreign Relations Authorization Act, Pub. L. No. 99-93, tit. V, 99 Stat. 438 (1985) (50 U.S.C. § 1701 note). See also Richard B. Lillich & David J. Bederman, *The Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims*, 91 AJIL 436, 436-39 (1997).

⁶⁴ See, e.g., Syrus Rayhan Claim, Dec. No. IR-0475 (1992). Likewise, the FCSC rejected one claim under a pre-adjudication of the claims settled with the Agreement concluded between the United States and Vietnam (67). See American Int'l Group Claim, Dec. No. V-0405, at 2-3 (1986). But otherwise enforced the continuous nationality rule in a way that permitted eligibility. See, e.g., Marian L. Moffitt Claim, Dec. No. V-0494 (1985) (claim originally filed in name of U.S. father, and upon his death was transferred by his estate to his U.S. children); Lincoln C. Brownwell Claim, Dec. No. V-0429 (1985) (assignment by U.S. claimant to 5 U.S. parties); William A. Yerabek Claim, Dec. No. V-0257 (1985) (where U.S. national purchased real property through Vietnamese spouse, claim was still considered continuously owned by U.S. nationals). See also J. Jeffrey Brown, *The Jurisprudence of the Foreign Claims Settlement Commission: Vietnam Claims*, 27 Va. J. Int'l L. 99, 110-13 (1986).

⁶⁵ See *supra* text accompanying notes 27 and 28. A somewhat ambiguous indication of this apparent trend is found in the implementing legislation to the United States-Czech Agreement (21) -- to wit, the Czechoslovakian Claims Settlement Act of 1981, 22 U.S.C. § 1642 (1988) -- which, in Section 4(b)(3), set aside a portion (\$5.4 million) of the settlement for persons who were not U. S. citizens when their property was nationalized by Czechoslovakia and who, indeed, for this very reason and in respect of the same claims, were denied compensation -- incorrectly according to H.R. Rep. No. 97-385. 97th Cong., 1st Sess. 9, 10 (1981) -- by the Foreign Claims Settlement Commission on a prior occasion. The ambiguity lies in the fact that Congress stipulated the amount set aside to be paid "*ex gratia*." On the other hand, as Vratislav Pechota has remarked, "[e]ven though Congress did not intend to innovate insofar as international law was concerned, it helped raise the question of basic fairness in the dogma of nationality of claims." Pechota, *supra* note 39, at 650.

It should be noted that substantial controversy has been generated by a provision of Title III of the Helms-Burton Act which permits U.S. citizens with claims to property confiscated by the Cuban government to sue, in U.S. courts, persons who traffic in such property. See Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785, § 306 (1996) (codified at 22 U.S.C. §§ 6021-91). Helms-Burton purports to extend its protection to property owned by individuals who were not, at the time of the confiscation, U.S. nationals. This may violate the continuous nationality rule for claims, a

In any event, assuming a shift away from the pure continuous nationality rule to be in the making, at least to some degree, the trend is a salutary one. As Professors Lillich and Weston stated in their treatise seventeen years ago:

Requiring nationality at the date of signature, when it is common knowledge that decades often pass between the time claims accrue and the time they are settled, naturally operates to preclude the allowance of many otherwise meritorious claims, since individual claimants dying during this period often leave nonnational heirs or legatees. When thus invoked to deny awards to a claimant's successors, the rule warrants its description as "an archaic relic which does not serve the ends of justice."⁶⁶ Furthermore, requiring nationality at the date of entry into force, which frequently follows the date of signature by weeks or even months, merely increases the rule's capacity to cause hardship.⁶⁷

Simply requiring proof of nationality on the date of claim accrual would seem the best way to serve "the ends of justice."⁶⁸

I. Individuals

Thirty-one of the 69 post-1975 Settlement Agreements expressly declare "individuals"⁶⁹ or "natural"⁷⁰ or "physical"⁷¹ persons who are claimant State nationals to be eligible for lump sum protection, and the remainder clearly imply as much⁷² or assign such claimants, without prejudice, to other settlement arrangements.⁷³ In so doing, they

point that has been noted in the literature. See Opinion of the Inter-American Juridical Committee, OAS Doc. 51st Sess. CJI/SO/II/doc. 76/96 rev. 5, ¶¶ 5(c) & 6(b) (1996); David Kaye, *The Helms-Burton Act: Title III and International Claims*, 20 *Hastings Int'l & Comp. L. Rev.* 729, 740-43 (1997); Christian Franken, *The Helms-Burton Act: Force or Folly of the World's Leader*, 7 *Minn. J. Global Trade* 157, 17-71 (1998); Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 *AJIL* 434, 438 (1996).

⁶⁶ Citing Friedberg, *Unjust and Outmoded -- The Doctrine of Continuous Nationality in International Claims*, 4 *Int'l Lawyer* 835, 836 (1970).

⁶⁷ 1 Lillich & Weston at 52 (most footnotes omitted).

⁶⁸ Cf. Kerley, *Nationality of Claims -- A Vista*, 63 *American Soc'y Int'l L. Proceedings* 35, 36-37 (1969):

It has been suggested that it would be logical to permit the state to present a claim on behalf of a person who was its national at the time of the injury, even if the claimant is not its national at the time of presentation. I doubt, however, that the law is likely to develop in this way. It seems unlikely to me that states will, as a general practice, be disposed to undertake the presentation of claims on behalf of persons who have ceased to be their nationals. Much more foreseeable is a growing recognition of the right of a state to present a claim on behalf of a person who is its national at the time of presentation and who, though not its national at the time of injury, had other links with the claimant state.

⁶⁹ See Article 3 of the Danish-Hungarian Agreement (15); Article 1(1) of the Swedish-Egyptian Agreement (20); Article 3 of the West German-Greek Agreement (28); Articles 2 & 3 of the British-Czech Agreement (45); and Article 2 of the United States-Czech Agreement (46).

⁷⁰ See Article 1(b) of the Italian-Czech Agreement (8); Article 1 of the Italian-Romanian Agreement (12); Article 12 of the Canadian-Romanian Agreement (16); Article 2(1) of the Canadian-Polish Agreement (19); Article 2 of the Dutch-Italian Agreement (21); Article 2 of the Swiss-Hungarian Agreement (23); Article 2(1) of the Canadian-Czech Agreement (24); Article 3 of the United States-Egyptian Agreement (34); Article 1 of the French-Brazilian Agreement (35); Article 2 of the Swiss-Moroccan Agreement (38); Article 1 of the United States-Chinese Agreement (40); Article 2 of the Swiss-Zairean Agreement (42); Article 1 of the Canadian-Cuban Agreement (43); Article 1 of the Canadian-Chinese Agreement (44); Article 2 of the Canadian-Bulgarian Agreement (48); Article 1 of the United States-Ethiopian Agreement (55); and Articles 1 & 3 of the British-Chinese Agreement (58); Article 1 of the French-Zairean Agreement (61); Article 1(B) of the United States-Iranian Agreement (63); Article 1 of the United States-German Agreement (64); Article 1 of the United States-Cambodian Agreement (66); Article 1 of the United States-Vietnamese Agreement (67); and Article 1 of the United States-Albanian Agreement (68).

⁷¹ See Article 1(1) of the Italian-Egyptian Agreement (6); Article 1(a) of the Italian-Bulgarian Agreement (7); Article 3(1) of the Canadian-Hungarian Agreement (13); Article 1(1) of the United Kingdom-Egyptian Agreement (18); Article 2 of the Italian-Hungarian Agreement (25); Articles 1 & 2 of the Austrian-Czech Agreement (29); Article 2 of the British-Romanian Agreement (31); Article 1(b) of the French-Guinean Agreement (37); Paragraph 6 of the British-Cuban Agreement (39); Article 2 of the Austrian-Yugoslav Agreement (41); Article 1 of the British-U.S.S.R. Agreement (56); Articles 4 & 5 of the Austrian-East German Agreement (59); Article 7(a) of the United Kingdom-Bulgarian Agreement (60); Article 3 of the United Kingdom-Latvian Agreement (65).

⁷² See the Swiss-West German Agreement (5); the Danish-Norwegian Agreement (14); the Belgian-West German Agreement (26); the Polish-British Agreement (33); the British-Mauritius Agreement (49); and the British-Vanuatu Agreement (51); Article 1(a) of the Greek-Polish Agreement (53); Article 1(a) of the Greek-Czech Agreement (54).

⁷³ See Article 1(c) of the United States-Peruvian Agreement (27) and Article 1(2) of the West German-Polish Agreement (30).

continue a pattern firmly established in the pre-1975 Settlement Agreements.⁷⁴

It remains, however, to be noted that, traditionally, States have been reluctant to take up the claims of "individual," "natural," or "physical" persons who, though possessing claimant State nationality (even within the terms of the continuous nationality requirements), possess also the nationality of a foreign country, especially the nationality of the respondent State. "[W]here the person injured is a dual national," it has been said, "the state of the one nationality is not entitled to espouse the claim against the state of the other nationality."⁷⁵

Only three of the post-1975 Settlement Agreements addresses the matter of dual or double nationality explicitly.⁷⁶ They do so in a manner that challenges the traditional rule. For example, the United States-Egyptian Agreement (34) defines, in Article 3, the phrase "national of the United States" to mean, *inter alia*, "a natural person . . . who owes permanent allegiance to the United States" and by expressly stipulating, relative to this definition, in an annexed Agreed Minute, that the United States "recognized and applies the principle of international law concerning the dominant and effective nationality of dual nationals."⁷⁷ Even more specifically, an Agreed Minute to the United States-Albanian Agreement (68) notes that the term "U.S. nationals" was understood to "include dual United States - Albanian nationals only if those nationals are domiciled in the United States currently or for at least half the period of time between when the property was taken and the date of entry into force of the Agreement."

These two agreements reinforce a trend already begun in pre-1975 practice⁷⁸ (particularly in relation to the United States, which had officially endorsed the "dominant and effective nationality" doctrine before 1975)⁷⁹ and continued most recently in the decision of the Iran-U.S. Claims Tribunal. The Tribunal held, beginning with the *Espahanian* case,⁸⁰ that dual Iranian and U.S. nationals could make a claim before the Tribunal provided that their dominant and effective nationality was of the State other than the respondent. In other words, a dual Iranian-U.S. national wishing to make a claim against the United States would have to prove that her Iranian nationality was dominant and effective. This holding was confirmed in the *A-18* decision.⁸¹ In that opinion, the full Tribunal finally articulated the substantive basis of the dominant and effective nationality rule, noting that "[i]n determining the dominant and effective nationality, [it] will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment."⁸² The *A-18* case also states that there is a "relevant period" for making the dominant and effective nationality determination, a period of time between the date the claim arose and the Claims Settlement Agreement on January 19, 1981.⁸³

⁷⁴ See 1 Lillich & Weston at 45-61.

⁷⁵ J. Simpson & H. Fox, *International Arbitration* 106 (1959). See also 5 G. Hackworth, *A Digest of International Law* 822 (1943); F. Vallat, *International Law and the Practitioner* 19, 24 (1966); Wang, *Nationality of Claims and Diplomatic Intervention -- Canadian Practice*, 43 *Canadian Bar Rev.* 136, 137 (1965). But see Griffin, *International Claims of Nationals of Both the Claimant and Respondent States -- The Case History of a Myth*, 1 *Int'l Lawyer* 400 (1967), indicating that the question of dual nationality was far less settled in the nineteenth century than subsequent statements about the absolute nature of the traditional rule would suggest.

⁷⁶ See *supra* note 67 and accompanying text. The issue of dual nationality appears to have been implicated, however, even if never actually addressed, in respect of the United States-Czech Agreement (29). Czechoslovakian nationals who became naturalized U.S. citizens during World War II posed the possibility of dual nationality by virtue of the United States-Czechoslovak Naturalization Treaty of July 16, 1928, 46 Stat. 2424, T.S. No. 804, and therefore were resisted by the Czech negotiators from being included in the lump sum settlement. According to Pechota, however, no formal agreement ever was reached on this potential problem and Czechoslovakia "seems to accept the view that personal status is determined by dominant nationality." Pechota, *supra* note 39, at 652. See also Exchange of Notes with the Austrian-Italian Agreement (17), wherein claims of those who "possessed Italian nationality at the time when such losses occurred but subsequently acquired Austrian nationality" were allowed.

⁷⁷ See Authors' Note to the United States-Egyptian Agreement (34). In construing this provision to determine that claimant dual nationals were eligible for an award, the Department of State considered such factors as the family's education in American schools, its employment in the United States, that it owned its apartment in the United States, and that they returned to Egypt only as tourists. Claim No. E8, Decision No. 2, 1977 *Digest of U.S. Prac. in Int'l L.* 693.

⁷⁸ See, e.g., *Merge Case* (United States v. Italy), 22 *I.L.R.* 443, 455 (United States-Italian Conciliation Commission 1955), wherein the Commission held that "[t]he principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality wherever such nationality is that of the claiming State. . . ."

⁷⁹ See 8 M. Whiteman, *supra* note 54, at 1252. See also Lillich (US), at 83-84.

⁸⁰ *Espahanian and Bank Tejarat*, 2 Iran-U.S. C.T.R. 157 (1983-I), noted at 77 *AJIL* 646 (1983). See also *Golpira and Islamic Republic of Iran*, 2 Iran-U.S. C.T.R. 171 (1983-I).

⁸¹ See *Islamic Republic of Iran and United States* (Case A/18), 5 Iran-U.S. C.T.R. 251 (1984 - I).

⁸² *Id.* at 265.

⁸³ *Id.* For more on the Tribunal's practice regarding eligibility of individuals, see David J. Bederman, *Nationality of Individual Claimants before the Iran-United States Claims Tribunal*, 42 *ICLQ* 119 (1993).

The Tribunal's practice bolsters the view, confirmed in Belgian, British, Italian, and Swiss practice at least,⁸⁴ that dual nationality is less and less likely to be equated *ipso facto* with ineligibility. But it should be observed that one post-1975 Agreement, that between Sweden and Egypt (20) (actually concluded in 1971) embraces the traditional rule of disqualification for dual nationals. It has two relevant provisions on dual nationality. Article 1(3) provides that "[i]ndividuals having Swedish-Egyptian dual nationality shall be wholly excluded from the application of this Agreement." The following provision notes that "[i]ndividuals having Swedish nationality and a nationality other than Egyptian shall be deemed to be of Swedish nationality within the meaning of this Agreement only where the Swedish nationality can be said to be their predominant or actual nationality." This latter provision is the only example in Lump Sum Agreement practice to the problem of individuals who hold the nationality of the eligible, claimant State, as well as that of a third (non-respondent) State.

This issue has been partially addressed in the practice of the Iran-U.S. Claims Tribunal. In the first such case, the Daley claim,⁸⁵ the issue was not really addressed because the claimants proved that when acquiring U.S. citizenship in 1965 they had ceased being British subjects.⁸⁶ Likewise, in the claim of Uiterwyk Corporation,⁸⁷ Chamber One noted that the individual owners of the claimant entity had automatically renounced their Dutch nationality when becoming U.S. citizens between 1956 and 1958.⁸⁸ Somewhat laconically, the Chamber noted that "the requirements of proving dominant and effective United States nationality . . . do not apply to any of the five individual Claimants."⁸⁹ The inference seems to be that *if* the individual claimants were, in fact, dual nationals of both The Netherlands and the United States, the Tribunal would have been obliged to determine which was their dominant and effective nationality under the A-18 decision. The same dicta appeared in the later claim of Ali Ashgar.⁹⁰

Whether an individual, having one "eligible" nationality and one of a third country, must satisfy the dominant and effective test is a novel question for international tribunals. The Tribunal, in the Asghar, Uiterwyk Corp., and Daley claims, seems to have assumed that its specific grant of jurisdiction, in the Claims Settlement Agreement,⁹¹ required that it make such a determination. Moreover, the Tribunal might have implicitly been reasoning by analogy from the CSA's other provisions concerning corporate nationality and the requirement of effective control,⁹² clauses that were intended to (primarily) limit Iran's exposure to claims made by entities which were, in fact, dominantly American. This conclusion, however, may not be inescapable. Some publicists might suggest that the dominant and effective nationality test only really works, in an evidentiary sense, when the two opposing nationalities are those of the States parties to the arbitration. How else can claims of real attachment to one or the other country be effectively tested and rebutted? Moreover, since dual nationality is not prohibited by international law (although certainly discouraged in municipal law), a national (for example) of both the United States and Britain ought to be allowed to make a claim without necessarily showing that the U.S. nationality is dominant and effective. This result might run counter to the presumption, raised in Lianosoff,⁹³ that statelessness is no better than the nationality of a third state. This area remains a contentious one, and publicists may wait in vain for international arbitral or lump sum practice to resolve it.

⁸⁴ See Lillich (GB), at 31-33; 1 Lillich & Weston at 57-60; Lillich & Weston, *Introduction*, in *Contemporary European Claims*, at 2-3; Giardina, *International Claims: Contemporary Italian Practice*, *id.* at 116-18; Cafilisch, *International Claims: Contemporary Swiss Practice*, *id.* at 141-42. See also Weston, at 92 n.64, indicating that the French *commissions de répartition*, though they had not discussed the dual nationality problem as of 1971, probably would resolve it in favor of the "dominant and effective nationality" doctrine.

