## CHAPTER TWO: STATES

Pages 5-28

### A. Statehood

*Introduction.* Just as a law school course in corporate law might be called ``Corporations," a course in international law might be called ``States." Like a corporation, a state is an artificial entity. The internal laws of a corporation are the by-laws, rules, and regulations adopted by its board of directors. The internal laws of a state consist of its legislation and common law. The *external* law of a corporation is the law of its state of incorporation; the external law of a state is international law.

**Reading Assignment: *International Law Anthology*, pp. 165-68, 189-96.**

**NOTES AND QUESTIONS**
**FOR CLASSROOM DISCUSSION**

**1.** What are Lassa Oppenheim's four conditions of statehood?

**2.** What do we need to have a state? Are the following entities ``states"? Hong Kong. The Vatican. Somalia. Monaco. Palestine. (The answers may change over time!)

**3.** How does Harold Maier define sovereign equality?

**4.** What fallacies does Virginia Black find in transferring personal moral virtues to state moral virtues?

**5.** Thomas Hobbes had next to nothing to say about international law, but his theory of the state had a huge impact. What, according to Virginia Black, is the main difficulty with Hobbes' theory as far as international law is concerned?

**6.** What is the difference between ``personal" and ``dispositive" obligations of states?

**7.** Does international law decide what a state is? Where its boundaries are? What happens when it breaks up into two or more states? What happens when a state is incorporated into another state? Are the rules, if there are any, clear and determinable? Are they enforceable?

**8.** What is the difference between state continuity and state succession?

**9.** When is there a presumption of continuity?

**10.** What is the ``clean slate" rule in the Vienna Convention on Treaty Succession? (See *Anthology* p. 195.)

### B. Recognition

*Introduction.* King Louis XIV of France said, ``L'etat c'est moi!" Nowadays we regard that statement as an exaggeration, an example of royal hubris. But perhaps absolute monarchs really believed that all the legal right, title, and interest of their kingdoms resided in their royal persons. Indeed, treaties were made in the name of the king, and not in the name of the king's country.

In 1936 Italy attacked Ethiopia; the Ethiopian emperor Haile Selassie fled the country and went into exile in Great Britain. (Italy then called its conquered territory ``Abyssinia.") Did Emperor Selassie carry with him all right, title, and interest to the state he ruled? Was the real ``Ethiopia" walking around Great Britain in the person of a heavily bearded gentleman named Haile Selassie? Was this gentleman entitled to gather up all the wealth of Ethiopia? Could he, for example, go to the Bank of England, identify himself as the state of Ethiopia, and withdraw the funds? If the Bank of England refused, could Selassie successfully sue the bank? In the series of cases that follow, the former monarch tried to get hold of funds that were admittedly owing to Ethiopia.

#### The Emperor's Case Part I

[Haile Selassie v. Cable & Wireless, Ltd.,
1938 L.R. Ch. 545]

BENNETT, J.:

Plaintiff Haile Selassie commenced these proceedings for the purpose of obtaining an order for an account of what was due under a contract made between the Director General of Posts Telegraphs & Telephones of Ethiopia, and Cable & Wireless Ltd. The contract related to the transmission of wireless messages between an Ethiopian State radio telegraphic station at Addis Ababa in Ethiopia and a radio telegraphic station of the defendant company in Great Britain. The relevant provision of the contract was that the charges paid by the senders of telegraphic messages between the two stations should be apportioned in the proportion of two-thirds to the transmitting station and one-third to the receiving station.

As a result of the war between Italy and Ethiopia the radio telegraphic station at Addis Ababa was closed down on May 2, 1936.

At the hearing of the action the parties agreed that the sum payable by the defendant company under the contract was 10,613 pounds. The only point to be decided in the action was whether, having regard to recent events in Ethiopia and to the attitude taken up by His Majesty's Government in relation to the plaintiff and to the de facto control of the Italian Government in Ethiopia, the plaintiff was entitled to recover judgment against the defendant company for the above-mentioned sum.

It was ascertained from the Foreign Office that (1) His Majesty's Government still recognized the plaintiff as de jure Emperor of Ethiopia; (2) His Majesty's Government recognized the Italian Government as the Government de facto of virtually the whole of Ethiopia; and (3) that an Envoy Extraordinary and Minister Plenipotentiary from His Majesty the Emperor of Ethiopia was accorded recognition at the Court of St. James. In addition to the claim made to these moneys by the plaintiff the defendants proved that a claim to them had been made by the Italian Government.

It is plain, I think, that the contract sued on was made by the Director General of Posts Telegraphs and Telephones of Ethiopia on behalf of the plaintiff as the sovereign authority of Ethiopia. It is also, I think, plain that the rights and liabilities under the contract were not the private rights and liabilities of the plaintiff, but were the rights and liabilities of the Ethiopian Empire of which he was the sovereign head.

The plaintiff left Ethiopia in consequence of the Italian invasion on May 1, 1936, and has never since returned. He was living in England when the writ in the action was issued and he still lives here.

The defendants allege as follows: (1) ``By letter to the defendants dated February 2, 1937, the Italian Ambassador in London gave notice to the defendants that the moneys claimed by the plaintiff in this action were claimed from the defendants by the Italian Government, and by letter to the Italian Ambassador dated February 18, 1937, the defendants made inquiry whether the Italian Government was willing to submit the determination of the question what party is entitled to such moneys to the decision of the English Courts or itself to commence proceedings in this Country against the defendants for the maintenance of its said claim. The defendants received an answer dated April 14, 1937, to their said inquiry stating that the Italian Government claims such moneys and is not prepared to admit in any circumstance that its rights in making such claim are in any way in doubt." The correspondence referred to in this paragraph establishes the fact that the Italian Government do claim the sum admitted by the defendants to be due from them under the contract sued on.

In addition to this plea there are two further pleas set up by the defendants:

(2) ``His Majesty Haile Selassie left Addis Ababa and his former Empire of Ethiopia on or about May, 1, 1936, and has never since returned thereto by reason of the conquest thereof by the military forces of the King of Italy which are the armed forces of a hostile power. On or about May 9, 1936, the King of Italy and the Italian Government by proclamation annexed the said Empire of Ethiopia and since the said date have been or become and now are the sovereign head and government thereof and in control thereof. By reason of the premises the alleged cause of action of His Majesty Haile Selassie has passed to and become vested in the King of Italy and the Italian Government."

(3) ``Under the Constitution of Ethiopia the sovereign power over the Empire of Ethiopia and all public rights appertaining thereto were vested in the Emperor of Ethiopia as a corporation sole or alternatively in the natural person who is for the time being the Emperor of Ethiopia. The claim in this action is in respect of a public right appertaining to the sovereign power of the Empire of Ethiopia and was by virtue of the recognition in December, 1936, by His Majesty's Government of the Government of Italy as the de facto Government of Ethiopia suspended or alternatively transferred to the King of Italy as the sovereign head of the Italian Government."

The questions of law which arise out of these pleas were debated with much enthusiasm by counsel for the plaintiff and the defendants respectively, and I do not doubt but that they are of interest and importance. I do not, however, intend to express any opinion upon them. The defendants are willing to pay the moneys they admit to be due from them to whoever may legally be entitled to receive it. The defendants have proved that, in addition to the claim made to these moneys by the plaintiff, a claim to them has been made on behalf of His Majesty the King of Italy by his Ambassador. The defendants are unable to adopt the normal course of interpleading, since one of the claimants is the head of a sovereign state over whom this Court has no jurisdiction.

The right of the plaintiff to recover judgment cannot be determined without determining whether the claim put forward on behalf of His Majesty the King of Italy is well founded.

*The Parlement Belge*, 5 P.D. 197, 217, establishes this proposition: ``that as a consequence of the absolute independence of every sovereign authority and the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

Scrutton L.J., in considering this proposition in *Luther v. Sagor & Co.*, 3 K.B. 532, 555 (1921), is reported as saying that, ``If by any misadventure the authorized representative of a sovereign state should claim property not really belonging to the state it appears to me that the remedy is by diplomatic means between states, not by legal proceedings

against an independent sovereign," and he adds, ``What the Court cannot do directly it cannot in my view do indirectly."

If I were to give effect to the plaintiff's argument in this case I should undoubtedly be indirectly deciding against the claim put forward on behalf of His Majesty the King of Italy to the money the defendants admit they owe under the contract sued on by the plaintiff. If I may respectfully say so I entirely concur with the view expressed by Scrutton L.J. in the passage from his judgment to which I have referred.

I propose to base the order to be made in this action on the ground that a claim has been made to the moneys the plaintiff seeks to recover by His Excellency the Italian Ambassador on behalf of His Majesty the King of Italy, and to hold that, having regard to that claim, I have no jurisdiction to decide the rights of the plaintiff.

The order will be as follows: the defendants having proved that a claim has been made on behalf of His Majesty the King of Italy to the moneys the defendants admit they owe under the contract referred to in the statement of claim which moneys the parties to this action admit amount to the sum of 10,613 pounds, stay all further proceeding in the action.

## The Emperor's Case Part II

[Haile Selassie v. Cable & Wireless, Ltd.,
1938 L.R. Ch. 839]

This is an appeal by the plaintiff in the action, His Majesty Haile Selassie the First, Emperor of Ethiopia, against an order of Bennett, J. staying all further proceedings in the action. The action arises out of a contract made between the plaintiff, as the sovereign head of the Empire of Ethiopia, through his agent the Director General of Posts, Telegraphs and Telephones of Ethiopia, and the defendant Cable & Wireless Ltd. for the institution and working of a radio telegraphic service between Ethiopia and Great Britain. It is admitted that the contract was made, and that the sum of 10,613 pounds is owing by the defendants in accordance with its terms. The substantial defense to the action is that by reason of the conquest of Ethiopia by the armed forces of His Majesty the King of Italy, coupled with the recognition by His Britannic Majesty's Government of the King of Italy as de facto sovereign of Ethiopia, the right to recover this sum from the defendants has become vested in the King of Italy. The defense also refers to certain correspondence which took place subsequently to the issue of the writ between the defendants and the Italian Ambassador in London in the course of which it was stated by the Ambassador that his Government claimed the money, that it saw no reason to take part in the present proceedings, and that, if those proceedings resulted in the defendants being compelled to make payment to the plaintiff, it would consider itself entirely free to claim the money in question at such time, in such manner, and in such circumstances as it might consider suitable.

The action duly came on for trial, and after several adjournments Bennett J. on March 2, 1938, reserved his judgment, which he delivered on March 23, 1938. In his reasons for judgment the learned judge declined to express any opinion upon what we have described as the substantial defense to the action. The ground upon which he made the order to stay proceedings was, to use his own words, that ``The right of the plaintiff to recover judgment cannot be determined without determining whether the claim put forward on behalf of His Majesty the King of Italy is well founded." We were informed that no argument had been addressed to him upon this point.

In our opinion the decision of the learned judge cannot be supported. The action is one to which the Italian Government is not a party, nor is it a necessary party. The question which falls to be decided in the action is whether or not the defendants are liable to the plaintiff, and although the claim of the Italian Government is one which, if made by a private individual in this country, could have been dealt with in interpleader proceedings, no such proceedings are possible without the consent of that Government. But the fact that His Majesty the King of Italy cannot be brought before the Court cannot deprive the plaintiff of his right to have his claim adjudicated upon by the Courts of this country in his absence unless there be some rule of English law which precludes the Courts from entertaining the claim. In our opinion no such rule of law exists. It is unquestionably true that the Courts of this country are not competent to entertain an action which directly or indirectly impleads a foreign sovereign state. Thus, if property locally situate in this country is shown to belong to, or to be in the possession of, an independent foreign sovereign, or his agent, the Courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it. The rule applies in the case both of actions in personam and of actions in rem. But it has never been extended to cover the case where the proceedings do not involve either bringing the foreign sovereign before the Court in his own person or in that of his agent or interfering with his proprietary or possessory rights in the event of judgment being obtained. Where it is either admitted or proved that property to which a claim is made either belongs to, or is in the possession of, a foreign sovereign, or his agent, the principle will apply. But where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favor of

the sovereign's title before it can be asserted that that title is being questioned. But it was held by Bennett J. that where a foreign sovereign has made a claim the proceedings in effect amount to impleading that sovereign. In our opinion not only is that view incorrect in principle, but it is contrary to certain weighty expressions of judicial opinion to which we will later refer. So far as principle is concerned, the present action does not seek to bring His Majesty the King of Italy before the Court, nor does it seek to interfere with any proved or admitted proprietary or possessory right belonging to him. The fact that His Majesty the King of Italy has put forward a claim to these moneys by asserting that the chose in action consisting of a debt owed by the defendants has become vested in him does not, in our opinion, add anything. It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country were to be deprived of his right to have his claim adjudicated upon by the Courts merely because a claim to the property, or the debt, had been put forward on behalf of a foreign sovereign. Such a claim can be adjudicated upon without impleading the foreign sovereign either directly or indirectly. The phrase ``impleading indirectly'' does not, in our opinion, mean adjudicating upon such a claim as is made by the Italian Government in the present case. It refers to such proceedings as Admiralty proceedings in rem where the action in form is an action against the ship.

Bennett J. relied upon *The Parlement Belge*. But that was a case where the property in the vessel was admittedly vested in the Belgian Government, and the claim against it involved impleading that Government. He also relied upon the observations of Scrutton L.J. in *Luther v. Sagor & Co*. But with all respect to the learned judge he has, in our opinion, attributed to those observations a meaning which in the context they do not bear. Scrutton L.J. was considering a case where a foreign sovereign is in possession of property, but if his words were intended to go beyond such a case, and to apply to a case where property is in the hands of a third person, and the foreign sovereign has merely made a claim to it, we respectfully dissent from the view which he expresses.

The question as to the effect of a claim by a foreign State as distinct from a proprietary title or possession proved or admitted was discussed in the House of Lords in the case of *Compania Naviera Vascongado v. S.S. Cristina*, 1938 A.C. 485, 490. In that case Lord Atkin said: ``The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well-established and to be beyond dispute. The first is that the Courts of a country will not implead a foreign sovereign, that is they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.'' For present purposes we think that this can be taken as exhaustive, and it is to be observed that in the case of property the lack of jurisdiction is said to exist where the property belongs to or is in possession or control of a foreign sovereign. In the case of a debt such as that with which we are concerned there can be no question of possession or control, and the title to it is the very thing which stands to be established or not to be established in these proceedings. In *Compania Naviera* itself the vessel was in the actual possession or under the control of the Spanish Republican Government, and the decision was based on that fact. Lord Wright said: ``In the present case the fact of possession was proved. It is unnecessary here to consider whether the Court would act conclusively on a bare assertion by the Government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondents here have established the necessary facts by evidence.'' It is to be noticed that even in this case put by Lord Wright, possession is the relevant matter, and the problem which he poses is as to whether or not a mere assertion of possession can be challenged. The fact that he expresses the view, albeit tentatively, that such an assertion would not be sufficient, does in our opinion form ground for thinking that where no such possession has been or can be asserted no objection to the jurisdiction can arise. Lord Maugham, however, expresses a clear opinion upon the subject, and although he does so only by way of dictum, we respectfully agree with his view. He said: ``It is clear, I think, that the property in the goods and chattels would have to be established if necessary in our Courts before the immunity could be claimed. The ambassador could not be sued in trover or detinue; but, if the property were not in his possession, and he had to bring an action to recover it, I am of opinion that he would have to prove in the usual way that the goods were his property. Speaking for myself I think the position of a foreign Government is the same. There is, I think, neither principle nor any authority binding this House to support the view that the mere claim by a Government or an ambassador or by one of his servants, would be sufficient to bar the jurisdiction of the Court, except in such cases as ships of war or other notoriously public vessels, or other public property belonging to the state. Professor Dicey has been relied on in favor of another view; but his proposition, founded on existing authorities, was that `an action or proceeding against the property' of a foreign sovereign or an ambassador or his suite was for the purpose of the general rule `an action or proceeding against such person' (Dicey on Conflict of Laws, Chapter IV., Rule 52). He did not (as he showed in the notes to the rule) mean by this that an action against property *claimed* by such a person is beyond the juris diction of our Courts. An independent sovereign sued for breach of promise of marriage in our Courts can indeed claim to be outside of our jurisdiction, but there is no authority for the view that, if he wrongfully obtained possession of valuable jewelry in this country, and it was in the hands of a third person, he could claim to stay