⁸⁵ Daley and Islamic Republic of Iran, 18 Iran-U.S. C.T.R. 232 (1988 - I).

⁸⁶ *Id.* at 236-37.

⁸⁷ Uiterwyk Corp. and Islamic Republic of Iran, 19 Iran-U.S. C.T.R. 107 (1988-II).

⁸⁸ *Id.* at 118.

⁸⁹ *Id.*

⁹⁰ Asghar and Islamic Republic of Iran, 24 Iran-U.S. C.T.R. 238, 242-43 (1990-I).

⁹¹ See Claims Settlement Declaration, art. II(1) (The Tribunal is established "for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States"), *reprinted in* 1 Iran-U.S. C.T.R. at 9.

⁹² See Claims Settlement Declaration, art. VII(1), *reprinted in* 1 Iran-U.S. C.T.R. at 11. See also Convention on Certain Questions relating to conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89, Article 5 of which provides that "[w]ithin a third [s]tate, a person having more than one nationality shall be treated as if he had only one," and that primary nationality would be dependent on habitual residence or close connections. *Id.* art.5. It is questionable whether this provision speaks to the circumstance described here.

⁹³ Lianosoff and Islamic Republic of Iran, 5 Iran-U.S. C.T.R. 90, 93 (1984 - I).

II. Partnerships

Whereas one of the pre-1975 Settlement Agreements provides for partnerships expressly,⁹⁴ none of the post-1975 do so, doubtless a continuing reflection of this century's trend toward the corporate form of doing business abroad. Like their pre-1975 counterparts, however, a number of the post-1975 Settlement Agreements expressly mention claims by "juridical persons,"⁹⁵ "commercial companies,"⁹⁶ "companies, firms or associations,"⁹⁷ "unincorporated associations,"⁹⁸ "enterprises,"⁹⁹ and "other legal entities"¹⁰⁰ -- all phrases that clearly embrace partnership claims.¹⁰¹

The eligibility of partnerships had previously been an irksome question in international claims practice. Up until recently, there has been little chance for the development of consistent doctrine.¹⁰² The fighting question was, and still is, whether a claim can be brought for that share of a partnership or joint venture controlled by non-eligible individuals.¹⁰³ There are, analytically, three possible solutions to the puzzle. The claims of partnerships can be barred if even a single interest-holder holds an ineligible nationality. So, if one were to imagine a law firm of forty principals, its claim (as a partnership) would be disallowed if even a single partner held the nationality of the respondent State. At the other extreme, a partnership or joint venture could be allowed to claim for the entire property of the entity, even for those interests held by ineligible nationals. Finally, a compromise solution would be to disaggregate the interests of the partnership, allowing the entity to bring a claim only for those interests held by stakeholders with an eligible nationality. The remaining interests would not be actionable. This final, pro rata, solution was adopted by the Iran-U.S. Claims Tribunal.¹⁰⁴

Even though lump sum agreements are relatively silent as to partnership claims, the national claims commission practice is to treat both partners and partnerships as eligible if they meet nationality requirements, to allow claims by individual partners according to their proportional partnership share, or occasionally to assimilate the partnership to

⁹⁴ See 1 Lillich & Weston at 62 n.79, discussing Article 2(a) of the United States-Romanian Agreement of March 30, 1960, reprinted in 2 Lillich & Weston at 217.

⁹⁵ Article 2 of the Dutch-Italian Agreement (21); Article 2(3) of the Swiss-Hungarian Agreement (23); Article 2(2) of the Canadian-Czech Agreement (24); Article 2 of the Italian-Hungarian Agreement (25); Article 2(2)(ii) of the British Romanian Agreement (31); Article 2 of the Swiss-Moroccan Agreement (38); Article 1(a) & (b) of the United States-Chinese Agreement (40); Article 2(2) of the Austrian-Yugoslav Agreement (41); Article 2 of the Swiss-Zairean Agreement (42); Article 1 of the Canadian-Cuban Agreement (43); Article 1 of the Canadian-Chinese Agreement (44); Article 2 of the Canadian-Bulgarian Agreement (48); Article 2(1), (2) & (3) of the Finnish-East German Agreement (52); Article 1 of the British-U.S.S.R. Agreement (56); Articles 1 & 3 of the British-Chinese Agreement (58); Articles 1 & 2 of the Austrian-East German Agreement (59); Article 1 of the French-Zairean Agreement (61); and Article 1(B) of the United States-Iranian Agreement (63).

⁹⁶ Article 2 of the Swiss-Hungarian Agreement (23).

⁹⁷ Articles 2 & 3 of the British-Czechoslovak Agreement (45).

⁹⁸ Article 2(1)(a)(ii) & 2(1)(b)(ii) of the British-Romanian Agreement (31).

⁹⁹ Article 5 of the Swiss-Zairean Agreement (42).

¹⁰⁰ Article 3 of the United States-Egyptian Agreement (34); Article 2 of the United States-Czech Agreement (46); and Article 2 of the United States-Ethiopian Agreement (55).

¹⁰¹ The term "institutions" is used in Article 1 of the West German-Polish Agreement (30) and in the second paragraph of the Polish-British Agreement (33), a term that conceivably could be intended to cover partnerships (and, indeed, all forms of business entities) for claims purposes. *But see infra* note 114 and accompanying text.

Also, depending on comparative law analyses, arguably the term "bodies corporate," found in Article 3 of the Danish-Hungarian Agreement (15) could be similarly interpreted. *But see infra* text accompanying note 114.

¹⁰² See Ohly, *A Functional Analysis of Claimant Eligibility*, in Lillich, *State Responsibility* 281, 290-91.

¹⁰³ The question of whether a claim could be made by a partnership controlled entirely by nationals of an eligible nationality was answered early in the affirmative. *See, e.g.*, Claim of Wellington, Sears & Co. (U.S. v. Turk.), F. Nielsen, *American-Turkish Claims Settlement: Opinion and Report* 459 (1937); Case of Massardo, Carbone & Co. (Italy v. Venez.), *Ralston* 706, reprinted in 10 R.I.A.A. 541. *But see* Messrs. D.J. & D. Spillane & Co. (U.K. v. Mex.), *Further Decisions and Opinions of the Commissioners*, 1933, at 72 (May 13, 1931), reprinted in 5 R.I.A.A. 156 (where the Tribunal required that claims be filed by individual members of the partnership); Claim of Henry Chauncey (U.S. v. Chile), reprinted in 2 Appendix to the Case of the United States of America v. Chile 558, 569 (1910) (where the Tribunal ruled that the partnership itself was considered a legal person under Chilean law, and thus ineligible to itself bring a claim against Chile), revised by an amiable compositeur, *The Alsop Claim* (U.S. v. Chile), 11 R.I.A.A. 355, 360, reprinted in 5 AJIL 1079, 1085 (1911).

¹⁰⁴ See *Housing and Urban Services Int'l (HAUS) Inc. and Islamic Republic of Iran*, 9 Iran-U.S. C.T.R. 313, 314-22 (1985 - II). For more on the Tribunal's practice, see David J. Bederman, *Eligible Claimants Before the Iran-United States Claims Tribunal* in *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* 47, 88-92 (Richard B. Lillich, Daniel Barstow Magraw & David J. Bederman ed. 1998); Scribner K. Fauver, *Partnership Claims before the Iran-United States Claims Tribunal*, 27 Va. J. Int'l L. 307 (1987).

corporate status and to apply the relevant test for corporate nationality.¹⁰⁵ United States practice offers an example of the first approach;¹⁰⁶ Austrian and French practice examples of the second;¹⁰⁷ and British and Swiss practice examples of the third.¹⁰⁸ There may be a subtle shift in international claims practice on this subject. To the extent that this indicates a liberalization in treatment of eligibility of partnerships and joint ventures, this would be a welcome development.¹⁰⁹

III. Corporations

Like the pre-1975 Settlement Agreements, nearly all the post-1975 Settlement Agreements contain some provision authorizing claims by corporations, whether this form of doing business is contemplated under the rubrics "juridical persons,"¹¹⁰ "companies, firms and associations,"¹¹¹ "commercial companies,"¹¹² "enterprises,"¹¹³ "bodies corporate,"¹¹⁴ or under the actual term "corporations."¹¹⁵ Occasionally, reference is found to claims by "institutions,"¹¹⁶ a term possibly intended to cover corporate or quasi-corporate claims¹¹⁷ or possibly claims by business enterprises that take the place of private corporations in socialist legal systems.¹¹⁸ Moreover, several agreements mention claims by "moral persons,"¹¹⁹ a term also intended to cover corporate or quasi-corporate claims.

Also like their pre-1975 counterparts, a number of the post-1975 Settlement Agreements contain language explicitly or implicitly requiring corporate and equivalent claimants to possess the nationality of the claimant State although without elaborating on the meaning of this requirement. Thus, Article 2 of the Swiss-Moroccan Agreement (38) authorizes claims by, simply, "juridical persons of Swiss nationality. . . ."¹²⁰

¹⁰⁵ See 1 Lillich & Weston at 62-63.

¹⁰⁶ See Lillich (US), at 84-86; Lillich & Christensen at 14-15.

¹⁰⁷ See Seidl-Hohenveldern, *International Claims: Contemporary Austrian Practice*, in *Contemporary European Practice* at 14, 31-32; Weston at 168 n.397, 169.

¹⁰⁸ See Lillich (GB) at 34-36; Cafilisch, at 148-50. British practice, it may be noted, permits the claims of partnerships despite the absence of British partners or the presence of non-British partners. Swiss practice, on the other hand, requires that the partners controlling the firm be Swiss.

¹⁰⁹ See Richard B. Lillich, *Joint Ventures and the Law of International Claims*, 10 Mich. J. Int'l L. 430 (1989).

¹¹⁰ Article 1(b) of the Italian-Czechoslovak Agreement (8); Article 3 of the Canadian-Bulgarian Agreement (9); Article 3(1)(ii) of the Canadian-Hungarian Agreement (13) (referring to both "juridical persons" and "corporations"); Article 2 of the Canadian-Romanian Agreement (16); Article 2(2) of the Canadian-Polish Agreement (18); Article 2 of the Dutch-Italian Agreement (21); Article 2 of the Swiss-Hungarian Agreement (23); Article 2(2) of the Canadian-Czech Agreement (24); Article 2 of the Italian-Hungarian Agreement (25); Article 2(2)(ii) of the British-Romanian Agreement (31); Article 1 of the French-Brazilian Agreement (35); Article 2 of the Swiss-Moroccan Agreement (38); Article 1(a) & (b) of the United States-Chinese Agreement (40); Article 2(2) of the Austrian-Yugoslav Agreement (41); Article 2 of the Swiss-Zairean Agreement (42); Article 1 of the Canadian-Cuban Agreement (43); Article 1 of the Canadian-Chinese Agreement (44); Article 2 of the Canadian-Bulgarian Agreement (48); Article 2(1), (2) & (3) of the Finnish-East German Agreement (52); Article 1 of the British-U.S.S.R. Agreement (56); Articles 1 & 3 of the British-Chinese Agreement (58); Articles 1 & 2 of the Austrian-East German Agreement (59); Article 1 of the French-Zairean Agreement (61); Article 1(B) of the United States-Iranian Agreement (63); Article 1 of the United States-German Agreement (64); Article 3 of the British-Latvian Agreement (65); Article 1 of the United States-Cambodian Agreement (66); Article 1 of the United States-Vietnamese Agreement (67); and Article 1 of the United States-Albanian Agreement (68).

¹¹¹ Articles 2 & 3 of the British-Czech Agreement (45).

¹¹² Article 2 of the Swiss-Hungarian Agreement (23).

¹¹³ Article 5 of the Swiss-Zairean Agreement (42).

¹¹⁴ Article 3 of the Danish-Hungarian Agreement (15); and Article 1 (1) of the Swedish-Egyptian Agreement (20). *But see supra* note 101 and accompanying text.

¹¹⁵ Article 1(1) of the West German-Dutch Agreement (3); Article 1(B) of the United States-Peruvian Agreement (27); Article 2(1)(a)(ii) & 2 (1)(b)(ii) of the British-Romanian Agreement (31); Article 3 of the United States-Egyptian Agreement (34); Article 2 of the United States-Czech Agreement (46); Article 1 of the United States-Ethiopian Agreement (55); Article 1(2) of the British-Chinese Agreement (58); Article 7(b) of the British-Bulgarian Agreement (60) (referring both to "corporations and unincorporated associations").

¹¹⁶ Article 1 of the West German-Polish Agreement (30) and the second paragraph of the Polish-British Agreement (33).

¹¹⁷ *But see supra* note 101 and accompanying text.

¹¹⁸ The only agreements using the term "institutions" had Eastern European countries as the claimant States. *See supra* note 115. *See also* Article 1(2) of the Belgian-Zairean Agreement (32) (referring to "legal persons," but excluding "publicly traded corporations").

¹¹⁹ Article 1(1) of the Italian-Egyptian Agreement (6); Article 1(a) of the Italian-Bulgarian Agreement (7); Article 1(b) of the French-Guinean Agreement (37); and the introduction to the Italian-Moroccan Agreement (47).

¹²⁰ For identical or similar explicit language, *see also* Article 2 of the Italian-Hungarian Agreement (25); Article 1 of the United States-Chinese Agreement (40); Article 2 of the Swiss-Zairean Agreement (42); Article 1 of the Canadian-Chinese Agreement

Other agreements, however, are more detailed and may be seen to divide into four distinct approaches to the corporate nationality requirement. Under the first -- and most traditional -- approach, a corporation is a national of the State of its incorporation, as expressly exemplified by two British agreements¹²¹ and three Canadian agreements¹²² in which claimant State incorporation (or its equivalent) appears to be the sole test of corporate nationality.¹²³ Under the second approach, as evidenced by three Austrian agreements,¹²⁴ corporate nationality is determined by looking to the siege or headquarters of the claimant corporation.¹²⁵ Under the third approach, represented by one Swiss agreement,¹²⁶ the criterion of control or predominant link is relied upon without reference to place of incorporation or siege social.¹²⁷ And under the fourth approach, illustrated by two United States agreements,¹²⁸ a hybrid test is utilized, requiring both incorporation in the United States and direct or indirect ownership by U.S. nationals (natural and/or juridical) of 50 percent or more of the outstanding shares of stock or other beneficial interest in the corporation.¹²⁹ National claims practice applies similar rules to nonstock corporations as they do to stock corporations in determining nationality.¹³⁰ In

(44); Article 2 of the Canadian-Bulgarian Agreement (48); Article 2 of the Finnish-East German Agreement (52); and Article 1 of the French-Zairean Agreement (61). For agreements devoid of such language but implicitly requiring claimant State nationality on the part of corporate entities nonetheless, *see* the French-Guinean Agreement (37); British-Czech Agreement (45); the United States-Czech Agreement (46); and the British-U.S.S.R. Agreement (56). A few agreement elliptically refer to "persons," and may have indicated an intent to include corporations of the relevant nationality. *See* Article 1 of the West-German-Swiss Agreement (5).

¹²¹ *See* Article 1(2)(b) & (c) of the British-Egyptian Agreement (18); Article 2(1)(a)(ii) and 2(1)(b)(ii) of the British-Romanian Agreement (31). Actually, these provisions extend the place of incorporation test beyond the confines of the United Kingdom to include "corporations . . . constituted . . . in any territory for the international relations of which the United Kingdom Government are . . . responsible." *See also* Article 2 of the United States-Czech Agreement (46), safeguarding "all corporations . . . for which the United States may, according to its laws, assert international responsibility." For related pertinent discussion, *see supra* text at notes 45-48.

¹²² *See* Article 3(1)(ii) & 3(2)(ii) of the Canadian-Hungarian Agreement (13) ("incorporated or constituted under Hungarian law"); Article 2(2) of the Canadian-Czech Agreement (24) and Article 1 of the Canadian-Cuban Agreement (43).

¹²³ Great Britain and Canada appear to be in a distinct minority of States that judge a corporation's nationality solely on the basis of place of incorporation, at least for international claims purposes. *See* 1 Lillich & Weston at 66-79. *See also* Lillich (GB) at 36-40.

¹²⁴ *See* Article 1(1) of the Italian-Egyptian Agreement (6); Article 2 of the Italian-Czechoslovak Agreement (8); Article 2 of the Italian-Romanian Agreement (12); Article 2(1) & (2) of the Austrian-Czech Agreement (29); Article 2(2) of the Austrian-Yugoslav Agreement (41); and Article 4(1) of the Austrian-East German Agreement (59).

¹²⁵ The three Austrian agreements are in accord with longstanding Austrian practice, which adheres strictly to the *siege* approach. *See* Seidl-Hohenveldern, *supra* note 107, at 32-34.

¹²⁶ *See* Article 2 of the Swiss-Hungarian Agreement (23).