proceedings by the rightful owner against that person to recover possession of the jewelry merely by stating that he claimed it. To come within Professor Dicey's rule he would, in my opinion, be bound to prove his title."

The appeal must be allowed, with costs, and the action remitted to the Chancery Division for hearing.

## The Emperor's Case Part III

[Haile Selassie v. Cable & Wireless, Ltd.,
1939 L.R. Ch. 182]

BENNETT, J. (upon remand from the appeals court):

The defendants have always been and still are ready and willing to pay the sum which they owe, to any one who is entitled to receive it, but a claim has been made to it on behalf of H.M. the King of Italy. The defendants were and are placed in a difficult situation.

Since the Italian Government are a foreign sovereign authority they cannot be brought before an English Court by interpleaded proceedings.

The defendants have to choose between paying the plaintiff and running the risk of the Italian Government hereafter establishing that the money is owing to them, or resisting the plaintiff's claim in these proceedings by setting up by way of defense the title of the Italian Government to the money the plaintiff seeks to recover.

They have elected to take the latter course and have resisted the plaintiff's claim. The defendants contend that the question was settled in their favor by authority and they rely on three reported cases.

The first was the *United States of America v. McRae*, L.R. 8 Eq. 69, a decision of James Vice-Chancellor. In that case the suit arose out of a transaction entered into during the war between North and South in the United States of America, a war which broke out in the year 1861. The suit was started by a bill in equity issued, after the war was terminated, by the United States of America, suing as plaintiff.

The facts were that a rebellious government calling itself the government of the confederate states had been established in the southern part of the United States of America. For this government defendant McRae had acted as agent in Liverpool and in that capacity he had received contributions from subscribers to a loan to this government.

The purpose of the action was to make the defendant liable for all the contributions he had received. The United States of America had repudiated all liability to repay the moneys borrowed by the government of the confederate states. The bill was filed at a time when the plaintiff ruled throughout the territory of the United States of America and when the confederate government had no longer any existence.

The question discussed was what was the footing on which the defendant was liable to account.

The Vice-Chancellor was willing to order an account to be taken as it would be taken between the government of the confederate states on the one hand and the defendant as agent for such government on the other, on the plaintiff submitting to pay what on the footing of that account might be found due from them.

The plaintiff refused to take an order for an account on this footing and the Vice-Chancellor dismissed the bill. The purport of his judgment was to establish that the plaintiff's rights against the defendant were as successor to the government of the confederate states and that the plaintiff could only have an account on that footing.

The defendants rely on a passage in the Vice-Chancellor's judgment. They say it states a proposition of English law which rules the present case in their favor. The passage is as follows: ``I apprehend it to be the clear public universal law that any government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature of origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts, or arsenals, would, on the success of the new or restored power, vest ipso facto in such power; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government."

I agree that the passage does contain a statement which, if it be a statement of the law of England applicable to the facts of the present case, would be an authority which would bind me to decide the case in the defendants' favor.

But is it such an authority? The Vice-Chancellor was not considering which of two claimants, one being a de jure sovereign and the other a de facto sovereign, was entitled to recover property in the jurisdiction of this Court, the title to which had at one time been vested in the de jure sovereign. No such question was in issue or discussed. Hence I cannot regard the passage in question as an authority on the question which arises for decision in the present action.

The next case relied on was *Luther v. Sagor & Co.*

I think the only point established by the decision in that case is that when the Government of this country has recognized that some foreign government is de facto governing some foreign territory, the law of England will regard the acts of the de facto government in that territory as valid and treat them with all the respect due to the acts of a duly

recognized foreign sovereign state. It is clear I think that the acts so treated are acts in relation to persons or property in the territory which the authority is recognized as governing in fact.

It was not suggested in that case nor was anything said in it which supports the view that on or in consequence of such recognition a title to property in this country vests in the de facto government and that a title vested in a displaced government is divested. Thus *Luther v. Sagor & Co.* is not an authority which supports the defendants' pleas.

The last case cited is of importance, because it is concerned with the Italian conquest of Ethiopia and the recognition of the Italian Government as the de facto government of Ethiopia. It is the *Bank of Ethiopia v. National Bank of Egypt and Liquori*, 1937 L.R. Ch. 513, and it was decided by Clauson J.

The question to be decided in that case was whether the Bank of Ethiopia, a company incorporated by Ethiopian law, had been dissolved or had otherwise ceased to exist by force of a decree promulgated in Ethiopia by the Italian Government when governing that country de facto.

Clauson J., following and applying *Luther v. Sagor & Co.*, held that the bank was dissolved by the decree.

It had been suggested in argument on behalf of the Bank of Ethiopia that there was some limitation on the sovereignty of the de facto government arising out of the recognition of His Majesty Haile Selassie as the de jure sovereign of Ethiopia, and in disposing of that argument the learned judge used the following language:

``It was then sought, as I understood, to argue that the recognition of some measure of sovereignty de jure in the fugitive Emperor logically led to the denial of full sovereignty to the de facto government: and it was, as I understood, suggested that there existed this limitation on the acts of the de facto government which are to be recognized as internationally valid, that they must be acts which are strictly necessary for preserving peace, order and good government within the area controlled by the de facto government. This seems to me to be entirely inconsistent with the authorities to which I have already referred, and in principle to be fallacious. The recognition of the fugitive Emperor as a de jure monarch, appears to me to mean nothing but this, that while the recognized de facto government must for all purposes, while continuing to occupy its de facto position, be treated as fully recognized foreign sovereign state, His Majesty's government recognizes that the de jure monarch has some right (not in fact at the moment enforceable) to reclaim the governmental control of which he has in fact been deprived. Where, however, His Majesty's government has recognized a de facto government, there is, as it appears to me, no ground for suggesting that the de jure monarch's theoretical rights (for ex hypothesi he has no practical power of enforcing them) can be taken into account in any way in any of His Majesty's Courts."

On this passage the defendants base an argument to the effect that the plaintiff has no enforceable rights as sovereign de jure so long as there is another government recognized as the de facto government of the country of which he is recognized as the sovereign de jure, and that, since the money sought to be recovered in this action is public money, belonging to the state of Ethiopia, the plaintiff cannot recover it, but that the Italian Government can do so.

In my judgment the passage relied on by the defendants is no authority whatever for the proposition for which it is sought to use it, and the last sentence of the passage which I have read from the judgment shows that it is not such an authority.

The learned judge was concerned to demonstrate that the plaintiff had no governmental control of any kind in Ethiopia, and gives as his reason that he had no means of enforcing control there. He was not considering or deciding questions of title to property in this country, where, if the plaintiff has a title, that title can be enforced.

It seems to me to be plain that what has been decided in *Luther v. Sagor & Co.* and the *Bank of Ethiopia v. National Bank of Egypt and Liguori* has reference exclusively to the acts of a de facto government and a de jure government, both recognized as such by His Majesty's Government and both claiming to have jurisdiction in the same area with reference to persons and property in that area. The principle is that the Courts of this country will recognize and give effect to the acts of the former in relation to persons and property in the governed territory and will disregard and treat as a nullity the acts of the latter.

The present case is not concerned with the validity of acts in relation to persons or property in Ethiopia. It is concerned with the title to a chose in action--a debt, recoverable in England.

Having considered all the cases cited to me in argument, I have come to the conclusion that the point is not covered by English judicial authority.

I have to decide whether it is the law of England that the plaintiff, recognized by His Majesty's Government as the Emperor de jure of Ethiopia, has lost the right to recover the debt in a suit in this country, because the country in which he once ruled has been conquered by Italian arms and because His Majesty's Government recognizes that that country or the greater part of it is now ruled by the Italian Government.

It is unfortunate, I think, that the question has to be decided by a judge, for, in deciding it, it is impossible to avoid deciding on a claim made by a foreign sovereign state not a party to the proceedings. For this reason I shall say as little as possible.

My judgment is in favor of the plaintiff. I will first read a passage from the judgment of Lord Cairns in *United States of America v. Wagner*, L.R. 2 Ch. 582, 593: ``It was contended then, that when a monarch sues in our Courts, he

sues as the representative of the state of which he is the sovereign; that the property claimed is looked upon as the property of the people or state; and that he is permitted to sue, not as for his own property, but as the head of the executive government of the state to which the property belongs; and it was contended, in like manner, that when the property belongs to a republic, the head of the executive, or in other words the President, ought to sue for it." This argument, in my opinion, is founded on a fallacy. The sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks to recover. But in the Courts of Her Majesty, as in diplomatic intercourse with the government of Her majesty, it is the sovereign, and not the state, or the subjects of the sovereign, that is recognized. From him, and as representing him individually, and not his state or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed by all other states, and by the Courts of other states, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the state itself, and not in any officer of the state. It is from the state that an ambassador is accredited, and it is with the state that the diplomatic intercourse is conducted."

I regard this statement as authority for the proposition that when the liability to pay the debt in the suit arose, the right to sue for it and to recover it was vested in the plaintiff.

I ask myself why should the fact that the Italian army has conquered Ethiopia and that the Italian Government now rules Ethiopia divest the plaintiff of his right to sue.

The only reason can be, I suppose, that the money is not the plaintiff's own money, and that it is a sum which he is under some obligation to spend for the benefit of the people of Ethiopia--an obligation which he cannot now fulfill.

There is a clear answer to this suggestion. I think it undesirable that I should state it.

I hold that nothing has happened to divest the title formerly vested in him and that he is entitled to judgment for the sum agreed between the parties as the sum due from the defendants on January 1, 1936.

## The Emperor's Case Part IV

[Haile Selassie v. Cable & Wireless, Ltd.,
1939 L.R. Ch. 194]

SIR WILFRID GREENE M.R.

This is an appeal from a judgment of Bennett J. in an action by the late Emperor of Abyssinia against Cable and Wireless Limited. The claim in the action was for an account of all dealings between the plaintiff and the defendant company under a certain agreement, and payment of the amount found due. The agreement in question was an agreement between the competent Minister of the then Government of Ethiopia and the defendant company in relation to the establishment of a wireless station at Addis Ababa, the capital city of Abyssinia. Under that agreement certain sums admittedly became due from the defendant company. The dispute between the parties turned on the fact that the defendants asserted that the plaintiff had no title to sue for those moneys. Bennett J. decided in favor of the plaintiff. At the date of the trial the evidence available which was before the learned Judge, so far as it relates to the essential question raised in this appeal, showed that the annexation of Ethiopia by His Majesty the King of Italy had not yet been recognized by His Majesty's Government, but that His Majesty's Government recognized the plaintiff as the de jure Emperor of Ethiopia, and that His Majesty's Government recognized the Italian Government as the Government de facto of virtually the whole of Ethiopia, and such recognition had existed since the second half of December, 1936, that is to say, since a date earlier than the date of the issue of the writ, which was issued on January 4, 1937. Bennett J. held that the events which had taken place in Ethiopia and the other matters which were established before him were not sufficient to divest the plaintiff as still de jure Emperor of Ethiopia, of the right to recover the debt in suit in this country. From that judgment this appeal is brought. The appeal stood in the list for hearing on November 3 last, and it was called to our attention by Mr. Wynn Parry that, on the day before, an announcement had been made by the Prime Minister in the House of Commons from which it appeared that in the course of a few days, or at any rate a very short time, it was the intention of His Majesty's Government to recognize His Majesty the King of Italy as Emperor of Abyssinia, that is to say, that his position would be recognized de jure and non longer merely de facto. It was obvious from that announcement that, if it were carried into effect, the situation of this action would be profoundly affected, because circumstances would then be brought to the knowledge of the Court which would have a very important bearing upon the position of the plaintiff and his rights in respect of the debt in question in the action. Accordingly we thought right to adjourn the hearing of the appeal until a date after the probable date of recognition.

What has happened is this. As appears from a certificate signed by the direction of His Majesty's Principal Secretary of State for Foreign Affairs, dated November 30, 1938, His Majesty's Government no longer recognizes His Majesty Haile Selassie as de jure Emperor of Ethiopia; His Majesty's Government now recognizes His Majesty the King of Italy as de jure Emperor of Ethiopia. From that certificate two things emerge as the result of the recognition

thereby evidenced. It is not disputed that in the Courts of this country His Majesty the King of Italy as Emperor of Abyssinia is entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto is no longer recognized as existent. Further, it is not disputed that that right of succession is to be dated back at any rate to the date when the de facto recognition, recognition of the King of Italy as the de facto Sovereign of Abyssinia, took place. That was in December, 1936. Accordingly the appeal comes before us upon a footing quite different to that upon which the action stood when it was before Bennett J.

We now have the position that in the eye of the law of this country the right to sue in respect of what was held by Bennett J. to be (and no dispute is raised with regard to it) part of the public State property, must be treated in the Courts of this country as having become vested in His Majesty the King of Italy as from a date, at the latest, in December, 1936, that is to say, before the date of the issue of the writ in this action. Now that being so, the title of the plaintiff to sue is necessarily displaced. When the matter was before Bennett J., the de jure recognition not having taken place, the question that he had to deal with was whether the effect of the de facto conquest of Abyssinia and the recognition de facto of the Italian Government's position in Abyssinia, operated to divest the plaintiff of his title to sue. Whether that decision was right or whether it was wrong is a question we are not called upon to answer, but what is admittedly the case is that if Bennett J. had had before him the state of affairs which we have before us, his decision would have been the other way.

Now that being so, the only course which this Court can take is to allow the appeal and dismiss the action, but the question arises as to costs. On the one hand, of course, it was open to the plaintiff to claim that, in so far as Bennett J.'s judgment was not displaced on the facts as they were before him, he was entitled to keep his order as to the costs of the action. With regard to the costs of the appeal this position might have arisen. It might have been thought worth one side's or the other's while to argue this appeal on the merits in order to ascertain whether or not at the date when Bennett J. delivered his judgment and on the evidence then before him, the decision to which he came was the right one. That being the position, counsel for both parties have taken what, in my view, is a very proper course and in the interests of their clients a very wise course, because neither counsel feels that he would be justified in asking this Court to hear the appeal on the merits with a view to coming to a decision on the matter of costs, which on the one hand would, or might, deprive the plaintiff of the order for costs below which he already holds, and on the other hand might involve the defendant in paying the costs of this appeal or, on the other hand, involve the plaintiff in the risk of paying the costs of this appeal. In those circumstances, neither counsel wishes to argue against an order to this effect, that so far as costs are concerned the order as to costs below is to stand and that there should be no costs of this appeal, and as I say, I think that counsel for both parties have very wisely advised their clients to take that course. Mr. Andrew Clark, appearing for the plaintiff in the action, if I may be permitted to say so, took a perfectly proper course, and indeed the only course that was open to him in not attempting to argue before this Court what would have been a hopeless proposition, namely, that the effect of the de jure recognition of His Majesty the King of Italy as Emperor of Abyssinia has not been to divest his client, the late Emperor Haile Selassie, of his title to sue.