¹²⁷ This posture appears to be consistent with modern Swiss practice generally. *See* Caflich, *supra* note 55, at 142-48.

¹²⁸ *See* Article 3 of the United States-Egyptian Agreement (34), and Article 1(B) of the United States-Ethiopian Agreement (55). *See also* Article 1(2) of the Belgian-Zairean Agreement (32).

To the extent that the United States-Iranian Agreement (63) incorporates the relevant provisions of the Claims Settlement Declaration (including Article VII(1)(b)) earlier concluded between the two countries, *see* 1 Iran-U.S. C.T.R. at 9, it, too, would be evidence of this practice. The Claims Settlement Declaration required that for a corporation to be eligible it had to be (1) organized in Iran or the United States, and (2) "collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock." For more on the Tribunal's handling of corporate claims, *see* David J. Bederman, *Eligible Claimants Before the Iran-United States Claims Tribunal*, in *The United States-Iran Claims Tribunal: Its Contribution to the Law of State Responsibility* 47, 92-93 (Richard B. Lillich, Daniel Barstow Magraw & David J. Bederman eds. 1998).

¹²⁹ *See, e.g.*, Claim of Missionary Sisters of the Immaculate Conception, China Claims Program, 1972 FCSC Ann. Rep. 458 (declining to treat a New Jersey corporation as a U.S. national because at no relevant time was it more than 22% owned by U.S. nationals); Claim of Federal Motorship Corporation, Ethiopian Claims Program, 1987 FCSC Ann. Rep. 44 (declining to treat a Delaware corporation as a U.S. national because, for part of the relevant period, 70% of the corporation's stock was owned by non-nationals). For more on the FCSC's practice with Vietnam claims, *see* Brown, *supra* note 64, at 113-19.

The approach of looking to the nationality of the corporation's stockholders as well as to its place of incorporation has been one of long-standing with the United States, starting with Article 2(b) of the United States-Yugoslav Agreement of July 19, 1948 (*see* 1 Lillich & Weston at 66-68) and continuing to the present day in the decisions of the Iran-United States Claims Tribunal (*see, e.g.*, *Aeromaritime, Inc. v. Iran*, 1 Iran-US C.T.R. [1981-82]). For the text of the United States-Yugoslav Agreement, *see* 2 Lillich & Weston at 10.

A variation on the theme is afforded by Article 1(b) of the United States-Peruvian Agreement (27), authorizing claims by "corporations organized under the laws of a state of the United States which . . . own . . . 50 percent or more of the outstanding stock or other property or interest in property or contract rights, upon which the claims [covered by the Agreement] are based. . . ."

For discussion of the eligibility of stockholder claims, *see infra* § D.

¹³⁰ *See* Claim of the Brothers of the Order of Hermits of St. Augustine (Inc.), Cuban Claims Program, 1972 FCSC Ann. Rep. 159 (ruling that a nonstock corporation organized under U.S. law with U.S. nationals as trustees qualified as a U.S. national for

these ways, too, the post-1975 Settlement Agreements continue patterns begun before 1975.¹³¹

IV. Stockholders

Although the position taken by the International Court of Justice in the Barcelona Traction Case in 1970¹³² continues to render the current posture of customary international law relative to stockholder claims somewhat confusing, post-1975 lump sum practice appears no different than pre-1975 lump sum practice in uniformly protecting such claimants. While only one of the post-1975 Settlement Agreements authorize stockholder claims explicitly,¹³³ the vast majority sanction them implicitly by way of settling claims for "property and interests in property,"¹³⁴ "property, rights and interests,"¹³⁵ "property, rights, interests and claims,"¹³⁶ "property, rights, causes of action and interests,"¹³⁷ "property and financial claims,"¹³⁸ "property and creditor rights,"¹³⁹ or "any property claims"¹⁴⁰ adversely affected by the respondent State.¹⁴¹ However, U.S. practice has not permitted stockholders to maintain claims in corporations which are eligible claimants as U.S. nationals. The Foreign Claims Settlement Commission has ruled that ". . . the claim of a legal entity, such as a corporation, is owned by the corporation like any other of its assets and not by its stockholders."¹⁴² The Commission ruled that U.S. stockholders may only pursue their proportionate interests if: (1) the claim arose in favor of a foreign corporation and (2) that corporation maintained the right to the claim until the claim was filed.¹⁴³ This rule appears to prefer efficiency by having corporations, rather than their stockholders, present claims to the commission.

Additionally, indirect as well as direct stockholder claims¹⁴⁴ are either explicitly or implicitly protected¹⁴⁵ -- subject, of course, to the minimum requirement that the claims be held by claimant State nationals. In the case of direct stockholder claims, putting aside the United States-Peruvian Agreement (27) requiring U. S. stockholder claimants (both direct and indirect) to "own 50 percent or more" of the adversely affected property upon which the claims

claims purposes).

¹³¹ For discussion of the pre-1975 Settlement Agreements in relation to the requirements of corporate nationality, *see generally* 1 Lillich & Weston at 63-79. *See also* Contemporary European Practice at 3-4; Lillich (GB), at 36-40; Lillich (US) at 86-94; Lillich & Christensen at 15-17; Weston, at 90-92.

¹³² 1970 I.C.J. 3.

¹³³ *See* Article 2 of the United States-Ethiopian Agreement (55). *See also* Article 1(2) of the Belgian-Zairean Agreement (32) (noting that "this Protocol is applicable only pro rata as to interests held [in corporations] by members of Belgian nationality at the time of the transfer of ownership.").

¹³⁴ *See* Article 1(A) & (B) of the United States-Peruvian Agreement (27); and Article 3 of the United States-Egyptian Agreement (34).

¹³⁵ Article 1(a) of the Italian-Bulgarian Agreement (7); Article 3 of the Danish-Hungarian Agreement (15); Articles 1 & 2 of the Canadian-Czech Agreement (24); Article 1(a) of the Italian-Hungarian Agreement (25); Article 1 of the Austrian-Czech Agreement (29); Article 3 of the British-Romanian Agreement (31); Article 2 (1) of the United States-Egyptian Agreement (34); Article 1 of the French-Guinean Agreement (37); Article 1 of the Swiss-Moroccan Agreement (38); Article 1(1) of the Austrian-Yugoslav Agreement (41); Article 1 of the Swiss-Zairean Agreement (42); Articles 2(1)(a) & 3 of the British-Czech Agreement (45); Article 1 of the Italian-Moroccan Agreement (47); Article 2 of the United States-Ethiopian Agreement (55); and Article 1(b) of the British-U.S.S.R. Agreement (56).

¹³⁶ Articles 1(1) & 2 of the Swiss-Hungarian Agreement (23).

¹³⁷ Article 1 of the Canadian-Cuban Agreement (43)

¹³⁸ Articles 1 & 2 of the Finnish-East German Agreement (52).

¹³⁹ Article 1 of the French-Zairean Agreement (61).

¹⁴⁰ Articles 1 & 3 of the British-Chinese Agreement (58).

¹⁴¹ *See also* Article 1 of the United States-Chinese Agreement (40) settling claims relative to the "property of nationals of the USA;" Article 1 of the Canadian-Chinese Agreement (44) settling claims of Canadian citizens "in respect of property in China;" Articles 2(1) & 3 of the British-Czech Agreement (45) settling "all claims" relative to "money or property" subjected to enemy occupation measures in Czechoslovakia; and Article 1 of the Austrian-East German Agreement (59) settling "property claims" of Austrian citizens.

¹⁴² Claims of AOFC, Inc., Cuban Claims Program, 1972 FCSC Ann. Rep. 127, 132.

¹⁴³ *Id.* *See also* Claim of Mary F. Sonnenber, Cuban Claims Program, 25 FCSC Semiann. Rep. 48, 49 (Jul.-Dec. 1966) (claim denied for stock interest in a corporation organized in the United States with over 50% U. S. ownership); Brown, *supra* note 64, at 113-15 (discussing FCSC's practice on shareholder eligibility with Vietnam claims).

¹⁴⁴ Indirect stockholder claims are claims based on shares held in an intermediary corporation of a third State which, in turn, owns stock in a negatively affected respondent State corporation. Direct stockholder claims are claims based on shares held in a negatively affected respondent State corporation.

¹⁴⁵ Explicit mention of both direct and indirect stockholder claims are found in Article 2 of the Swiss-Hungarian Agreement (23); Article 1 of the United States-Peruvian Agreement (27); Article 3 of the British-Romanian Agreement (31); Article 2 of the Swiss-Moroccan Agreement (38); and Article 2 of the United States-Ethiopian Agreement (55). *See* 1 Lillich & Weston at 91.

are based,¹⁴⁶ the present custom appears to be to overlook the "substantial and bona fide interest test" of traditional international law. The present practice would thus disregard the extent of claimant State interest in the respondent State corporation. This is confirmed from the general silence of the post-1975 Settlement Agreements in this particular connection as well as from post-World War II claims settlement practice as a whole.¹⁴⁷

In the case of indirect stockholder claims, on the other hand, the post-1975 Settlement Agreements appear, like their pre-1975 counterparts, significantly more restrictive, in at least two instances. First, the 50 percent or more ownership requirement stipulated in the aforementioned United States-Peruvian Agreement (27), is applicable to indirect as well as direct stockholder claims. Second, there is the requirement of Article 2 of the United States-Ethiopian Agreement (55) that U.S. interests total 25 percent or more of the intermediary corporation for an indirect stockholder claim to be eligible.¹⁴⁸ In addition, it is necessary to acknowledge that, though the three remaining agreements explicitly authorizing indirect stockholder claims¹⁴⁹ do so without qualification, two of the three are associated with a claimant State -- Switzerland -- that in the past has not permitted such claims at all,¹⁵⁰ suggesting, therefore, the possibility of a restrictive approach to the distribution process.

U. S. national claims practice has treated beneficiaries of trusteeships similarly to shareholders in corporations. The Foreign Claims Settlement Commission has emphasized the nationality of the beneficiaries, not the trustees or administrators, of the trusteeship and has allowed for proportional recovery of interests in the trusteeship.¹⁵¹ The Commission has repeatedly insisted on following the international law rule that the nationality of the beneficiaries be established before an award can be made.¹⁵²

In sum, the post-1975 Settlement Agreements appear generally of a piece with their pre-1975 counterparts relative to stockholder claims. Furthermore, like the pre-1975 Settlement Agreements after Barcelona, they appear generally unaffected by the Barcelona decision, except perhaps in what appears to be a continued palpable hesitation relative to indirect stockholder claims.

V. Other Claimants

Successor and Surrogate Claimants. Seven of the post-1975 Settlement Agreements provide for successor and surrogate claimants explicitly,¹⁵³ and the remainder -- almost unanimously -- do so implicitly.¹⁵⁴ Few are as detailed,

¹⁴⁶ Article 1(B). The provision additionally requires the stockholder claimants to "have made their claims known to the United States Government prior to the date of [the] Agreement," as does Article 1(A) of the United States-Iranian Agreement (63).

¹⁴⁷ See 1 Lillich & Weston at 87-91; Contemporary European Practice at 4-5. The United States Foreign Claims Settlement Commission has ruled that the claim of a corporation "... is owned by the corporation like any of its other assets and not by its stockholders," and that stockholders may only pierce the veil to claim their proportional interests "... if (1) the claim arose in favor of a non-United States national corporation, and (2) that corporation continued to own the claim until the date of filing." Claims of AOFC, Inc., Cuban Claims Program, 1972 FCSC Ann. Rep. 127, 132.

¹⁴⁸ In adjudicating claims, the Foreign Claims Settlement Commission of the United States has enforced the 25 percent ownership requirement. See Claim of Avon Products, Inc., Cuban Claims Program, 1967 FCSC Ann. Rep. 35-36. (Commission determined that claimant was indirect owner of nationalized firm and, therefore, was an eligible claimant.) See also Claim of Federal Motorship Corporation, et al., Ethiopian Claims Program, 1987 FCSC Ann. Rep. 44, 47 (Commission allowed claim for indirect ownership where claimant owned 30 percent of the nationalized corporation's stock, thus satisfying the 25 percent rule).

¹⁴⁹ See *supra* note 143.

¹⁵⁰ See Caffisch, *supra* note 55, at 154-56.

¹⁵¹ Claim of Efim Golodetz, Cuban Claims Program, 1972 FCSC Ann. Rep. 183, 189 (denying a claim for 450 of 900 shares of a trusteeship where 2 of the 4 beneficiaries were not U. S. nationals).

¹⁵² Claim of National Bank of Westchester, White Plains, as Administrator with the Will Annexed, Estate of Meta Blum, Deceased, Czech Claims Program, 16 FCSC Semiann. Rep. 26 (Jan. - June 1962); Claim of the Florida National Bank and Trust Company at Miami, as Administrator c.t.a. of the Estate of Francisco Hidalgo Gato, deceased, Cuban Claims Program, 1970 FCSC Ann. Rep. 67 (claim denied for failure to establish nationality of beneficiaries). For more on this issue, see David J. Bederman, *Beneficial Ownership of International Claims*, 38 ICLQ 935 (1989).

¹⁵³ See Article 1(2)(c) of the British-Egyptian Agreement (18) ("successors in title"); Articles 1(1)(b) & 2 of the Belgian-West German Agreement (26) ("survivors"); Article 3 of the West German-Greek Agreement (28) ("successors or agents"); Article 2(2) of the Austrian-Czech Agreement (29) ("successors"); Article 1(d)(ii) of the British-Romanian Agreement (31) ("successor in title"); Paragraph 4(a) of the British-Cuban Agreement (39) ("heir or successor in title"); Article 2(2) of the Austrian-Yugoslav Agreement (41) ("successors"), and Article 5 of the Austrian-East German Agreement (59) ("successors").

¹⁵⁴ Some of these Settlement Agreements are more revealing in their implicitness, however. See, e.g., Article 2(2) of the Canadian-Polish Agreement (19); Article 2(1) & (2) of the Canadian-Czech Agreement (24) and Article 1 of the Canadian-Cuban Agreement (43), each providing for claims of natural and juridical persons who were, "or whose legal predecessors were," Canadian nationals on specified dates (emphasis added). See also article 3(1) of the Swiss-Hungarian Agreement (23) releasing "the Hungarian State and all Hungarian natural or juridical persons from their initial liabilities ... towards the Swiss claimants or their successors" upon the payment of the lump sum (emphasis added). See also Article 8 of the West German-Dutch Agreement (3)

however, as the Austrian-Yugoslav Agreement (41), Article 2(2) of which provides that "the successors, if physical persons, must have enjoyed Austrian nationality or, if juridical persons, must have had their seat in the territory of the Republic of Austria on the date of signature of this Agreement." On the other hand, it may reasonably be assumed that, in general, and on the basis of national claims practice reported to date, successor and surrogate claimants under the post-1975 Settlement Agreements are or are not eligible to share in the lump sum distribution to the same extent or subject to the same nationality and other requirements as original claimants.¹⁵⁵ The sole expressed exception to this proposition, doubtless reflecting the tense relations existing between Cuba and the United States, is found in Paragraph 4(a) of the British-Cuban Agreement (39) requiring the otherwise eligible "heir or successor in title" to be "resident outside the United States of America."

State Claimants. Claims by State qua States generally are allowed under lump sum practice also,¹⁵⁶ and the post-1975 Settlement Agreements afford no exception to this general rule. Twenty of the 69 agreements do so explicitly,¹⁵⁷ two might be said to encompass such claims implicitly,¹⁵⁸ and only one, by way of an annexed Agreed Minute, excludes them from the terms of the agreement altogether and then without prejudice to their validity.¹⁵⁹ Of course, disallowing claimant States to bring claims on their own behalf and, instead, requiring them to seek satisfaction through a separate

(referring to "former German beneficiaries or persons . . ."); Article 4(4) of the Italian-Egyptian Agreement (6); Article 1(1) of the Canadian-Hungarian Agreement (13).

¹⁵⁵ See 1 Lillich & Weston at 103-06. See also Contemporary European Practice, at 5-6; Lillich (GB), at 53-59; Lillich (US), at 94-98; Lillich & Christensen, at 21-25; Weston at 76-77. See Claim of International Telephone and Telegraph, Individually and as Trustee, Cuban Claims Program, 1972 FCSC Ann. Rep. 191, 193 (Commission allowed IT&T to file a claim as a majority owner when the nationalized company was declared "inoperative and void" by the State of Delaware).

¹⁵⁶ See 1 Lillich & Weston at 106-110; Contemporary European Practice at 5-6.