That being so, the order of the Court will be that the appeal be allowed, that the action be dismissed, but that the order as to costs made by Bennett J. shall not be disturbed, and there will be no costs of the appeal.

SCOTT L.J.: I agree.

CLAUSON L.J.: I agree.

Appeal allowed.

## NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

**1.** Do you feel a tiny bit sorry for the trial court judge, Bennett, J.? No matter which way he comes out, he gets reversed!

**2.** Note that as the case goes through successive stages, the quality of the legal research gets better. The interesting case of *United States v. McRae*, for example, is cited for the first time in the third stage of the *Emperor's Case*.

**3.** Note also that the British court holds that it has no jurisdiction over Italy or the Italian government. The court says: ``The defendants are unable to adopt the normal course of interpleading, since one of the claimants is the head of a sovereign state over whom this Court has no jurisdiction.'' The only way a British court in the 1930s could get jurisdiction over a foreign government would be for that government to come into court voluntarily as plaintiff (or, in rare cases, to waive its defense of sovereign immunity). When Haile Selassie, representing himself as the government of Ethiopia, voluntarily came into court as plaintiff, the court of course had jurisdiction over him. Also in the cited case of *United States v. McRae*, when the United States filed a bill of equity, the equity court had jurisdiction over the United States. (In recent years, other exceptions to the general rule of ``sovereign immunity'' have made headway in numerous countries; we'll get into this topic later in the course.)

**4.** The full litigation of *United States v. McRae* is too lengthy to be included in this book, and much of it is

irrelevant to present concerns. Yet it is a window on a largely unknown bit of Civil War history. The following account is based on the case reports contained in the following *English Law Reports*: L.R. 4 Eq. 327; L.R. 3 Ch. 79; and L.R. 8 Eq. 69.

In the nineteenth century, Southern states exported vast quantities of cotton to Great Britain's mills. When the Civil War broke out in 1861, the British mercantile class was partial toward the Confederacy--to the great consternation of President Lincoln. The Confederacy imported weapons, in exchange for cotton and money to Great Britain. Colin McRae was a Southerner who moved to London to act as one of the agents of the Confederacy. His main job was to facilitate trade. He purchased as much weaponry as he could with Confederate money and Confederate bonds. But he also collected money on behalf of the Confederacy--from Americans residing in London and Paris who were sympathetic to the South--and used this for additional purchases.

In July 1862, Congress passed a law making all property of persons holding any office or agency under the Confederacy subject to confiscation. When the Civil War ended in 1865, the United States government began confiscation proceedings against McRae's landholdings in the South. In addition, the United States hired an English solicitor to institute civil proceedings against McRae in Great Britain. The solicitor brought a suit in Chancery court for an accounting. Perhaps this was a mistake; perhaps an action should have been brought at law. To the casual reader, the equity court seemed to be highly protective of McRae's rights even though a sovereign country, and ally, was plaintiff.

First, the court accepted McRae's contention that the plaintiff should terminate its condemnation proceedings against his property in the United States as a condition of proceeding against him personally in an equity court in Great Britain. The court repeated the ancient saying, ``He who seeks equity must do equity."

Secondly, the court said that if the United States wishes an equitable accounting, it must step into the shoes of the Confederacy as the successor government to the Confederacy. The plaintiff declined; it did not want to ``recognize" the legitimacy of the Confederacy in any way, not even by succeeding to the property of the Confederacy. Instead, the United States said it was proceeding on its own behalf, reclaiming its own property--there was never any such thing as ``property" of the Confederacy.

The court wasn't buying. To be sure, it adopted the *principle* of successorship in international law that was cited in *Emperor's Case Part III* which you have read as quoted, namely, the ``clear public universal law that any government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature of origin of the title of such displaced power." The court was willing to grant the plaintiff an accounting, but only if the plaintiff claimed title as successor to the Confederacy.

*Why* was the United States unwilling to step into the shoes of the Confederacy in this case? The *ostensible* reason given by the solicitor on behalf of the United States was that his client was unwilling to recognize in any way the legitimacy of the Confederacy. But, after all, the Civil War was *over*. Why was the United States being so punctilious? Was there a deeper motive behind its refusal to claim successorship to the Confederacy? As a mental puzzle, think about this question before reading the next paragraph. Re-read this Note. What is your answer?

Hint: Recall that McRae, as agent for the Confederacy, purchased as much war materiel as he could with Confederate money and Confederate bonds. The cash and the bonds represented *obligations* of the Confederacy. Many of the companies in Great Britain that had furnished goods to the Confederacy during the war were now holding Confederate paper. Presumably they would be delighted if the United States were to make good on the Confederate obligations. Presumably the United States had no intention in the world of repaying creditors who had helped the South during the Civil War. Do you now see the dilemma the equity court created for the United States as plaintiff against McRae?

The dilemma (and the answer to our question) is as follows: A request for an equitable accounting requires that the both parties before the court--the plaintiff as well as the defendant--account to each other for all outstanding obligations between them. Here, the United States wished to gather in all monies due to McRae; that's why it brought the suit. But the United States was clearly unwilling to pay all of McRae's obligations, for that would involve making good on all the Confederate paper in the hands of British creditors! In other words, if the United States sued as the successor to the Confederacy, it would have to pay the Confederacy's obligations as well as being entitled to gather in whatever obligations were owed to the Confederacy through its agent McRae. All debts and all credits would have to be accounted for. The United States was perfectly happy to stand as creditor for all credits owed the Confederacy, but was unwilling to serve as debtor for all the indebtedness incurred by the Confederacy. Indeed, we may well imagine that the debts far exceeded the credits, for McRae would probably have used up all available credits in purchasing war materiel for the Confederacy, whereas he incurred substantial debts. But the court held that the United States cannot come into the case as creditor without also being a debtor. In wonderfully archaic language, the court said that the United States cannot both ``approbate and reprobate." In other words, the United States cannot claim from an agent of the Confederacy an account of his agency and at the same time repudiate the agent's own indebtedness to his creditors.

Hence, the United States stood to lose far more money by bringing this suit than it would if it did nothing. No plaintiff starts a lawsuit in order to lose money! All the United States could do was to attempt to convince the court that it could not recognize the legitimacy of the Confederacy, and hence could not be its ``successor.'' But this approach failed totally with the equity court.

Did the United States get into this dilemma because it chose to go to an equity court? Would it have been better off in a law court? Suppose McRae was holding a substantial amount of property in London. Could the United States proceed just against this property, saying that it constituted ill-gotten gains resulting from the giant illegal conspiracy known as the ``Civil War,'' in which 140,414 Americans lost their lives (over thirty *times* as many deaths as the combined death total of the Revolutionary War, War of 1812, and Mexican War of 1846)?

Answer: perhaps, assuming McRae was holding any property in London. But here the equity court did some investigation of its own. It found, in effect, that Colin McRae was an honest agent; he did not profit from his agency. The court said that ``there is absolutely not a tittle of evidence'' that any public monies or goods were in McRae's hands when the Civil War ended. Perhaps it is this fact, more than any legal argument, which accounted for the court's decision to dismiss the bill in equity. In this respect, the court's decision as a whole seems to have been fair and equitable.