¹⁵⁷ See Article 1(c) of the Italian-Bulgarian Agreement (7); Article 1 of the Canadian-Bulgarian Agreement (9); Article 2 of the United States-Filipino Agreement (10); Article 2 of the Canadian-Romanian Agreement (16); Article 2 of the Italian-Hungarian Agreement (25); Article 1(a) of the United States-Peruvian Agreement (27); Article 1 of the Austrian-Czech Agreement (29); Article 1(2) of the West German-Polish Agreement (30); Article 1(c) & (d) of the British-Romanian Agreement (31); Article 1(a) of the French-Guinean Agreement (37); Article 1(a) & (b) of the United States-Chinese Agreement (40); Articles 2 & 3 of the British-Czech Agreement (45); Article 1(1) & (2) of the United States-Czech Agreement (46); Articles 2, 3 & 4 of the Canadian-Bulgarian Agreement (48); Article 2(1) & (3) of the Finnish-East German Agreement (52); Articles 1 & 2 of the British-U.S.S.R. Agreement (56); Articles 1(3) & 3(3) of the British-Chinese Agreement (58); Articles 1 & 2 of the Austrian-East German Agreement (59); Article 3 of the British-Latvian Agreement (65); Article 1 of the United States-Cambodian Agreement (66); Article 1 of the United States-Vietnamese Agreement (67).

¹⁵⁸ See Article 2 (2) of the Canadian-Czech Agreement (24) and Article 1 of the Canadian-Cuban Agreement (43) ("claims of juridical persons incorporated or constituted pursuant to the laws of Canada").

¹⁵⁹ See the Author's Note introducing the United States-Ethiopian Agreement (55).

agreement or fund leaves a greater lump sum from which claimant State nationals may seek relief.¹⁶⁰

C. Some Conclusions

Lump sum settlement practice from 1975-1995 is strongly suggestive of some changes in the doctrinal rules associated with claimant eligibility and diplomatic protection. While the harsh effects of the continuous nationality rule have been moderated somewhat, the rule (in its general form) retains much force. A rule of dominant and effective nationality has been advanced for dual national claims. Partnership claims now appear to be disaggregated, allowing individual partners to make claims if they are otherwise of an eligible nationality. The eligibility standards for corporations and their shareholders appear to have been relaxed substantially, and so the substantive holding in Barcelona Traction may now well be cast in doubt (at least as reflected in lump sum agreements). Lastly, these agreements have slightly refined some aspects of practice regarding beneficial ownership of claims.

Any new review of the specific rules of diplomatic protection must, perforce, take into account the substantial State practice of lump sum agreements. Despite controversies as to whether that practice is a reliable guide to some aspects of the international law of State Responsibility (particularly the vexing question of the standard of compensation for expropriations), there should be no doubt that lump sum settlements are certainly relevant as to questions of claimant eligibility.

¹⁶⁰ The statute governing American claims against Cuba, 22 U.S.C. § 1642 (V), was intended to adjudicate only private claims. Therefore, the statute constrained the commission to deny U.S. Government claims for losses suffered in Cuba. Claim of the United States of America, Cuban Claims Program, 1967 FCSC Ann. Rep. 50, 51. Similarly, the United States-Chinese Agreement (40), under which claims were governed by the same statute as the above-mentioned Cuban claims, excluded claims of the U. S. Government against China. 1979 Digest of United States Practice in International Law 1215.

III. INTERIM REPORT ON “THE ROLE OF DIPLOMATIC PROTECTION IN THE FIELD OF THE PROTECTION OF FOREIGN INVESTMENT”, BY PROFESSOR JULIANE KOKOTT*

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I. Introduction

A previous report for this Committee by this Rapporteur¹ showed that the development of international human rights law modifies and reduces the potential field of application of the law of Diplomatic Protection (hereafter DP).² However, the traditional law of aliens and DP still provide a stronger basis for the protection of property rights than does human rights law.³ This report will examine what is left for DP in one of its traditionally most important fields of application: the protection of property. In the context of DP, there is one scenario where issues of property and its protection are particularly relevant: the investment of capital in a foreign country.

This report intends to answer the question what role DP can play in the field of protection of foreign investment (hereafter FI) as this area of international law appears today. In order to reach any conclusion, it will be necessary to have a look at the related issues of the law of protection of FI and the obstacles any attempts to codify this law on a multilateral basis had to face in the (not too recent) past. The focus will be on certain issues that have a special link to the law of DP - predominantly, the dispute resolution regime.

*The author wants to thank Mr Sebastian Horsten for his help with the preparation of this report as well as for his efforts to assemble the Committee’s report. He also served as session reporter for the Committee’s session at the 2002 New Delhi Conference.

¹ Juliane Kokott, *Interim Report on „The Exhaustion of Local Remedies“*, in: The International Law Association (ILA), REPORT OF THE SIXTY-NINTH CONFERENCE, London (2000), p. 606, chapter A. 4.

² Cf. Juliane Kokott, *Zum Spannungsverhältnis zwischen Nationality Rule und Menschenrechtsschutz bei der Ausübung diplomatischer Protektion*, in: G. Ress/T. Stein (eds.), DER DIPLOMATISCHE SCHUTZ IM VÖLKER- UND EUROPARECHT, AKTUELLE PROBLEME UND ENTWICKLUNGSTENDENZEN (1996), p. 45; English publication under the title *Diplomatic Protection - the Problematic Relationship Between the Nationality Rule and Human Rights*, forthcoming.

³ For a recent discussion of the importance of DP in the human rights context see International Law Commission (ILC), *First report on diplomatic protection* (by John R. Dugard, Special Rapporteur), U.N. General Assembly Doc. A/CN.4/506 (March 7, 2000), p. 7 – 10.

In addition, this report will examine the question how DP, a means of Public International Law traditionally understood as a right which one state may exercise against another state,⁴ has to respond to the demands by private investors and host states with regard to the protection of FI. In a globalized economy, states are at least *de facto* joined by transnational corporations as players on the international stage, insisting on their rights and unwilling to resort to traditional state – to – state procedures. We need to examine whether these demands call for a reassessment of where DP stands and whether it can help to facilitate and support co-operation between investors and their host states, *e.g.* being faced with the establishment of dispute settlement procedures and dealing with the unresolved question whether and how an agreement between the (private) investor and the host state is to be dealt with under Public International Law.

As this brief outline shows, the task of codifying the law of DP as it relates to the field of the protection of FI is far from easy and needs to be discussed whether as of now, a clear recommendation on whether and how to codify that law can be given at all.

So as to present a comprehensive view of the field of law here at issue, it will be useful to start by looking at the current way by which protection of FI is handled between the investors' home states and their foreign hosts. Special attention will be given to the dispute resolution procedures established by bilateral treaties governing the protection of FI. This focus will help to identify the aspects of the debate on the codification of the protection of FI that specially touch the field of DP. This overview will be followed by a discussion of multilateral approaches such as, *e.g.*, the OECD-based draft of a "Multilateral Agreement on Investment" (MAI), again with a focus on its dispute resolution features, and the reasons why this effort failed in 1998. Based on the results of these observations, there will be an attempt to reach a conclusion with some suggestions.

II. The Protection of Foreign Investment and Diplomatic Protection

1. Definition

According to a commonly accepted definition, the term "foreign investment" means "[t]he transfer of funds or materials from one country [...] to another country [...] to be used in the conduct of an enterprise in that country in return for a direct or indirect participation in the earnings of the enterprise."⁵ This transfer of funds to another country is closely related to DP and the notion of protection of property. On the one hand, the investor expects the foreign state to observe its internationally binding obligations. On the other hand, however, the investor is concerned that his property - the investment – might be jeopardized by risks like confiscation or expropriation without adequate compensation.⁶

Foreign investment is divided into two major groups: direct and indirect (portfolio) investment. The difference between the two groups is the "degree of managerial control acquired by the investor."⁷ That distinction is of some importance for the role DP plays (or does not play) in the field of FI and will be discussed in more detail below. For the general purpose of this text, it suffices to address them both as "foreign investment" without further distinctions.

2. The Need for Protection

There are several reasons why investors may want to leave their home state in order to invest abroad. Investors want to launch FI to open new markets for their products, to lower costs of production, to circumvent limitations on import of goods and to avoid risks that come with the constant flux of exchange rates. Most FI is placed within the three major trade blocks of Northern America, (Western) Europe and Japan.⁸ All three of them can be regarded as well regulated and politically stable. They offer an environment – including their legal systems - that does not call for any

⁴ For a definition of DP see ILC (*supra*, note 3), p. 11: "[...] diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State."

⁵ Stefan A. Riesenfeld, in: 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (EPIL) 435 (1995) (keyword: *Foreign Investments*). For an extensive discussion of the term "investment" see: Christoph H. Schreuer, THE ICSID CONVENTION: A COMMENTARY (2001), Art. 25, paras. 80 – 110. For the purpose of this text, the investor's country will be called the "home state" while the receiving country is named the "host state".

⁶ See Wilhelm Karl Geck, in: 1 EPIL 1045 (1992) (keyword: *Diplomatic Protection*), at 1047.

⁷ Stefan A. Riesenfeld, (*supra*, note 5). He explains that portfolio investment "includes debt instruments, such as bonds, as well as equity instruments, such as stocks and shares, so long as the investor does not acquire substantial voting power (usually less than 25 per cent). Direct investment may take the form of new venture or of the acquisition of existing enterprises."

⁸ In 1997, 92 per cent of the US\$ 400 billion in foreign direct investment went to developed countries, leaving only 12 per cent of those flows to the 136 developing countries on the globe. See Ahmad Khalaf Masa'deh, *International Rules for Investment and Investors: Light at the End of the Tunnel?*, 11 EUROPEAN BUSINESS LAW REVIEW (EBLR) 157 (2000), at 157 and note 1. For more details on the flow of investment between the so-called triad of the three major blocks see United Nations Conference on Trade and Development (UNCTAD), WORLD INVESTMENT REPORT 2001, Chapter 1, p. 13, available online at <http://www.unctad.org/wir/contents/wir01content.en.htm>.

additional means to protect FI.

However, the situation is different when the host state of a FI is a developing country that does not (yet) meet the standards reached in the countries belonging to the three major trade blocks. Some of the concerns about investing in developing countries are potential threats to their internal and external stability and the absence in such countries of a reliable judiciary. The need for additional protection is more pressing for both sides: for the investor to ensure a stable environment as a necessary precondition for its investment and for the host state in order to attract foreign investors – and to establish ways to maintain control over incoming investment and the use of its resources according to its domestic policies.⁹

Having identified the need for additional international protection of FI (as compared to being limited to domestic legal safeguards), the next step is to find the most efficient way to protect FI. Avoiding the uncertainties of customary international law, contractual regulations promise additional protection and have proven to be the most favored means of protection of FI. In order to design the agreement according to the needs of the individual investor, a “State Contract” might appear as the tool an investor would favor. Such a State Contract would be concluded between the host state and the investor. However, can this contract be regarded as an agreement under Public International Law? This question is highly disputed and it is uncertain that the agreement can be regarded as such even if the host state has explicitly declared to be bound under international law. After all, one of the parties is not a state but only a private corporation; therefore, it would appear that a breach of the contractual obligations, committed by the host state, cannot result in international responsibility with consequences such as countermeasures.¹⁰

The result is that State Contracts alone entail the danger that they might not be effectively enforceable and are therefore too uncertain to sufficiently reduce the risk of FI. This finding, however, does not rule them out as a means of protection, but rather explains the demand for an additional safeguard that clearly is subject to Public International Law: namely, an investment treaty of some kind that serves as a framework for investment, involving (at least) both the home and the host state. Within that given treaty framework, the investor and the host state are free to enter into a State Contract to adapt the general rules of the investment treaty to their individual needs.

3. Bilateral Investment Treaties

a) Content

In the absence of a multilateral framework governing the protection of FI, the home states have resorted to a rapidly growing network of bilateral investment treaties (BITs) between them and potential host states for FI. Especially in the decade of the 1990’s, the number of BITs literally exploded, currently numbering about 1,940.¹¹ Despite this extraordinarily high number of treaties and some unavoidable differences among them, there is remarkable uniformity. One of the reasons for the similarities is the fact that the treaties are negotiated on the basis of model drafts prepared by the home states and those drafts are themselves typically based on some common sources.¹²

The focus of the BITs is clearly on the rights of the investor and the duties of the host state. That means that they usually do not deal with either the home state’s or the investor’s obligations.¹³ The BITs focus on their scope of application, the admission of FI, the so-called post-entry treatment and dispute settlement procedures.¹⁴ Defining the scope of application means the description of what FI comprises¹⁵ and the condition on which FI is to be admitted. As far as

⁹ See Ulrich Häde, *Der völkerrechtliche Schutz von Direktinvestitionen im Ausland*, 35 ARCHIV DES VÖLKERRECHTS (AVR) 181 (1997), at 182-183; for some examples on the need for the protection of FI in developing countries see Joachim Karl, *Internationaler Investitionsschutz – Quo vadis?*, 99 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFTEN (ZVGLRWISS) 143 (2000), at 153; he mentions restrictions on the free movement of capital in Malaysia in 1998 and plans on a land reform in Zimbabwe that might entail large-scale expropriations. See also his overview on obstacles to FI in developed compared to developing countries: *ibid.*, at 154; he identifies the risk of discrimination, access of foreign key personnel to the host state, liberalization of previously monopolized markets and ways to attract FI as common concerns for FI in both groups of host states.

¹⁰ See Ulrich Häde (*supra*, note 9), at 188-189; Asif H. Qureshi, *INTERNATIONAL ECONOMIC LAW* (1999), p. 378, para. 16-15.

¹¹ For detailed statistics see UNCTAD (*supra*, note 8), Chapter 1, p. 6, Box I.1; according to that source, 78 countries concluded 84 BITs in 2000 alone. See also with more statistics Kenneth J. Vandavelde, *The Economics of Bilateral Investment Treaties*, 41 HARVILJ 469 (2000).

¹² Kenneth J. Vandavelde (*supra*, note 11), at 469 (note 3).

¹³ This last point was one of the concerns that burdened the MAI debate.

¹⁴ Asif H. Qureshi (*supra*, note 10), p. 379, para. 16-17.

¹⁵ See e.g. Art. 1 (1) of the “Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments” of April 18, 1997, BGBl. II 1998, 1448, at 1449:

“For the purpose of this Agreement:

1. the term “investment” shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State, and more particularly, though not exclusively:

- (a) movable and immovable property (...);
- (b) shares of stocks (...);

admission of FI is concerned, it should be noted that most BITs encourage FI, but avoid the creation of an explicit right of entry; instead, they leave the regulation of the entry conditions to the national legislation of the host state, subject to the principle of fair and equitable treatment.¹⁶

The provisions on post-entry treatment deal with a limited number of issues: besides the above mentioned rule of fair treatment, the BITs codify the rules of non-discrimination and most-favored nation treatment. They also include provisions on free transfer of payment and deal with the issue of expropriation. It should be noted that a large number of the existing BITs require payment of prompt, adequate and effective compensation for expropriated investments¹⁷ – the so-called Hull doctrine – despite the still ongoing debate on the general applicability of that formula, in contrast to the rule of “appropriate” compensation.¹⁸ Many BITs also oblige states to comply with undertakings made in respect of investments, which might include the terms of state contracts.¹⁹

Thus, BITs cover to a large extent measures which traditionally have represented a classic field of application of DP, the protection of property. Moreover, they cover the only area, where the law of aliens and DP today still provide for a stronger protection than is now provided by international human rights law.

b) Dispute Resolution Procedures

i) Investor – State and State – State Procedures

In the context of DP, special attention should be given to the last important issue regulated by BITs – the dispute settlement procedures. Generally, two parallel procedures co-exist, both of which are established as alternatives to the jurisdiction of the host state’s national courts. The first of these alternative procedures applies in the event of disputes between the investor and the host state concerning the relevant investment. Leaving out the details, it can be said that the BITs open the way to arbitration tribunals, either established *ad hoc*²⁰ or, if applicable,²¹ by the International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes.²²

The second alternative dispute resolution procedure is the one that shows the closest connection to DP, although it is certainly different from its traditional concept. The BITs open the way to a dispute resolution between the contracting states in the event of disputes regarding the interpretation or application of the provisions of the relevant BIT. The procedure is similar to the investor – state procedure. At first, there is a period of time reserved for negotiations; if no agreement is reached after that period has elapsed, the states have the right to submit the dispute to an arbitration body. The BITs regulate the deadlines and the composition of that body, sometimes with a provision that gives the President of the International Court of Justice (ICJ) a role as the person who determines the chairman of the said body or one of the arbitrators in case of one party refusing to appoint such a person.²³

This procedure comes close to DP insofar as the investor – state dispute resolution does not stand alone, but is rather accompanied by the BITs’ provision of treaty rights that the home state can exercise against the host state in order to enforce the provisions of the BIT, thereby assisting the investor. The consequence is that the investor can rely on its home state to step in if the investor – state procedures (either before national courts or before an international

(c) claims to money utilized for the purpose of creating an economic value (...);

(d) intellectual property, in particular copyrights, patents (...) trade-names (...) and good will;

(e) business confessions conferred by law or under contract (...);

(...).”

¹⁶ See e.g. Art. 3 (1) of the “Agreement between Switzerland and the Republic of Cuba for the Promotion and Reciprocal Protection of Investments” of June 28, 1996 (entry into force: November 7, 1997), Swiss Official Collection 1999, p. 2135; Art. 2 (1) of the German-Philippine Agreement (*supra*, note 15), at 1450: “Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations (...);” see also Asif H. Qureshi (*supra*, note 10), p. 380, para. 16-17. The U.S. BITs are different in this respect since they regard the question market access as subjected to the rules for treatment of FI, like national and most-favored nation treatment; see Ahmad Khalaf Masa’deh (*supra*, note 8), at 163.