**5.** What about the key distinction between recognition de facto and recognition de jure? What does it mean? What does the court in *Emperor's Case Part I* say it means? Recall that the court was informed by the British government that:

(1) His Majesty's Government still recognized the plaintiff as de jure Emperor of Ethiopia; (2) His Majesty's Government recognized the Italian Government as the Government de facto of virtually the whole of Ethiopia; and (3) that an Envoy Extraordinary and Minister Plenipotentiary from His Majesty the Emperor of Ethiopia was accorded recognition at the Court of St. James.

Is it now clear? If we look just at statements (1) and (3), we can conclude that the Emperor is the legitimate (``de jure'') ruler of Ethiopia and that the Emperor's representative is the credentialed ambassador to Great Britain. But what does (2) mean? Is it simply a statement of fact--that Italy has conquered Ethiopia? If it is *only* a statement of fact, then why does the British Government formally ``recognize'' it as a fact?

Some writers have suggested that recognition de facto means potential recognition de jure. This certainly seems to be what occurred in the course of the Emperor's litigation. But what if the de facto government is *never* accorded de jure recognition? Doesn't the notion of ``potential recognition'' seem quite insubstantial?

How about looking at the matter the opposite way: treat the de jure government as potentially the de facto government? Consider the suggestion given by Bennett, J. in *Emperor's Case Part III*: ``[W]hile the recognized de facto government must for all purposes, while continuing to occupy its de facto position, be treated as fully recognized foreign sovereign state, His Majesty's government recognizes that the de jure monarch has some right (not in fact at the moment enforceable) to reclaim the governmental control of which he has in fact been deprived.'' Is Judge Bennett saying that the ``real'' government is the de facto government, whereas the ``potential'' government is the de jure government? If not, what can he mean?

**6.** One thing is indisputable: if faced with a choice between a government recognized de facto and a different government recognized de jure, the court will always choose the de jure government. Why? Is it because courts like legitimacy? Will a court ever prefer an illegitimate government over a legitimate one?

**7.** Nevertheless, didn't the court to some extent question the legitimacy of the Emperor? Wasn't it a bit hard for the court to pretend that the legitimate government of Ethiopia was walking around Great Britain filing lawsuits, while the de facto government was actually in Ethiopia running the country? On the other hand, wouldn't it have been hard for the court to allow Italy, as conqueror, to gather up the foreign assets of Ethiopia? Wouldn't this be the same thing as rewarding aggression? Which would you choose?

**8.** Could the court have followed the British government's directive that Haile Selassie was the de jure Emperor of Ethiopia, but nevertheless have denied Selassie recovery in the instant case? Perhaps the court could have tried to draw a distinction between Haile Selassie as the legitimate government of Ethiopia, and Haile Selassie as the legitimate claimant to Ethiopian assets? What sort of distinction could the court have drawn? Stop and work out an answer to this question before looking at the hint in the next paragraph.

Big Hint: Consider the argument that Judge Bennett *rejected* in *Emperor's Case Part III* in citing *United States of America v. Wagner*.

**9.** In *United States v. Pink*, 315 U.S. 203 (1942), the First Russian Insurance Co., organized under the laws of the former Empire of Russia, established a New York branch in 1907. It deposited with the Superintendent of Insurance, pursuant to the laws of New York, certain assets to secure payment of claims resulting from transactions of its New York branch. By certain laws, decrees, enactments and orders, in 1918 and 1919, the Russian Government nationalized the business of insurance and all of the property, wherever situated, of all Russian insurance companies (including the First Russian Insurance Co.), and discharged and canceled all the debts of such companies and the rights of all

shareholders in all such property. On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the de jure Government of Russia and as an incident to that recognition accepted an assignment (known as the Litvinov Assignment) of certain claims, including the claims of the Soviet Union to the assets of the First Russian Insurance Company in New York.

The United States, as assignee of the Soviet Union, sued the administrator of the First Russian Insurance Co. in New York, but the New York courts held against the United States on the ground that the Soviet nationalization decrees of 1918 and 1919 had no extraterritorial effect. On certiorari to the United States Supreme Court, the Supreme Court said: ``If it is true that the Russian decrees in question had no extraterritorial effect, it is decisive of the present controversy. For the United States acquired, under the Litvinov Assignment, only such rights as Russia had. If the Russian decrees left the New York assets of the Russian insurance companies unaffected, then Russia had nothing here to assign. But that question of foreign law is not to be determined exclusively by the state court. The claim of the United States based on the Litvinov Assignment raises a federal question." Because of the ``national policy" underlying the Litvinov Assignment, the Supreme Court held that there was, under federal law, extraterritorial effect, and hence the assets belonged, by assignment, to the United States. Moreover, the Court held that de jure recognition is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence.

Most courts have given de jure recognition retroactive effect, back to the time of de facto recognition. Is this what the British courts finally did in *Emperor's Case Part IV*? What ``act" of Italy was recognized retroactively? Weren't the assets in the possession of Cable & Wireless Ltd. *already* in its possession at the very moment of Italy's invasion of Ethiopia?

Shouldn't the British Court of Appeals, in *Emperor's Case Part IV*, have decided the case in favor of Haile Selassie *despite* all the reasoning about de facto and de jure recognition? For, after all, didn't those assets belong to the Emperor *before* Italy entered into the picture?

If this *should* have been the logical decision, what considerations do you think decisively influenced the court to decide in favor of Italy? Do we have to go beyond the court's decision to the historical events of the period? Is it decisive that Great Britain was following the policy of appeasement of its Prime Minister, Neville Chamberlain? Were the courts simply enacting official policy, which was to appease dictators like Mussolini and Hitler in the hope that, giving in to their ``final demands" would bring, in Chamberlain's immortal and infamous phrase, ``peace in our time"?

**10.** If you answered the previous question in favor of Haile Selassie, consider the following argument in favor of Italy: Abyssinia is the successor state to Ethiopia, as ``successor state" is defined in the reading on ``State Continuity" on pp. 193-95 of the *Anthology*. As such, Abyssinia (governed now by Italy) succeeds to all the property, title, and interest of Ethiopia. Since the money in the possession of Cable & Wireless belonged to Ethiopia, it now belongs to Abyssinia!

**11.** The following treaty on the Rights and Duties of States is a classic multilateral convention. Note that although the treaty entered into force well in advance of the Emperor's Cases, neither Great Britain, Italy, nor Ethiopia were parties. But what if they were parties and the Convention were binding upon them--would Articles 6 and 7 have changed the result in any of the four Emperor's Cases? Why? Why not?

## Convention on the Rights and Duties of States

Done at Montevideo, Dec. 26, 1933.

Entered into force, Dec. 26, 1934; for the United States, Dec. 26, 1934. 49 Stat. 3097, T.S. No. 881, Bevans 145, 165 L.N.T.S. 19. Ratified by Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States, Venezuela. Signed but not ratified by Argentina, Paraguay, Peru, Uruguay.

*Article 1.* The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

*Article 2.* The federal state shall constitute a sole person in the eyes of international law.

*Article 3.* The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

*Article 4.* States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

*Article 5.* The fundamental rights of states are not susceptible of being affected in any manner whatsoever.

*Article 6.* The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.

*Article 7.* The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state.

*Article 8.* No state has the right to intervene in the internal or external affairs of another.

*Article 9.* The jurisdiction of states within the limits of national territory applies to all the inhabitants.

Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.

*Article 10.* The primary interest of states is the conservation of peace. Differences of any nature which arise between them should be settled by recognized pacific methods.