¹⁷ Kenneth J. Vandeveld (*supra*, note 11), at 470.

¹⁸ See on this debate Martin Schäfer, *Der Enteignungsstandard im allgemeinen Völkerrecht*, 44 RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 199 (1998), at 201 - 204.

¹⁹ See e.g. Art. II(2)(C) of the US-Argentina BIT, 31 I.L.M. 124 (1992), at 130.

²⁰ See e.g. Art. 10 (2) of the German-Philippine Agreement (*supra*, note 15), at 1453.

²¹ See e.g. Art. 8 (2) of the “Agreement between Switzerland and the Republic of Botswana for the Promotion and Reciprocal Protection of Investments” of June 26, 1996 (entry into force: February 27, 2001), Swiss Official Collection 2001, p. 494.

²² „Convention on the Settlement of Investment Disputes between States and Nationals of other States”, March 18, 1965, 575 U.N.T.S. 159, reproduced in: 4 I.L.M. 524 (1965) (ICSID Convention). For the relation between BITs and the ICSID Convention see Christoph H. Schreuer (*supra*, note 5), Art. 25, paras. 285 – 308. See also Malcolm D. Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 HARVILJ 103 (1992).

²³ See e.g. Art. 10 of the “Agreement between the Federal Republic of Germany and the Lebanese Republic for the Promotion and Reciprocal Protection of Investments” of March 18, 1997, BGBl. II 1998, 1439, at 1444 - 1445.

arbitration body) should fail, *e.g.* due to a lack of co-operation by the host state. This additional state – state tool at least indirectly increases the weight of the “lower level” state – investment procedure since the host state will most likely wish to avoid the possibility that the investor’s home state will step in and raise the dispute to an international controversy. The existence of the state-state procedure thus insures that the host state will abide by the BIT requirements.

ii) Dispute Settlement and Diplomatic Protection

As said above, the dispute resolution procedures provided by the BITs do not conform with those available under traditional DP. The most significant difference is the exclusion of DP as soon as the BIT – dispute resolution procedure between the investor and the host state has commenced, unless the host state fails to comply with the arbitration award.²⁴ Under the BIT regime, the contracting states have waived their right to exercise DP insofar and replaced it by an alternative dispute resolution system.

The BITs are drafted very similar to the ICSID-Convention that explicitly excludes DP if an investor has submitted a case to the ICSID.²⁵ The ICSID-Convention gives the arbitration award a final and binding effect upon the parties.²⁶ This system does not only exclude review of the award before any national courts, but also before the ICJ. “The obligation of the investor’s State of nationality under Art. 27 [ICSID-Convention] not to give diplomatic protection extends to the post-award phase unless the host State has failed to comply with the award.”²⁷ This dispute resolution scheme established by the BITs, with an exhaustive arbitration system that restricts DP to a means of last resort, very much reduces the importance of DP.

The arbitration procedure under both the ICSID and the BITs are certainly to the advantage of both the investor and the host state, compared to the exercise of DP, since they exclude the uncertainties of DP, resulting from its discretionary nature, and avoid the politicized atmosphere of DP. An example of the discretionary nature of DP is the home state’s option to enter into a lump sum agreement to obtain compensation for a legal wrong committed by another state; this agreement might preclude an investor from obtaining full compensation that could be achieved under a BIT.²⁸ A significant advantage of the BIT scheme is the fact that the investor “obtains direct access to an international remedy.”²⁹ Moreover, the state – state arbitration procedures are at hand to support the investor in the way described above.

By the same token, the state – state arbitration procedures provided by the BITs differ from “classic” DP. At first thought, one might call them DP, or something close to it. The home state takes action with the intention of supporting the investor, exercising its (the state’s) own rights under the BIT instead of the investor’s rights. The line of argument is likely to be that an action taken against the investor is based on a misinterpretation of the BIT. This would open the gate to a proceeding between the contracting states on the interpretation and/or application of the relevant BIT.

However, the home state is limited to the right to submit the case to the arbitration body and is obliged to agree to the final and binding arbitration award.³⁰ Compared to the means established under customary international law to exercise DP, this is a very limited set of options for the home state. Under DP, the home state can choose between options that range from doing nothing at all to informal acts of diplomacy, referring the case to (*e.g.*) the ICJ and eventually to retorsion and reprisal, leaving only the use of force out of the scope of allowed means.³¹ The sole remaining event that opens the door to further actions initiated by the home state is the disregard of the arbitration award by the host state. However, this would be a case where one state is in breach of its treaty obligations towards another state and since this scenario does not involve an individual (or at the most, only in a very remote sense, compared to investor – state proceedings), this case would only have a very distant relation to DP. It would instead be dealt with under more general rules of public international law.

²⁴ See *e.g.* Art. 9 (3) of the German-Philippine Agreement (*supra*, note 15), at 1453: “Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting State has failed to abide by or comply with the award rendered by the International Center for Settlement of Investment Disputes.”

²⁵ Art. 27 (1) ICSID-Convention (*supra*, note 22). It should be noted that the application of the ICSID-Convention with its Art. 27 (1) renders the exclusion of DP in the BIT superfluous; this, however, does not prevent some BITs from doing so; see Paul Peters, *Dispute Settlement Arrangements in Investment Treaties*, 22 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW (NYIL) 91 (1991), at 145 - 146 and note 159, referring to 32 BITs, partly from the UK and Scandinavian countries; this appears to be one more clear indication of the will to rule out DP as an option in the FI context.

²⁶ Art. 53 (1) ICSID-Convention: “The award shall be binding on the parties and shall not be subject to any appeal [...]”

²⁷ Christoph H. Schreuer, (*supra*, note 5), Art. 53, para. 24.

²⁸ See David J. Bederman, *Lump Sum Agreements and Diplomatic Protection*, Draft Report for the ILA Committee on Diplomatic Protection of Persons and Property of April 27, 2000; he also mentions the uncertainties of the nationality rule in this context (*ibid.*, at p. 10 – 11).

²⁹ Christoph H. Schreuer, (*supra*, note 5) Art. 27, para. 4.

³⁰ See *e.g.* Art. 10 (5) of the German-Philippine Agreement (*supra*, note 15), at 1453: “(...) Such award is final and binding upon the Contracting States.”

³¹ Wilhelm Karl Geck (*supra*, note 6), at 1062.

c) Why not Diplomatic Protection?

i) General Observations

So far, this report has explained why there is a need for special protection for FI and why it makes sense to find this protection in a treaty-based system, the BIT network. The report also explains that the BIT regime entails the consequence that DP is waived in the field of FI. However, a key question from the DP point of view is why is the BIT system preferred to the exercise of DP? The exclusion of DP explained above so far appears to be a consequence of the BITs, but does not fully explain why the BITs are preferred.

This report has already given some answers worth repeating. The exercise of DP is still left to the discretion of the investor's home state. The investor cannot predict whether the home state will be willing to use DP – and it is much less predictable, to what extent this will happen. Investors from “strong” countries might be in a better position, being blessed with a powerful government ready to intervene. Investors from smaller countries, however, can hardly rely on their home states. These states might fear the political and/or economic consequences of an open dispute with the stronger host state.³²

ii) Conflict between DP and the Protection of Foreign Investment

The difficulties and intricacies of DP described above are of a more general nature and apply not only to the protection of FI, but to any exercise of DP, regardless of the actual nature of the alleged violation of international law.

Another reason for the rapid development of BITs to the detriment of DP can be found not in the arena of politics, but in legal doctrine. This reason applies specially to the relation between DP and the protection of FI: it is the doctrine developed by the ICJ in its ruling in the Barcelona Traction case.³³ In that case, the Court addressed the issue whether the shareholders of a company are entitled to claim compensation under customary international law if their company has suffered a legal wrong, notwithstanding the separate corporate personality of the company. Despite the fact that a damage done to the company will undoubtedly affect the company's shareholders, the Court nonetheless held that DP cannot be exercised on behalf of the foreign shareholders.³⁴

The consequence of this holding is that “in the absence of bilateral or multilateral investment protection treaties shareholders are unprotected by international law.”³⁵ This lack of protection might not be evident in case of a foreign company, owned by foreign shareholders,³⁶ but it is certainly more obvious if the company has the nationality of the host state, while it is owned by foreign shareholders.³⁷ This was exactly the situation in the ICJ's 1989 ELSI-case.³⁸ Having the Barcelona Traction case in mind, it might seem surprising that the Court allowed the US to bring the case. However, as Ahmad Khalaf Masa'deh³⁹ points out, the ELSI-case can be distinguished from the Barcelona Traction case: the former case dealt with a treaty between the U.S. and Italy on friendship, commerce and navigation that was allegedly breached by Italy. This is one of several explanations why the ICJ allowed the U.S. to bring the case, despite the fact that ELSI was incorporated in Italy and owned by two U.S. companies.⁴⁰ Another possible explanation is that in ELSI, the right in question was the shareholders' “Direct Right” to manage their investment, rather than as a right of the company. Alternatively, one could treat it as an instance of injury caused by the state of incorporation, as contemplated in the Barcelona Traction case.⁴¹

The doctrine that “a corporation enjoys the nationality of the State in which it is incorporated and that it is that State only, which has *locus standi* (...) regardless of its shareholders” was an important additional reason why home states and investors resorted to creating the now existing network of BITs.⁴² They include shares in the scope of their

³² See Wilhelm Karl Geck (*supra*, note 6), at 1061 – 1064.

³³ Case concerning Barcelona Traction, Light, and Power Company, Ltd. (Belgium v. Spain), Judgment of February 5, 1970, 1970 I.C.J. REPORT 3 (“Barcelona Traction case”).

³⁴ Barcelona Traction case, para. 44.

³⁵ Ahmad Khalaf Masa'deh (*supra*, note 8), at 160.

³⁶ Though this scenario raises the question which country is entitled to exercise DP in case of shareholders from home country A and a company from home country B.

³⁷ Ahmad Khalaf Masa'deh (*supra*, note 8), at 160 - 161.

³⁸ Case concerning Elettronica Sicula S.p.A. (U.S. v. Italy), Judgment of July 20, 1989, 1989 I.C.J. REPORT 15, reprinted in: 28 I.L.M. 1109 (1989) (“ELSI-case”).

³⁹ Ahmad Khalaf Masa'deh (*supra*, note 8), at 161.

⁴⁰ The ICJ's language in para. 56 is consistent with the Barcelona Traction case: the Court holds that even if the US owners of ELSI have allegedly suffered the damage, it was ELSI's duty to initiate legal proceedings against the Italian authorities; 1989 I.C.J. REPORT 15, at 33. It is noteworthy that the ICJ in its ELSI case does not cite the Barcelona Traction case – the Court hence does not appear to find a contradiction and deals solely with the alleged violation of the US-Italian treaty. For a detailed analysis see Vaughan Lowe, *Shareholders' rights to control and manage: from Barcelona Traction to ELSI*.

⁴¹ Vaughan Lowe (*supra*, note 40), at 4-5.

⁴² Ahmad Khalaf Masa'deh (*supra*, note 8), at 161.

application⁴³ and thereby avoid the danger of a lack of (diplomatic) protection caused by the ICJ's doctrine in case of corporations with the host state's nationality. In addition, they grant foreign investors direct access to international arbitration bodies. From the investors' perspective, this is certainly a more effective way to protect their interests than relying on DP.⁴⁴ In this context, it should be noted that lump-sum agreements remained relatively unaffected by the Barcelona Traction decision. As U.S. practice shows, these agreements protect both indirect and direct stockholder claims, subject to certain ownership and substantial interest requirements.⁴⁵ However, the multitude of these lump sum agreements for the protection of stockholder's interests again underlines the importance of treaty based regimes, modifying and narrowing the field of application of Diplomatic Protection.

The result is striking: the incompleteness of protection provided by DP gave rise to the development of the BIT network. The consequence of that network is, in broad terms, the exclusion of DP from the arena of FI. In addition, the BIT system better reflects modern international law and its increasing recognition of individual rights than does traditional DP.

4. Multilateral Approaches and Diplomatic Protection

a) Overview

So far, this report has focused on bilateral approaches to ensure the protection of FI and their relevance to DP. However, it should not be neglected that there are also multilateral efforts to achieve the same goal. Again, an overview will help to assess the position of DP in that context.

What are the advantages of a multilateral approach? Some authors point to the general assumption that a multilateral approach would – in contrast to the patchwork style BIT network – facilitate the development of a more coherent policy in the international investment sphere;⁴⁶ besides, it is argued that “a multilateral framework would facilitate binding commitments on the admission of investments,” compared to today's focus on the post-entry stage of the investment.⁴⁷ There is also the expectation that with the existing BIT network at hand, it should be easy to summarize their provisions in a comprehensive multilateral instrument.⁴⁸

The history of the protection of foreign investment shows some examples of multilateralism instead of bilateralism. One example is the already mentioned ICSID as a body for the arbitration of investment disputes, based on a multilateral convention. Another example is the Multilateral Investment Agency (MIGA), established in 1985⁴⁹ with the intention of encouraging the flow of investments by issuing guarantees against non-commercial risks. The MIGA is closely linked to the World Bank. Primarily designed as an insurance facility, MIGA also aims to provide a forum for co-operation between investors, their home states and the host states.⁵⁰ Similar to the ICSID-Convention, the MIGA-Convention, in its dispute settlement provisions,⁵¹ gives arbitration awards final and binding effect upon the parties, precluding any appeal, annulment or revision.⁵²

Another multilateral instrument that covers FI, though being limited to certain aspects of that subject, is the WTO-based TRIMS agreement of 1994.⁵³ It is limited to the regulation of some performance requirements and thus far from being a broad basis for the regulation of FI. More important in this context is the 1994 Energy Charter

⁴³ See, e.g., Art. 1 (1) (b) of the German-Philippine Agreement (*supra*, note 15), at 1449.

⁴⁴ For a critical analysis of the question what exactly shareholders' rights mean see Vaughan Lowe (*supra*, note 40), at 7 – 11; he argues that states in their treaties protecting foreign investment should say very clearly what rights they wish to have protected; *ibid*, at 8.

⁴⁵ See Bedermann (*supra*, note 28), at 12.

⁴⁶ Joachim Karl, *Das Multilaterale Investitionsabkommen (MAI)*, 44 RIW 432 (1998); Asif H. Qureshi (*supra*, note 10), p. 379, para. 16-20.

⁴⁷ Asif H. Qureshi (*supra*, note 10), p. 381, para. 16-19.

⁴⁸ Joachim Karl (*supra*, note 9), at 144. In his 1998 article (*supra*, note 46), Karl explained why there is a need for the MAI and explained its advantages; in the article cited here, he explains why it was deemed to fail.

⁴⁹ “Convention Establishing the Multilateral Investment Guarantee Agency”, October 11, 1985, 24 I.L.M. 1605 (1985) (MIGA Convention).

⁵⁰ Jürgen Voss, *Introductory Note*, 24 I.L.M. 688 (1985) (on the draft of the MIGA-Convention). See also Jürgen Voss, *Die Multilaterale Investitionsgarantie-Agentur*, 33 RIW 89 (1987); Malcom D. Rowat (*supra*, note 22); Carsten Thomas Ebenroth, *Zur Bedeutung der Multilateral Investment Guarantee Agency für den internationalen Ressourcentransfer*, 42 JURISTENZEITUNG 641 (1987); Ibrahim F. I. Shihata, *The Role of ICSID and the Projected Multilateral Investment Guarantee Agency (MIGA)*, 41 AUSSENWIRTSCHAFT 105 (1986).

⁵¹ The MIGA-Convention provides for arbitration procedures for disputes arising between the members of the Agency (Art. 56 MIGA-Convention; the term “members” means the members of the International Bank for Reconstruction and Development and Switzerland, see Art. 2 and 4 MIGA-Convention), between the Agency and its members (Art. 57 and Annex II, MIGA-Convention) and between the parties to a contract of guarantee or reinsurance (Art. 58 MIGA-Convention).

⁵² Art. 56 (a), 58 and Annex II, Art. 4 (h) MIGA-Convention, 24 I.L.M. 1605 (1985), at 1625 – 1626 and 1633; Art. 4 (j) of Annex II orders the awards to be recognized as binding and enforceable within the member state's territory, giving them the same treatment as final domestic judgments.

⁵³ “Agreement on Trade-Related Investment Measures” of April 15, 1994, 48 U.K.T.S., Cm 3264 (1996), 1994 O.J. (L 336) 100.