*Article 11.* The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

*Article 12.* The present Convention shall not affect obligations previously entered into by the High Contracting Parties by virtue of international agreements.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

**1.** To the casual reader, treaties seem like pretty boring instruments. They tend to be written in imperious and didactic generalities. Yet the history of every treaty includes: (a) a motivating situation or problem, (b) exchanges of diplomatic notes and conversations among the potentially affected states, (c) long treaty conferences among the interested parties, (d) various drafts of the treaty, circulated to all the negotiators, (e) submission of the drafts by the negotiators to their home governments, (f) replies by the home governments, (g) the final adoption of the text of the treaty by the negotiators, (h) a formal signing by the representatives of the state parties, and (i) the formal, sometimes protracted, ratification process in each state. (In the United States, a treaty is ratified by the President with the advice and consent of a two-thirds majority of the Senate; the House of Representatives has nothing to do with the process.) Thus, the final wording that you end up with in a treaty reflects an enormous amount of bargaining over the very words themselves, with utmost attention to nuances of meaning. It is perhaps no exaggeration to say that more person-hours of intense thought go into every word in a treaty than are expended in any other legal document, including contracts between major corporations. Each word in a treaty is the resultant of all the conflicting vectors of the treaty's negotiating history. Each word is quite special.

**2.** The Montevideo Convention of 1934 did not arise out of the blue. It was the result of a special problem that arose following an unusual initiative by Mexico. In 1930, Don Genaro Estrada, the Secretary of Foreign Relations for Mexico, called for an end to the international practice of recognizing governments. Estrada stated that Mexico had ``suffered" from the practice of foreign states' passing on the legitimacy of Mexican governments. Recognition of governments, he said, ``offends the sovereignty of other nations [and] implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments." Estrada hoped to stop the great powers from using recognition decisions to interfere in the internal and external affairs of weaker states like Mexico. Estrada backed up his statement with an announcement of official policy: henceforth the Mexican government would no longer recognize other governments. Obviously Estrada hoped that his announcement would be met with similar declarations from other states.

Did Mexico get what it wanted from the Montevideo Convention? Refer to Articles 6 and 7. Do these represent a somewhat watered-down version of recognition? What about Article 8? Does its inclusion in the convention go part of the way toward meeting Estrada's goal? Or does it interfere with it?

**3.** What conclusion can we draw from the fact that the Montevideo Convention does not mention de facto or de jure recognition, much less distinguish between the two?

**4.** What other things do we discover about the nature of a ``state" from examining the provisions of the Montevideo Convention?

**C. Secession and Self-Determination**

**Reading Assignment**: *International Law Anthology*, pp. 196-203, 256-59.

NOTES AND QUESTIONS

## FOR CLASSROOM DISCUSSION

**1.** Do you agree with Lea Brilmayer that claims of title to land are the primary determinants in assessing the legality of secessionist demands?

**2.** What is the role of ``democracy'' in Lea Brilmayer's account? What is the role of ``democracy'' in claims of self-determination generally?

**3.** Does international law define the ``self'' in ``self-determination''? Can it ever do so? Is Lea Brilmayer's approach to the ``self'' in ``self-determination'' helpful in this regard?

**4.** How important are past injustices to Lea Brilmayer? How important do you think they are? Does the answer to your question depend on how far in the past we go?

**5.** Do you agree or disagree with Catherine Iorns' reply to Lea Brilmayer? Is Iorns right that Brilmayer's position amounts to ``might makes right''?

**6.** Hurst Hannum and Richard Lillich, in 1980, studied approximately 100 ``autonomy'' claims around the world. Since then, with the end of the Cold War and the breakup of the Soviet empire, autonomy claims have risen sharply. This may be one of the most important issues in international law in decades to come.

**7.** Isn't New York State to some extent ``autonomous''? How about Ontario in Canada? Might we view the autonomy movement on a continuum, with claims of local self-rule simply becoming stronger as the central government of a state becomes weaker vis-a-vis the locality? Or, on the other hand, is there no such thing as true autonomy in any entity within a state? What governmental prerogatives are local regions most likely to assert and achieve? (What about, for example, education? Firefighting? Zoning?) What governmental prerogatives are local regions least likely to achieve? (Consider, for example, treaty-making. Or sending ambassadors abroad. What about sending a representative to the United Nations?) Do these questions suggest that there is a lot of room for negotiating secessionist claims? Or are you left with the impression that there is very little room? To what extent are secessionist claims exaggerated in order to win small concessions? To what extent do they amount to ultimatums?

**8.** What are the minimum requirements to satisfy Hurst Hannum's and Richard Lillich's view of autonomy? Of self-government? Of cultural autonomy? Of religious autonomy?

**9.** The following case of the Tinoco Arbitration--a gold mine of international law!--recapitulates and reexamines several of the important concepts you've encountered so far in this Chapter. As you read the arbitrator's decision, consider how he finds the applicable rules of international law regarding:

(a) Continuity of governments;
(b) Recognition of governments;
(c) Estoppel against a non-recognizing government;
(d) Exhaustion of local remedies;
(f) A ``Calvo Clause'' provision;
(g) Internal constitutional law.

### The Tinoco Arbitration
### (Great Britain and Costa Rica)

Washington, D.C.: October 18, 1923

Opinion and Award of William Howard Taft,[1] sole arbitrator:

This is a proceeding under a treaty of arbitration between Great Britain and Costa Rica. The ratifications of the treaty were exchanged on March 7, 1923.

In January 1917, the Government of Costa Rica, under President Alfredo Gonzalez, was overthrown by Frederico Tinoco, the Secretary of War. Gonzalez fled. Tinoco assumed power, called an election, and established a new constitution in June, 1917. His government continued until August 1919, when Tinoco retired, and left the country. His government fell in September following. After a provisional government under one Barquero, the old constitution was restored and elections held under it. The restored government is a signatory to this treaty of arbitration.

In August 1922, the restored Costa Rican Government passed a law known as Law of Nullities. It invalidated all contracts between the executive power and private persons, made with or without approval of the legislative power between January 1917 and September 1919, covering the period of the Tinoco government.[2] The claim of Great Britain is that the Central Costa Rica Petroleum Company is a British corporation whose shares are owned by British subjects;[3] that the Central Costa Rica Petroleum Company owns, by due assignment, a grant by the Tinoco government in 1918 of the right to explore for oil in Costa Rica, and that the concession has been annulled without right by the Law of Nullities. She asks an award that she is entitled on behalf of her subjects to have the concession recognized and given effect by the Costa Rican Government.

The Government of Costa Rica denies its liability for the acts or obligations of the Tinoco government and maintains that the Law of Nullities was a legitimate exercise of its legislative governing power. It further denies the validity of such claim on the merits, unaffected by the Law of Nullities.

It is convenient to consider first the general objections to the claim of Great Britain, urged by Costa Rica, and then if such general objections cannot prevail, to consider the merits of the claim and Costa Rica's special defenses to it.

Great Britain contends, first, that the Tinoco government was the only government of Costa Rica de facto and de jure for two years and nine months; that during that time there was no other government disputing its sovereignty; and that it was in peaceful administration of the whole country, with the acquiescence of its people.

Second, that the succeeding government could not by legislative decree avoid responsibility for acts of the Tinoco government affecting British subjects, or appropriate or confiscate rights and property by that government except in violation of international law; that the act of Nullities is as to British interests, therefore itself a nullity, and is to be disregarded, with the consequence that the contracts validly made with the Tinoco government must be performed by the present Costa Rican Government, and that the property which has been invaded or the rights nullified must be restored.

To these contentions the Costa Rican Government answers: First, that the Tinoco government was not a de facto or de jure government according to the rules of international law. This raises an issue of fact.

Second, that the contracts and obligations of the Tinoco government, set up by Great Britain on behalf of its subjects, are void, and do not create a legal obligation, because the government of Tinoco and its acts were in violation of the constitution of Costa Rica of 1871.