Treaty.⁵⁴ Though this is only a sectoral treaty, limited to the energy sector, it was “the first major multilateral investment treaty imposing obligations on governments with respect to the treatment of foreign investment which is directly enforceable by private companies.”⁵⁵ The treaty includes a set of dispute resolution provisions that comprises, very similar to the BITs, both rules for arbitration between the investor and a contracting party and between contracting parties.⁵⁶ The state – investor procedure opens the way to the ICSID, thereby, via Art. 27 of the ICSID-Convention, excluding DP as soon as the arbitration procedure has commenced.⁵⁷

b) The Multilateral Agreement on Investment

i) The fate of the MAI

What is still lacking is a multilateral instrument that covers not only a certain sector of investment (like the Energy Charter Treaty), or certain aspects of FI (like the MIGA-Convention), or is only of regional importance (like, e.g., the 1992 NAFTA),⁵⁸ but all aspects of FI and its protection. This is what the OECD had in mind when it launched negotiations for a Multilateral Agreement on Investment (MAI) in September 1995.⁵⁹ The aim was to codify the law of FI in an agreement negotiated mostly between the OECD member states, giving other countries the option to join later.

However, as it turned out, it was impossible to reach a successful conclusion to the MAI negotiations. That conclusion was first postponed from 1997 to April 1998. A final postponement to October 1998 ended with France’s withdrawal from the negotiations.⁶⁰ The last draft of the MAI was full of gaps and terms that were subject to considerable controversies.⁶¹ For the purpose of this report, it suffices to mention some of the most significant obstacles that prevented the OECD from reaching an agreement.⁶²

There is a structural difference between the network of BITs and the multilateral approach insofar as the BITs are concluded between developed countries on one side and developing countries on the other side, with the intention of promoting investment in the developing countries. A multilateral treaty, in contrast, would predominantly cover investments between developed countries, since they constitute the majority of all FI. This leads to a collision of conflicting interests among the developed countries. Besides, it is hardly appropriate to force the developed countries to agree to additional safeguards against an unreliable judiciary, civil war or restrictions on the free transfer of capital. In this context, developed countries would face an increased risk of being subjected to investor – state arbitration without there being any real cause for such actions by, e.g., a biased and government-dependent judiciary.

In addition, the debate was burdened by issues such as the protection of the environment (are investors responsible for ecological and social issues in their host state?),⁶³ the notion of sustainable development⁶⁴ and minimum social and labor standards. The definition of investment was under discussion and there was a debate as to whether portfolio investments should be included – with the necessary consequence of allowing restrictions on the free transfer of capital under certain extraordinary circumstances. This issue, as strange as this might sound, has never been a serious problem within the BIT network that includes all kind of investment, perhaps because of a widespread understanding that a *de facto* limitation to foreign direct investment should be applied. Last but not least, the OECD lost the public debate on the MAI to the nongovernmental organizations (NGOs) opposing the MAI, who applied considerable pres-

⁵⁴ “*The Energy Charter Treaty*” of December 17, 1994, 33 I.L.M. 381 (1995).

⁵⁵ Thomas W. Wälde, *International Investment under the 1994 Energy Charter Treaty*, 29 JOURNAL OF WORLD TRADE (JWT) Vol. 5, p. 5 (1995), at p. 6. See also his *Introductory Note to the Energy Charter Treaty* in: 33 I.L.M. 360 (1995).

⁵⁶ Art. 26 and 27 Energy Charter Treaty, 33 I.L.M. 381 (1995), at 399 – 402.

⁵⁷ Art. 26 (4) (a) Energy Charter Treaty, 33 I.L.M. 381 (1995), at 400. However, it should be noted that the treaty leaves open the way to several other dispute resolution bodies. For details on the arbitration regime see Thomas W. Wälde (*supra*, note 55), at 56 – 63.

⁵⁸ “*North American Free Trade Agreement*” of December 1992, 32 I.L.M. 289 (1993); see Chapter 11, section B of the Agreement on dispute resolution between a state and the investor of another state; again, the ICSID can serve as the arbitration body.

⁵⁹ For an overview see e.g. Stephen J. Canner, *The Multilateral Agreement on Investment*, 31 CORNELL INT’L L.J. 657 (1998); Michael Daily, *Investment Incentives and the Multilateral Agreement on Investment*, 32 JWT 5 (1998); Joachim Karl (*supra*, note 46); Rainer Geiger, *Towards a Multilateral Agreement on Investment*, 31 CORNELL INT’L L.J. 467 (1998); Patrick Juillard, *MAI: A European View*, 31 CORNELL INT’L L.J. 477 (1998); Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT’L L.J. 491 (1998).

⁶⁰ See Alexander Böhmer, *The Struggle for a Multilateral Agreement on Investment – an Assessment of the Negotiation Process in the OECD*, 41 GERMAN YEARBOOK OF INTERNATIONAL LAW (GYIL) 267 (1998), at 267 – 269.

⁶¹ “*The MAI Negotiating Text (as of 24 April 1998)*”; see also the “*Commentary to the MAI Negotiating Text (as of 24 April 1998)*”; both texts are available online at <http://www.oecd.org/daf/investment/fdi/mai/negtext.htm>.

⁶² For a comprehensive overview see Joachim Karl (*supra*, note 9).

⁶³ For concerns on environmental aspects see Margaretha E. Kulesa, *Liberalisierung grenzüberschreitender Investitionen und Umweltschutz*, 21 ZEITSCHRIFT FÜR UMWELTPOLITIK UND UMWELTSCHUTZ 33 (1998); Thomas Wälde and Abba Kolo, *Multilateral Investment Treaties and Environmental Expropriation of Foreign Investment*, 5 CENTRE FOR ENERGY, PETROLEUM AND MINERAL LAW AND POLICY (CEPMLP) INTERNET JOURNAL, Article 2 (1999), <http://www.dundee.ac.uk/cepmlp/journal/html/vol5-2.html>.

⁶⁴ For the issue of sustainable development see OECD (Fabienne Fortanier and Maria Maher), *Foreign Direct Investment and Sustainable Development*, 79 FINANCIAL MARKET TRENDS 107 (June 2001); see also Yoshi Kodama, *The Multilateral Agreement on Investment and its Legal Implications for Newly Industrialising Economies*, 32 JWT 21 (Vol. 4, 1998).

sure against the member states.⁶⁵ The NGOs used the Internet for their cause in a way that made it hard for the OECD to react.

While it is uncertain whether the negotiations on the MAI will ever resume at the OECD, there is some work going on in the same area at the WTO.⁶⁶ Since one of the reasons for the strong public opposition against the MAI was the fact that it was discussed primarily among the developed OECD member states,⁶⁷ including only a few other nations,⁶⁸ the broader forum of the WTO might be more promising for a result that finds acceptance outside the conference room. In a statement preceding the 2000 WTO Ministerial Conference,⁶⁹ the EC pointed out that the negotiations on a multilateral framework of rules governing international investment within the WTO “will be significantly different from the approach taken in the MAI negotiations in the OECD.” The WTO has the advantage of being a well-established institutional framework and appears to be “the only multilateral forum that can fully take into account the interests of both developed and developing countries [...]”⁷⁰

The November 2001 WTO Ministerial Conference endorsed the idea of further WTO based negotiations, recognizing “the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment [...]”⁷¹ The EC welcomed the WTO statement and found it to correspond closely to the EC’s own agenda on the protection of FI. The EC statement names “the main principles (transparency and non-discrimination), the structure (positive listing) and the applicable dispute settlement mechanism (State-to-State).” It adds the developing countries’ opportunity to opt-out of the outcome of the negotiations as well as the question of investors’ responsibilities.⁷²

ii) The MAI’s dispute resolution scheme

Since the MAI is, despite its unfortunate fate, the most comprehensive attempt to codify the law of protection of FI undertaken so far, its dispute resolution regime deserves some special attention in the context of this discussion of DP and FI. Chapter V of the MAI draft⁷³ is devoted to dispute settlement and comprises both state – state and investor – state procedures. Unlike other sections of the draft⁷⁴ that chapter is not accompanied by a series of footnotes with objections and counter-proposals, but does have a general introductory note that “[i]t is understood that for a number of delegations further work is needed on dispute settlement.”⁷⁵ This indicates the considerable obstacles this section of the draft had to face.

The debate on investor – state arbitration was conducted in the shadow and influenced by a NAFTA dispute settlement procedure, the so-called Ethyl case. In 1997, the US company “Ethyl Corporation” (Ethyl) filed a claim against the Canadian government on the grounds that Canada had banned some fuel additives for environmental reasons; Ethyl contended that this ban was in violation of the NAFTA rules on both non-discrimination and expropriation. Eventually, Canada allowed Ethyl to resume the sale of the additive and paid \$13 million in compensation. Especially among, but not limited to, NGOs, this first test of the NAFTA investor – state dispute settlement procedure – drafted similar to the MAI regime – raised the fear of companies suing governments under the MAI with the aim of obstructing domestic environmental regulations.⁷⁶ Another concern that applies to arbitration proceedings under both bilateral and multilateral instruments is the fact that investments may be channeled through subsidiaries incorporated in different states. The investor may commence proceedings between each of those states and the host state. The host state may then be faced by a number of different arbitrations – and the consequently increased risk of losing at least one of them.

The MAI’s state – state procedure requires an effort to settle disputes via consultations before the aggrieved party can initiate any arbitration process. As under the BIT regime, the MAI state – state procedure deals with disputes

⁶⁵ For an overview on the NGO’s concerns see Edward M. Graham, *Regulatory Takings, Supranational Treatment, and the Multilateral Agreement on Investment: Issues Raised by Nongovernmental Organizations*, 31 CORNELL INT’L L.J. 599 (1998).

⁶⁶ See the relevant WTO website at http://www.wto.org/english/tratop_e/invest_e/invest_e.htm and the 1998 *Report of the Working Group on the Relationship between Trade and Investment to the General Council*, WT/WGTI/2 (8 December 1998).

⁶⁷ See for details Joachim Karl (*supra*, note 9), at 146.

⁶⁸ Argentina, Brazil, Chile, Estonia, Latvia, Lithuania, the Slovak Republic and Hong Kong.

⁶⁹ The so-called Millennium Round in Seattle.

⁷⁰ Commission of the European Communities, *Communication from the Commission to the Council and to the European Parliament – The EU Approach to the Millennium Round*, <http://europa.eu.int/comm/trade/pdf/0807nr.pdf>.

⁷¹ World Trade Organization, Ministerial Conference in Doha (Qatar), November 9-14, 2001, *Ministerial Declaration*, para. 20, WT/MIN(01)/DEC/W/1 (14 November 2001).

⁷² Memorial by the Directorate General for Trade of the EC of November 14, 2001, para. 7; <http://trade-info.cec.eu.int/europa/2001newround/pl4.php>.

⁷³ MAI draft (*supra*, note 61), at 63 - 76.

⁷⁴ See, e.g., the Preamble (*supra*, note 61), at 7 – 10.

⁷⁵ MAI draft (*supra*, note 61), at 63, note 1.

⁷⁶ Yoshi Kodama, *Dispute Settlement under the Draft Multilateral Agreement on Investment*, 16 JOURNAL OF INTERNATIONAL ARBITRATION 45 (1999), at 48 – 50; for the outcome of the case see George Monbiot, *Guardian discovers the Ethyl – NAFTA - MAI issue*, THE GUARDIAN, August 13, 1998, reproduced in: <http://www.canadianliberty.bc.ca/relatedinfo/ethyl.html>.

“about the interpretation or application of the Agreement.”⁷⁷ The arbitration body is established *ad hoc*, their members are persons proposed by the Secretary General of the ICSID.⁷⁸ In case of an investor – state dispute, the investor’s home state is precluded from initiating state – state arbitration proceedings in the same case unless the host state fails to comply with an arbitration award. In addition, the MAI does not allow extensive “forum shopping” in case of more than one applicable agreement: choosing one agreement for arbitration means waiving the right to submit the matter for decision under other agreements.⁷⁹

The investor – state procedure requires not only the existence of (possibly merely abstract) dispute concerning the alleged breach of an obligation of the home state. In addition, this breach needs to have caused an actual loss or damage to the investor or its investment.⁸⁰ As soon as a dispute falls within that scope, the investor – state dispute resolution system follows a scheme similar to the state – state regime and demands at first an attempt to settle the dispute by negotiation or consultation. If the consultations should fail, the investor has the right to choose the dispute resolution regime. It can follow the ICSID-Convention, the UNCITRAL rules or the rules of arbitration of the International Chamber of Commerce.⁸¹ This open approach was chosen in order to reduce the costs for individual investors: borrowing actual locations and detailed rules from existing mechanisms appeared to be less burdensome than the creation of an own MAI investor – to – state forum.⁸²

The investor – state arbitration system faced some opposition that contributed to the eventual failure of the MAI draft. One of the concerns was mentioned in the context of the Ethyl case: the fear that governments might be subjected to either abusive suits or to attacks on their regulations in the fields of environmental and social standards. This concern received more weight due to the automatic unconditional consent each contracting party had to give to the submission of investor – state disputes to international arbitration.⁸³ This compulsory arbitration stands in sharp contrast to the voluntary jurisdiction of the ICSID; outside the scope of geographically and functionally limited agreements like the Energy Charter Treaty, or the NAFTA, let alone bilateral treaties with their limited scope of application, this was a novelty. It was regarded as a threat to the parties’ sovereignty with regard to their right to regulate their domestic matters.⁸⁴

iii) MAI and DP

Is there any room left for DP? This question becomes acute as soon as the host state fails to comply with or abide by an arbitration award. In this event, the home state is no longer prevented from initiating a state – state procedure under the MAI against the host state. A disregard of the arbitration award would certainly constitute a dispute on the application of the MAI. Again, the result would be an arbitration award, this time in favor of the home state that brought this second case.

What happens if the host state once again refuses to comply with the arbitration award? The relevant MAI provision⁸⁵ establishes a very detailed set of rules for a party’s response to non-compliance. At first, the draft calls for one more attempt to settle the case by means of consultation. In case of a failure, the aggrieved state (in the scenario described here: the home state) is entitled to take measures in response, following notification of the other party and the “Parties Group”. The home state is now free to enact responsive measures, like a suspension of the application to the other party of obligations under the MAI. However, the provisions on general treatment and expropriation cannot be suspended.⁸⁶ All countermeasures must be proportionate and are subject to review by the Parties Group or by the arbitration tribunal. One proposal goes even further and grants the arbitration tribunal the power to suspend responsive measures.

At first look, this procedure comes close to the exercise of DP: the home state is – under certain circumstances – entitled to take action against the host state in order to compel that state to comply with the arbitration award; thereby, the home state exercises its rights with the aim of assisting its investor. However, attention should be drawn to a remarkable difference between DP under the MAI regime and under the BITs. Both the BITs and the draft MAI only allow the exercise of DP in the event of a host state not complying with arbitration awards in state – state proceedings. So far, the BITs and the MAI are on common ground. What is not common is the way the exercise of DP is regulated: the BITs leave open how the home states react to non-compliance while MAI creates a framework and allows responsive steps only within the limits of that frame. This can be regarded as some sort of distrust of possible home state responses. On one hand, the MAI acknowledges a home state’s right to resort to countermeasures under general international law as a tool to eliminate unlawful acts. On the other hand, however, the drafters apparently feared that those

⁷⁷ Chapter V. B (1), MAI draft (*supra*, note 61), at 63.

⁷⁸ Chapter V. C (2) (a), MAI draft (*supra*, note 61), at 65.

⁷⁹ Chapter V. C (1) (b) and (c), MAI draft (*supra*, note 61), at 65.

⁸⁰ Chapter V. D (1), MAI draft (*supra*, note 61), at 70.

⁸¹ Chapter V. D (2), MAI draft (*supra*, note 61), at 70.

⁸² Yoshi Kodama (*supra*, note 76), at 73.

⁸³ Chapter V. D (3), MAI draft (*supra*, note 61), at 71.

⁸⁴ Yoshi Kodama (*supra*, note 76), at 72 – 73.

⁸⁵ Chapter V. C (9), MAI draft (*supra*, note 61), at 69.

⁸⁶ This summary combines alternative options that appear in the draft so as to facilitate the understanding of the rules.

measures might “tend to be abused and used in an excessive manner, leading to an unfair outcome, particularly when politically strong states resort to such measures.”⁸⁷

This obvious distrust led to a strong restriction of a state’s right to exercise DP. First, the home state has to enter into consultations. The next step is an arbitration proceeding. Finally, the state can resort to countermeasures against a non-complying state, but only subject to limitations imposed by the MAI and constant supervision. The basis for this right to impose countermeasures might be found in general international law, but this right is to a large extent redesigned and has now a new appearance that is closely linked to treaty obligations.

III. Conclusion and Recommendation

This last observation with regard to a state’s right in the context of the MAI draft can be generalized and leads to a conclusion on the relation between DP and the rules governing the protection of FI. There is no need to go so far as to say that DP and the rules governing the protection of FI exclude each other. However, the result might well appear disappointing from the perspective of somebody who wants to argue that DP should play a strong role in today’s law of foreign investment. The analysis of the BIT regime as well as multilateral approaches has shown that DP does not play a major role among the available means of dispute resolution. Generally speaking, the agreements, both bilateral and multilateral, prefer alternative dispute resolution procedures and allow investors to access international arbitration bodies. This way gives them standing under international law and circumvents DP. This report shows that this development offers a number of advantages, compared to the need to resort to a home state’s willingness (or ability) to exercise DP.

There appears to be a strong sentiment of distrust towards DP – as regards its political uncertainties, its discretionary nature and its ability to protect foreign shareholders under the ICJ’s doctrine. What is the consequence? There appear to be two different options. One of them might be a call for a change of the rules governing DP with the aim of meeting the demands of investors. However, this option does not seem to be realistic because it neglects the existence of a network of bilateral agreements, accompanied by multilateral agreements. Sooner or later, a successor of the MAI will come into existence. Based on these considerations, a second option is more realistic: to accept that, in the context of foreign investment, the traditional law of DP has been to a large extent replaced by a number of treaty-based dispute settlement procedures.

Recognizing and accepting this shift opens the gate towards a contribution to that development. The BIT network is incomplete. Compared to the MAI and other multilateral agreements, it has some advantages, but the urge for a multilateral solution has not disappeared with the MAI’s failure. Efforts to cover the ground left open by the suspended MAI negotiations will certainly take place, *e.g.* at the WTO, and are already going on. The MAI dispute resolution regime was not much more than a proposal and leaves open a list of questions; the Ethyl case gave only one example of concerns regarding the investor – state arbitration procedure. More work has to be done to reach a system to settle investment disputes, accepted by all participating parties and meeting the demands not only of investors, but of all parties affected by such disputes.

For these reasons, the recommendation made here cannot be a contribution to the codification of DP, but rather a recommendation to take part in the work on treaty-based dispute resolution procedures in the context of multilateral investment agreements, based on experience with DP and with the goal to create a reliable system that supports investors without losing sight of other demands such as sustainable development.

⁸⁷ Yoshi Kodama (*supra*, note 76), at 69.

IV. INTERIM REPORT ON “DIPLOMATIC PROTECTION UNDER THE EUROPEAN UNION TREATY”, BY PROFESSOR TORSTEN STEIN

Art. 20 EC Treaty, introduced as Art. 8c by the Treaty on European Union (Maastricht Treaty) and located in Part Two of the EC Treaty concerning „Citizenship of the Union“ provides that:

„Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.“

Although the entry into force of the Treaty on European Union depended on the German Constitutional Court’s approval concerning its constitutionality of 12 October 1993, the Member States had already on 29/30 March 1993 agreed upon the (only politically binding) „Guidelines for the Protection of Non-Represented EC Nationals by EC Missions in Third Countries“,¹ which were provisionally applied as of 1 July 1993.² On the other hand, Member States did not completely accomplish the mandate contained in the second sentence of Art. 20 even in their finally adopted Decision of 19 December 1995;³ and they had apparently never intended to do so. From the very beginning and in the just quoted Decision they interpreted Art. 20 in a way which rendered „international negotiations with third States“ unnecessary. By the protection which Art. 20 grants to every citizen of the European Union, Member States seem to have agreed to understand only and exclusively „consular protection“, i.e. assistance to distressed nationals.⁴ Art. 1 of Decision 95/553 not only explicitly limits protection to the „consular“ kind, but also reduces possible consular functions in Art. 5 to assistance in cases of death, serious accident or illness, arrest or detention, violent crime, and to the relief and repatriation of distressed citizens. This is far less than the range of consular functions generally included and less than what was even contained in the draft decision prepared by the „ad hoc group Art. 20“.⁵

Art. 5 para. 2 of Decision 95/553 provides, however, that diplomatic representations or consular agents „may“, in so far as it falls within their power, also come to the assistance of any citizen of the Union who so requests for not explicitly listed plights; they *may*, they are not obliged to.

Some authors argue that Decision 95/553 is incompatible with primary Community Law, i.e. with Art. 20 (formerly 8c), already for this reason, because Member States were not free to preclude considerable portions of consular functions from the protection⁶ and to restrict the reduced protection to citizens of the European Union, thereby apparently excluding juridical persons (enterprises).⁷

It is all the more doubtful whether Decision 95/553 meets the purpose of Art. 20 in precluding diplomatic protection (as opposed to consular protection) at all, diplomatic protection being understood as a State’s right to react to an internationally illegal treatment by another State of one of its nationals.⁸ Articles 11-18 of the original draft of the ad hoc group contained provisions in that respect which did not, however, become part of Decision 95/553,⁹ to the opposition of several of the delegations.

Art. 20 is (as are Arts. 18, 19 and 21, formerly 8a, 8b and 8d EC Treaty) meant to be one of the first steps towards a „genuine“ citizenship of the Union which would replace the nationality of the Member States after the completion of a „real“ Union, i.e. after the foundation of the „United States of Europe“. The Union created by the Maastricht Treaty is not a State, and therefore the citizenship of the Union is not a nationality in the sense of international law, but mediated by the nationality laws of the Member States; as Art. 17 para. 1 EC Treaty (ex Art. 8) provides: „every person holding the nationality of a Member State shall be a citizen of the Union.“

But even if citizenship of the Union is a lesser legal status in comparison with the nationality of a state, citizens of the Union „shall enjoy the rights conferred by this Treaty ...“ (Art. 17 para. 2), and these rights include the right to protec-

¹ Council Doc. 7124/94 PESC 161 COCON 2.

² Cf. W. Kaufmann-Bühler, in: C.O. Lenz, EC Treaty (1999, 2nd edition), Art. 20, marg. no. 6.

³ Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, O.J. No. L 314, 28.12.1995, p. 73.

⁴ See already the (first) Report of the Commission on the Citizenship of the Union, COM (93), 702 final, 21.12.1993, p.7.

⁵ Council Doc. 9127/95, Arts. 6-9.

⁶ Cf. M. Ruffert, Diplomatischer und konsularischer Schutz zwischen Völker- und Europarecht - Bemerkungen zu Art. 8c EGV, Archiv des Völkerrechts, 1997, No.4.

⁷ W. Obwexer, Das Recht der Unionsbürger auf diplomatischen und konsularischen Schutz, *ecolex* 1996, p. 323.

⁸ Cf. W. Geck, Diplomatic Protection, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I (1992), p. 1045.

⁹ Cf. Council Doc. No. 9/27/95 and Obwexer (note 7), at p. 327 with note 39.

tion by the diplomatic or consular authorities of any Member State, conferred by Article 20.¹⁰

It is interesting to note that the German version of Art. 20 speaks of „diplomatic and consular protection“ („diplomatischer und konsularischer Schutz“), whereas the French version („protection de la part des autorités diplomatiques et consulaires“) as well as the Dutch, Italian and Spanish versions correspond to the English version. One might, therefore, assume that the German version is not a true reflection of the intention of the Parties to the Treaty. However, the EC Treaty (Art. 314) as well as the Union Treaty (Art. 5) are equally authentic in all languages, and the ad hoc group, in drafting rules „required to secure“ the protection conferred by Art. 20, did include articles on diplomatic protection in the strict sense.¹¹

Art. 33 para. 3 of the 1969 Vienna Convention on the Law of Treaties, which presumes that the terms of a treaty have the same meaning in each authentic text, does not help much to solve the problems in this case. At the end of the day and after taking into consideration the general rules and means of interpretation (Arts. 31 and 32 of the Vienna Convention), the interpretation will prevail which best reconciles the texts, having regard to the object and purpose of the treaty (Art. 33 para. 4 of the Vienna Convention).

It is, however, already doubtful whether the linguistically different versions of Art. 20 necessarily have different meanings. „Diplomatic protection“, as used in the German text, certainly denotes a State’s power to intervene for the benefit of one of its nationals (under certain circumstances also in favour of a foreign national) vis-à-vis another State, if that other State has in the treatment of a foreign national violated international law.¹² „Protection by the diplomatic authorities“, as used in most other language versions, includes „real“ diplomatic protection as well as consular assistance. Under Art. 3 of the Vienna Convention on Consular Relations, consular functions can be exercised also by diplomatic mission. Furthermore, „protecting in the receiving State the interests of the sending State and of its nationals“ is also one of the functions of a diplomatic mission (Art. 3 para. 1 b of the Vienna Convention on Diplomatic Relations).¹³

Since the terms used in the different language versions of Art. 20 allow for both interpretations (diplomatic and consular protection versus consular assistance only), the object and purpose of Art. 20 become relevant for the establishment of its true meaning.

Art. 20 itself reveals what might have been the intention of those who drafted it when it urges Member States to „start the international negotiations required to secure this protection“. The extension of consular protection and assistance to nationals of other Member States, which for the time being is all that Member States have agreed to do, normally does not require international negotiations, but only notification according to Art. 8 of the Vienna convention on Consular Relations, which reads:

„Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State“.

Here, negotiations would only become necessary in case the receiving State objects.

But negotiations with the aim to come to an agreement are, as a rule, required if diplomatic protection for foreign nationals in the receiving State is at stake,¹⁴ that is, if one EU Member State would in fact act in the same manner as a protecting power¹⁵ for another. Under Art. 45c of the Vienna Convention on Diplomatic Relations the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State when diplomatic relations are broken off, or if a mission is permanently or temporarily recalled. Under Art. 46 of the same Convention a sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, assume the temporary protection of the interests of the third State and of its nationals.

Here the agreement, acceptance or consent of the receiving State has to be obtained beforehand, which in almost every case would require respective negotiations. Negotiations are in particular necessary to establish the trilateral relation-

¹⁰ Cf. Norbert Reich, Union Citizenship- Metaphor or Source of Rights ?, 7 ELJ 2001, p.4

¹¹ See note 9 above.

¹² Cf. G. Ress, Diplomatischer Schutz, in: *Ergänzbare Lexikon, Völkerrecht* 2nd ed. 1990.

¹³ It is certainly true, on the other hand, that it will in most cases be the foreign office or government which decides whether or not to exercise diplomatic protection.

¹⁴ Cf. R.Dolzer, Diplomatic Protection of Foreign Nationals, in: *EPIL* (note 8), Vol. I (1992), p.1067.

¹⁵ Cf. G.Raub, Protecting Power, in: *EPIL* (note 8), Vol. III (1997), p. 1147.

ship between the sending State, the receiving State and the third State, especially with regard to the nature of the interests of the third State and to the scope of protection to be accorded to its nationals. As a consequence, Art. 20 EC Treaty does not only mention international negotiations, but also the establishment of the necessary rules among the Member States.

One might regard the „Guidelines“¹⁶ and Decision no. 95/553¹⁷ as establishing „the necessary rules among Member States“, but neither the Member States nor the Union have so far „started negotiations“ with any third State. Member States have only notified the third States in question by verbal note according to Art. 8 of the Vienna Convention through the diplomatic mission of the respective Council Presidency of their decision to co-operate in extending consular protection and assistance to all those nationals of other Member States in countries where their home State does not have an accessible diplomatic or consular mission.¹⁸ Third States apparently did not raise any objections against this notification, which is not surprising: The fact that a Member State will e.g. take care of a tourist from another unrepresented Member State when this tourist has run into problems in a third country, does not entail any disadvantage or inconvenience for that third country.

But the impression remains that the co-operation between Member States in the field of consular protection governed by the „Guidelines“ and Decision no. 95/553 might not be all that is envisaged by Art. 20 EC Treaty. This impression is *inter alia* strengthened by the fact that co-operation already took effect on 1 July 1993, and was apparently agreed upon at a time when it was not foreseeable if, or when the Maastricht Treaty would enter into force.¹⁹ It could, therefore, well be that this co-operation and its notification had less to do with Art. 20 EC Treaty than with the emergence of many newly independent States, more or less important, long or short-lasting, after the end of the Cold War and after the dissolution of the former Soviet Union.

At the time, the idea was born to establish common standing diplomatic missions of several EU Member States under alternating direction, an idea that was later on not realised.

The Maastricht Treaty having come into force on 1 November 1993 means that the already existing co-operation in the field of consular protection can be considered as also - partially - fulfilling the mandate under Art. 20 EC Treaty; only „partially“ because the co-operation does not cover the full range of consular functions and leaves out diplomatic protection completely.

It may, however, well be, that diplomatic protection by one EU Member State for a national of another does not, in practice, pose a real problem, although so far all Member States are represented only in five third States (China, Japan, Russia, Switzerland and the United States), and seventeen third States host only two (differing) representations of Member States.²⁰

But there exist numerous double accreditations under Art. 5 of the Vienna Convention on Diplomatic Relations, and the exercise of diplomatic protection does not necessarily presuppose the exchange of diplomatic missions, as long as the States concerned have recognised each other. The decision to exercise diplomatic protection will in most if not all cases be taken by the government or the foreign office, and not by the respective diplomatic mission.

On the other hand, it is not totally inconceivable that a citizen of the Union whose State of origin is not represented by a diplomatic mission in a remote third country, gets into a situation where he might require more than the limited acts of consular assistance listed in the „Guidelines“ and in Art. 5 of Decision 95/553. Such a citizen of the Union might remember that he or she is entitled under Art. 20 of the EC Treaty to protection by the diplomatic or consular authorities of any Member State.

Art. 20 EC Treaty contains a civil right,²¹ the content of which as well as its respect and application in a given case might be decided upon by the Court of Justice, be it by way of a preliminary ruling (Art. 234 EC Treaty) or in the course of an infringement procedure (Arts. 226, 227 EC Treaty). It is true that Art. 20 EC Treaty contains a „qualified“ civil right insofar as diplomatic protection by another Member State would presuppose agreements among the States

¹⁶ See note 1.

¹⁷ See note 3.

¹⁸ Cf. The Report of the Commission (note 4).

¹⁹ Cf. The Report of the Council (note 1).

²⁰ See the Second Report of the Commission on the Citizenship of the Union, COM(97) 230 final, 27.5.1997, p.12.

²¹ The Commission set out in its Report (note 1, at page 2): „The rights which result from the citizenship of the Union have constitutional rank since they are established by the Treaty. These rights have to be interpreted extensively, while the exceptions therefrom have to be interpreted narrowly according to the general principles of community law recognized by the Court of Justice.“

involved. It cannot be excluded that such agreements and the respective international negotiations could become an item of common foreign policy under Title V of the Union Treaty; one of the objectives of common foreign policy being „to promote international cooperation“ (Art. 11 para.1 point 4 EU- Treaty). But be that as it may, the exercise of diplomatic protection would not, therefore, fall under Art. 46 which precludes the Court’s jurisdiction over matters of the common foreign and security policy. Art. 20 EC Treaty is covered by the Court’s jurisdiction, and the German Federal Constitutional Court has made it very clear in its Maastricht Decision²² that the European Court’s jurisdiction is applicable at least in all those cases where a decision of the Council under Title V is implemented by way of a legal act of the EC which may infringe a person’s human rights. Although diplomatic protection at the present state of integration will not be exercised by the EC, but by its Member States, Art. 20 EC Treaty nevertheless lists obligations for the Member States whatsoever. It is not entirely unconceivable that the European Court of Justice could find that Member States have not met their obligations under Art. 20, although it is rather unlikely that the Court would grant a concrete right to protection. If this is so, the limited consular assistance to citizens of the Union finding themselves in distress, so far agreed between the Member States, might not be the last word on Art. 20 of the EC Treaty.

Art. 20 EC Treaty is a provision in which obligations under Community law and rules of general and specific public international law meet, with the potential consequence that the implementation of the obligation under Community law comes up against the limits drawn by public international law. On the other hand the question arises whether the obligation under Community law limits the discretion Member States have under international and national law as to whether or not they want to grant diplomatic protection, and if they do, to what extent and in what way.

This applies already to the consular assistance Member States have so far agreed upon. Under public international law no State is obliged to grant consular assistance to nationals of another State, although an unfounded refusal might constitute an unfriendly act.²³

This could be all the more true for diplomatic protection (in the strict sense) extended to foreign nationals. But in the light of Art. 20 EC Treaty the Member States of the Union seem to have lost the freedom to generally and in principle refuse such protection. And if Art. 20 does include diplomatic protection in the strict sense, this would also apply in that respect. Can Member States, in the light of Art. 20, generally refuse assistance to nationals of a particular other Member State, because in previous cases they did not receive reimbursement of financial advances or expenditures? Probably not.

Under international law a State is at least free to refuse consular or diplomatic protection to foreign nationals if such protection collides with its – not necessarily only external – interests. Would a European Union Member State be entitled to refuse the protection which under Art. 20 EC Treaty is promised to all Union citizens in a situation where the relations between a third State and a Member State are seriously troubled, a fact that might be the very reason for the non-existence of diplomatic or consular missions in that State? If the first mentioned Member State has good reasons to believe that in the case of granting the protection, it would be involved in the same political troubles, would it not be entitled to refrain from doing so? A similar situation would clearly fall within the limits of foreign policy which is not integrated under the European Treaties, but remains in the „intergovernmental pillar“ and depends on the common consensus of all parties involved, if a common, not a national, action is to be taken.

The question whether a Member State can go beyond the so far agreed consular protection and grant true diplomatic protection when a national of another member State so requests and the third State involved does not raise objections is a completely different problem. Acting for another State without authority or mandate from that State would not be admissible under general international law²⁴, but for EU Member States that „mandate“ could be implied in a general manner by Art. 20 EC Treaty and replace the agreement normally required under international law. Art. 20 EC Treaty obliges the Member States to „establish the necessary rules among themselves“, but this could be seen as relating only to rules as to „how“, and not „if“, protection is granted. In that case a Member State could, in the absence of such rules, grant protection according to its discretion and would be responsible only for acts which were clearly ultra vires.²⁵

From the point of view of third States, the crucial question is whether or not they would have to accept the exercise of protection by one EU Member State for the nationals of all others even in the absence of an agreement, i.e. whether „citizenship of the Union“ complies with the „nationality rule“ with respect to diplomatic or consular protection. For obvious reasons no third State has raised objections against the notifications made by the Council Presidency with regard to cooperation in the field of consular assistance. But that could be different with respect to diplomatic protec-

²² Decision of 12 October 1993, Vol. 89, p. 155.

²³ Cf. Raub (note 15), at p. 1147 et seq.

²⁴ The requirement of a specific mandate is underlined by Ress (note 12). The examples given by Dolzer (note 14) of „protection in the absence of a treaty“ are not comparable to the situation assumed here.

²⁵ Cf. Raub (note 15), at p. 1147 et seq.

tion, under the assumption that Art. 20 means diplomatic protection as well. And the boundaries between consular and diplomatic protection may be moving in certain situations, e.g. concerning assistance in cases of arrest or detention. According to the „Guidelines“, the consular officer shall „primarily make sure that the treatment of the arrested person does not fall short of the internationally accepted minimum standard“.²⁶ If a consular officer finds shortfalls and insists that they are removed, this would come fairly close to the exercise of diplomatic protection.

In principle, a State can extend diplomatic protection only to persons who possessed its nationality at the time when their rights were violated abroad and who still possess that nationality when protection is granted.²⁷ The „citizenship of the Union“ is not a nationality, but is imparted through the nationality of a Member State.²⁸

However, there have been attempts to loosen the strict nationality rule: In 1965 the Institut de Droit International has adopted a resolution whose Art. 3a reads: „A claim may be presented when the individual is a national [...] or a person which that State is entitled under international law to assimilate to its own nationals for purposes of diplomatic protection“.²⁹ And in 1970 O’Connell in his book on international law proposed „that a State should be allowed to present a case for a national as long as an adequate connection exists, one perhaps falling short of nationality, though ordinarily taking the form of nationality“.³⁰

Dugard, Special Rapporteur of the ILC,³¹ rejects the requirement of a genuine or effective link between the State and individual as held in the Nottebohm case,³² „as it would exclude literally millions of persons from the benefit of diplomatic protection in today’s world of economic globalization“.³³ He therefore supports a liberal application of the Nottebohm doctrine in order to consolidate of the principle into a requirement of good faith:³⁴ „a conferment of nationality will be recognized for the purpose of diplomatic protection provided it is not made in bad faith.“

Szczekalla³⁵ stresses that the frequent practical application of Art.20 would likely lead to a general recognition of the competence of *any* Member State providing protection to *any* Union citizen. This again might encourage the revaluation of the citizenship of the Union as a kind of „nationality“.

From Szczekalla’s point of view this presumption is in line with the practice of protection of Human Rights, which puts the validity of the nationality rule increasingly into question.

Vicuña, Rapporteur of the ILA,³⁶ also emphasises that the law of Human Rights has evolved beyond the framework of traditional diplomatic protection leading to changes in the nationality rule, since a link of nationality is no longer a necessary requirement to spouse an international claim.³⁷ However, the quoted cases do not concern international but American law.³⁸ Due to their rather “exotic” nature they are not suitable to serve as a convincing illustration of a development digressing from the nationality rule.

Even if there should not be much State practice reflecting such a rule in the near future, the „citizenship of the Union“ which is a status „short of nationality“, could be regarded as „assimilation“ in the sense of the Resolution of the Institut de Droit International, or as an „adequate connection“ in the sense of O’Connell’s proposal. If one accepts that third States have to recognise as a sovereign decision the distribution of competences between the EC and its Member States in the field of (economic) integration, one might argue that this should then apply equally to their decisions regarding diplomatic protection to nationals of other Member States.

²⁶ Such minimum standards are set out, inter alia, in the „United Nations minimum standards for the treatment of prisoners“ (1955) and in the „Principles on the Treatment of Criminal Offenders“ (1990).

²⁷ Cf. Ress (note 12).

²⁸ Cf. Art. 17 of the EC Treaty, as amended by the Amsterdam Treaty: „Citizenship of the Union shall complement and not replace national citizenship.“

²⁹ *Annuaire de l’Institut de Droit International*, Vol. 51 II (1965), p. 268.

³⁰ O’Connell, *International Law*, Vol. 2 (1970), p. 1033.

³¹ Cf. J.R. Dugard, *First report of the International Law Commission on diplomatic protection*, 7.3.2000, p.34 et seq.

³² *The Nottebohm Case* (1956) 5 I.C.L.Q. pp.239-240, 243-244.

³³ Cf. J.R. Dugard, footnote 31, p.41, marg. no. 117.

³⁴ *ibid* p.41, marg.no. 118.

³⁵ Cf. P.Szczekalla, *Die Pflicht der Gemeinschaft und der Mitgliedstaaten zum diplomatischen und konsularischen Schutz*, 3 *EuR* 1999, p.331.

³⁶ Cf. F.O. Vicuña, *Interim Report of the International Law Association London Conference 2000 on the changing law of nationality of claims*, p.28 et seq.

³⁷ *ibid* p.31 and 33.

³⁸ Vicuña refers at p.33 footnote 26 to Oppenheim’s *International Law*, Vol.1, 1992 at p.513, where exceptional cases are listed in which the diplomatic protection of non- nationals was allowed, e.g. *I’m Alone Case AD*, 7 (1933-34), No 86, pp 205,206; Martin Koszta and August Piepenbrink see *Martens, Causes célèbres*, v, pp 583-599.

Szczekalla follows the idea and even goes further. He considers third States as being *obliged* to accept the consular and diplomatic protection through the European Community *itself*, acting in this field mostly through the European Commission as the competent institution.³⁹

The majority opinion in the doctrine denies this obligation,⁴⁰ as the European Community, being an International Organisation, is only composed of Member States but not of citizens, which excludes the Community from the scope of Art. 20. Most authors therefore only request the introduction of „additional“ protection through the Community,⁴¹ a request which can be characterised as being of purely political nature.

Against this restrictive approach, Szczekalla points out the ruling of the Court of First Instance in the case „*Odigitria AAE v Council and Commission*“,⁴² concerning the protection of ships circulating under the flag of a Member State, in which the duty of diplomatic protection through the Commission was assumed. Contrary to the majority opinion, considering the duty of protection on behalf of the Commission being the result of a treaty,⁴³ Szczekalla states that in the field of diplomatic protection one can assume that a general authority of the Community relating to international law, being independent of the treaty, in particular of Art. 20, exists.⁴⁴

Since the network of the delegations of the Commission has become very dense, it would be intolerable not to make use of this network for the benefit of the protection of Union citizens. As a European institution exercising jurisdiction, the Commission is bound by the human rights which are protected in the Union and which comprise also rights of protection. The mere representation can therefore not be the task of these delegations. Szczekalla expected this matter to be clarified by the case „*Pescados Congelados Jogamar LS v Commission*“. Unfortunately the Court of First Instance declared this action for failure to act (Art.232 EC Treaty) as being inadmissible: the applicant had not duly followed the pre- litigation procedure (Art. 232, second para.).⁴⁵

Getting back to the point of departure, namely the question on whether third States are obliged to accept the protection through the Commission: If they already recognized the competence of the Community relating to international law for certain matters, one could consider that they are obliged to accept the Community's authority in this field, too. Otherwise they would have to face the reproach of behaving contradictorily. The same principles apply if a third State and the Community have agreed upon a treaty. In case of an infringement of this treaty, the authority of diplomatic protection is conferred upon the Community by Art. 281 EC Treaty.

Community practice shows that the Commission frequently contacts governments of third States in order to protect certain rights of Union citizens. In several cases, the Commission participates in public declarations and démarches of the so-called European Troika, requesting States or their current ruler to extensively respect the human rights.⁴⁶ Moreover, the Union can exercise (legal) influence through „human rights clauses“ contained in (e.g.) Association Agreements.⁴⁷

During its commercial policy negotiations, the Commission could plead on behalf of the rights of Union citizens being imprisoned in a third State, where they are deprived of consular protection. This approach could lead to a form of indirect consular protection.

On the other hand, the fact that Art. 20 EC Treaty mentions „the international negotiations required to secure this protection“ can be interpreted in such a way as to admit that the idea behind Art. 20 cannot be realised without the agreement of third States. As a consequence, more State practice in this respect is needed before one can speak of the emergence of a new rule. There is a quite different area in which such State practice is developing, i.e. „conditional extradition“ where consular or diplomatic officers of the requested State may verify whether the conditions under

³⁹ Cf. Szczekalla at note 35 p.333.

⁴⁰ Cf. M. Herdegen, *Der "Fremde" im Völkerrecht- Wandlungen eines Begriffs*, in: K. Hailbronner (ed.), *Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts: Bilanz und Ausblick an der Jahrtausendwende*, p.13 (19).

⁴¹ Monar/Bieber, *Die Unionsbürgerschaft*, 1995 p.36 as well as Hilf in Grabitz/Hilf, *Kommentar zur EU*, Vol.I, Art. 8c marg.no.38 et seq. (mai 1998).

⁴² Court of First Instance (CFI), Case T-572/93 *Odigitria AAE/Council and Commission* (1995), ECR II-2025 as well as Case C-293/95 (1996), ECR I- 6129: This appeal was dismissed as the pleas in law merely repeated the arguments presented to the CFI, therefore not satisfying the requirement of Art.225 EC Treaty that an appeal must indicate precisely which elements of the contested judgement are challenged.

⁴³ Cf. Obwexer (note 7) p.324 footnote 19 as well as Vedder/Folz, 8 EJIL 1997, p.521 et seq.

⁴⁴ Cf. Szczekalla at note 35 p.333.

⁴⁵ Case T-311/97, *Pescados Congelados Jogamar SL v Commission* (1999), ECR II- 1407. This inadmissibility was confirmed by the ECJ: Case C-249/99 (1999), ECR I-8333.

⁴⁶ Cf. concerning the Congo the answer of the Commissioner Pinheiro 4.9.1997, OJ No. C 82, 17.3.1998 p.49.

⁴⁷ e.g. the Euro- Mediterranean association agreement.

which extradition of a foreigner has been granted, are actually observed in the State which is requiring extradition.⁴⁸ But here again the State requesting extradition has previously accepted the conditions and their verification.

From the point of view of a Union citizen the already mentioned question arises whether and to what extent he or she can claim protection in the sense of Art. 20 EC Treaty from any Member State of the Union. Ress rightly stated in 1990 that the EC Treaty does not provide a claim for diplomatic protection.⁴⁹ This referred to diplomatic protection against the EC itself or against one of its Member States as the only conceivable constellations at that time, and remains correct because the EC can be regarded in that respect as a „self-contained régime“. But it can be hardly disputed that Art. 20 EC Treaty now provides the legal basis for a claim for protection against third States, be that protection consular or diplomatic.

Art. 20 does, however, grant that claim for protection only „on the same conditions as the nationals of that State“, i.e. the State which in a given case exercises protection. This is, no doubt, a considerable qualification of the Union citizens' claim for protection. Some Member States might, in their domestic legal order, not recognise any judicially reviewable claim for protection, in most others the decision to grant protection will be a matter of rather wide, if not absolute, discretion.

This brings us to still another question: Could the extent of protection which Union citizens can claim under Art. 20 EC Treaty be coincidental because it depends on which Member State (other than the home State of the claimant) has been declared competent in a given case? According to the „Guidelines“ and to Art. 4 of Decision 93/553, the diplomatic or consular representations of Member States in countries where one or several Member States are not represented, may agree on „practical arrangements for the effective management of applications for protection“, and on procedures to determine the Member State authorised to receive such an application. They could, e.g., decide to link that competence to the Council Presidency of the day. Citizens of the Union may thus knock at the door of any Member State's mission, but might then be referred to the representation of the Presidency.

Does the citizen have to accept that referral if he or she has reasons to believe that the competent Member State is notorious for doing little or even nothing in favour of his own nationals abroad?

After all Art. 20 EC Treaty provides for the protection by „any“ Member State. This is not meant to advocate „protection shopping“⁵⁰ in the sense that citizens of the Union shall have under all circumstances the right to choose the most powerful Member State as addressee of their applications. But the agreement among the representations on the spot may in some cases lead to discriminations which the European Court of Justice has not accepted in other contexts.

In addition, Hilf⁵¹ raises the question whether the Union citizen can ask for the protection of another Member State even if his own Member State is represented in the country, but the protective measures of the latter are not likely to be as efficient as the „foreign“ Member State's ones.

The wording of Art. 20 EC Treaty allows two different interpretations: „a third country, in which the own Member State is not represented“ can either mean that the own State is „not represented at all“ or that it is „not represented in an efficient way“.

In order to prevent the „competition for the most efficient protection“ among the Member States, Hilf differentiates as follows:⁵² if it is impossible to be protected through the own Member State due to *geographical reasons*, e.g. the next consulate or embassy is thousands of miles away, the Union citizen can claim protection of another Member State.

The Union citizen does on the other hand not have this choice if he only claims for the help of another Member State due to *reasons of effectivity*.

Finally, could the entire protection fail because the applicant refuses or is unable to sign a commitment to refund the financial advance? Such commitment is mentioned as a prerequisite for protection only in the secondary legislation,⁵³ not in Art. 20 EC Treaty. A few Member States seem to have agreed that passports issued by them may be retained and replaced by a single journey travel document, if the return trip is financed from public sources.⁵⁴ In the meantime, Member States have adopted a decision on the establishment of an emergency travel document⁵⁵ which still lacks

⁴⁸ Cf. e.g., the standing case-law of the Swiss Federal Court since Khetty (unpublished) and Dharmaraja (BGE 107 Ib, 68 = EuGRZ 1981, p. 507).

⁴⁹ Note 12.

⁵⁰ Cf. Dolzer (note 14), at page 1067 et seq.

⁵¹ Hilf in Grabitz/Hilf, Kommentar zur EU, Vol.I, Art. 8c marg.no. 19 (mai 1998).

⁵² *ibid* Art.8c marg.no. 20.

⁵³ Art. 6 of Decision 93/553.

⁵⁴ Cf. the Report of the Commission.

implementation as does Decision 93/553 in the national legal order of all Member States.⁵⁶

We have certainly posed more questions than we have given answers; some questions are rather hypothetical, others not entirely serious. But they should have made it clear that the Member States of the European Union, by introducing Art. 20 into the EC Treaty, have entered unstable ground, eventually in an effort to assert a state-like status of the Union which does not yet match reality.⁵⁷ In that case the more pragmatic approach of the foreign offices, namely to restrict co-operation to every day needs of consular assistance and to let some air out of Art. 20, may be wise. But it may also be that the big words in Art. 20 will one day catch up with such pragmatism.

⁵⁵ Decision of the Representatives of the Governments of the Member States, Meeting within the Council of 25 June 1996, on the establishment of an emergency travel document (96/409/CFSP), O.J. No. L 168/4, 6.7.96.

⁵⁶ Cf. the Second Report of the Commission (note 20).

⁵⁷ Sceptical also C. Closa, *Citizenship of the Union and Nationality of the Member States*, 32 RMLRev. 1995, p. 487 (at 401 et seq.). Cf. also J. Piernas, *La protección consular y diplomática del ciudadano de la Unión Europea*, Rev.Inst. Eur. 1993, p. 49.

V. FUTURE WORK OF THE COMMITTEE

As indicated, the ILA Executive Council's decision to establish this Committee was influenced by an awareness that the United Nations International Law Commission was proposing to take up the subject of "Diplomatic Protection" and it was felt that the time was opportune for the ILA to form a committee which could possibly contribute to or supplement the ILC's efforts in this respect. The ILC has since, in 1997, appointed Mr. Mohamed Bennouna Special Rapporteur for the topic of "Diplomatic Protection", and on Mr. Bennouna's resignation in 1999 elected Professor John Dugard to replace Mr. Bennouna as Special Rapporteur on the topic. The Committee has communicated with and furnished its various studies and reports to Professor Dugard, and is gratified that Professor Dugard has found occasion to draw upon and cite this Committee's work. The Committee will continue to seek ways of contributing to the ILA's and ILC's common efforts in this area.

The Chair, Co-Rapporteurs and Committee members will continue to discuss, at New Delhi and otherwise, the development of further studies and other projects relating to the Committee's mandate.

The Chair, Co-Rapporteurs and Committee members request that the ILA Executive Council extend the Committee's mandate and authorization to permit it to continue its work in the directions indicated.

The Chair wishes to congratulate and thank the Co-Rapporteurs and Committee members for their excellent work and gracious cooperation.