Third, that Great Britain is estopped, by the fact that it did not recognize the Tinoco government during its incumbency, to claim on behalf of its subjects that Tinoco's was a government which could confer rights binding on its successor.

Fourth, that the subjects of Great Britain, whose claim is here in controversy, were either by contract or the law of Costa Rica bound to pursue their remedies before the courts of Costa Rica and not to seek diplomatic interference on the part of their home government.

Dr. John Bassett Moore, now a member of the Permanent Court of International Justice, in his Digest of International Law, Volume I, p. 249, announces the general principle which has had such universal acquiescence as to become well settled international law:

Changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired.

The principle of the continuity of states has important results. The state is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper. The governments of Louis XVIII and Louis Philippe so far as practicable indemnified the citizens of foreign states for losses caused by the government of Napoleon; and the King of the Two Cicilies made compensation to citizens of the United States for the wrongful acts of Murat.

Again Dr. Moore says:

The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing de facto government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties and its external obligations.

What are the facts to be gathered from the documents and evidence submitted by the two parties as to the de facto character of the Tinoco government?

In January, 1917, Frederico A. Tinoco was Secretary of War under Alfredo Gonzalez, the then President of Costa Rica. On the ground that Gonzalez was seeking reelection as President in violation of a constitutional limitation, Tinoco used the army and navy to seize the government, assume the provisional headship of the Republic and become Commander-in-Chief of the army. Gonzalez took refuge in the American Legation, thence escaping to the United States. Tinoco constituted a provisional government at once and summoned the people to an election for deputies to a constituent assembly on the first of May 1917. At the same time he directed an election to take place for the Presidency and himself became a candidate. An election was held. Some 61,000 votes were cast for Tinoco and 259 for another candidate. Tinoco then was inaugurated as the President to administer his powers under the former constitution until the creation of a new one. A new constitution was adopted June 8, 1917, supplanting the constitution of 1871. For a full two years Tinoco and the legislative assembly under him peaceably administered the affairs of the Government of Costa Rica, and there was no disorder of a revolutionary character during that interval. No other government of any kind asserted power in the country. The courts sat, Congress legislated, and the government was duly administered. Its power was fully established and peaceably exercised. The people seemed to have accepted Tinoco's government with

great good will when it came in, and to have welcomed the change. Even the committee of the existing government, which formulated and published a report on May 29, 1920, directing the indictment of President Tinoco for the crime of military revolution and declaring the acts of his regime as null and void and without legal value, used this language:

Without having a constitution to establish the office of President and determine his functions, and even to indicate the period for which he was to be elected, the election was held by the sole will of the person who was violently exercising the executive power. And as was natural, the election fell to the same Mr. Tinoco, and, sad to relate, the country applauded! The act, therefore, of decreeing that said election should be held under such conditions is contrary to the most rudimentary principles of political law.

The quotation is only important to show the fact of the then acquiescence of the people in the result. Though Tinoco came in with popular approval, the result of his two years administration of the law was to rouse opposition to him. Conspiracies outside of the country were projected to organize a force to attack him. But this did not result in any substantial conflict or even a nominal provisional government on the soil until considerably more than two years after the inauguration of his government, and did not result in the establishment of any other real government until September of that year, he having renounced his Presidency in August preceding, on the score of his ill health, and withdrawn to Europe. The truth is that throughout the record as made by the case and counter case, there is no substantial evidence that Tinoco was not in actual and peaceable administration without resistance or conflict or contest by anyone until a few months before the time when he retired and resigned.

Speaking of the resumption of the present government, this passage occurs in the argument on behalf of Costa Rica:

Powerful forces in Costa Rica were opposed to Tinoco from the outset, but his overthrow by ballot or unarmed opposition was impossible and it was equally impossible to organize armed opposition against him in Costa Rican territory.

It is true that action of the supporters of those seeking to restore the former government was somewhat delayed by the influence of the United States with Gonzalez and his friends against armed action, on the ground that military disturbances in Central America during the World War would be prejudicial to the interests of the Allied Powers. It is not important, however, what were the causes that enabled Tinoco to carry on his government effectively and peaceably. The question is, must his government be considered a link in the continuity of the Government of Costa Rica? I must hold that from the evidence that the Tinoco government was an actual sovereign government.

But it is urged that many leading Powers refused to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations. What are the facts as to this? The Tinoco government was recognized in April 1917 by Ecuador; in May by Bolivia, Argentina, Chile, Haiti, and Guatemala; in June by Switzerland, Germany, Denmark, Spain, and the Vatican; in July by Mexico and Holland; in August by Colombia, Austria, and Portugal; in September by El Salvador; in November by Roumania and Brazil; and in December 1917 by Peru.

What were the circumstances as to the other nations?

The United States, on February 9, 1917, two weeks after Tinoco had assumed power, took this action:

The Government of the United States has viewed the recent overthrow of the established government in Costa Rica with the gravest concern and considers that illegal acts of this character tend to disturb the peace of Central America and to disrupt the unity of the American continent. In view of its policy in regard to the assumption of power through illegal methods, clearly enunciated by it on several occasions during the past four years, the Government of the United States desires to set forth in an emphatic and distinct manner its present position in regard to the actual situation in Costa Rica which is that it will not give recognition or support to any government which may be established unless it is clearly proven that it is elected by legal and constitutional means.

And again on February 24, 1917:

In order that citizens of the United States may have definite information as to the position of this Government in regard to any financial aid which they may give to, or any business transaction which they may have with those persons who overthrew the constitutional Government of Costa Rica by an act of armed rebellion, the Government of the United States desires to advise them that it will not consider any claims which may in the future arise from such dealings, worthy of its diplomatic support.

The Department of State issued the following in April, 1918:

The Department of State has received reports to the effect that those citizens of Costa Rica now exercising the functions of government in the Republic of Costa Rica have been led to believe by those persons who are acting as their agents, that the Government of the United States was considering granting recognition to them as constituting the Government of Costa Rica.

In order to correct any such impression which is absolutely erroneous, the Government of the United States desires to state clearly and emphatically that it has not altered the attitude which it has assumed in regard to the

granting of recognition to the above mentioned citizens of Costa Rica and which was conveyed to them in February, 1917, and further that this attitude will not be altered in the future.

Probably because of the leadership of the United States in respect to a matter of this kind, her then Allies in the war, Great Britain, France and Italy, declined to recognize the Tinoco government. Costa Rica was, therefore, not permitted to sign the Treaty of Peace at Versailles, although the Tinoco government had declared war against Germany.

The merits of the policy of the United States in this non-recognition it is not for the arbitrator to discuss, for the reason that in his consideration of this case, he is necessarily controlled by principles of international law, and however justified as a national policy non-recognition on such a ground may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law.

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition vel non of a government is by such nations determined by inquiry, not into its de facto sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a de facto government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the de facto character of Tinoco's government, according to the standard set by international law.

It is ably and earnestly argued on behalf of Costa Rica that the Tinoco government cannot be considered a de facto government, because it was not established and maintained in accord with the constitution of Costa Rica of 1871. To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a de facto government, which conforms to the limitations of the old constitution is to use a contradiction in terms. The same government continues internationally, but not the internal law of its being. The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?[4] Reference is further made, on behalf of Costa Rica, to the Treaty of Washington, December 20, 1907, entered into by the Republics of Central America, in which it was agreed that

The governments of the contracting parties will not recognize any one who rises to power in any of the five republics in consequence of a coup d'etat or by a revolution against a recognized government until the representatives of the people by free elections have reorganized the country in constitutional form.

Such a treaty could not affect the rights of subjects of a government not a signatory thereto, or amend or change the rules of international law in the matter of de facto governments. Their action under the treaty could not be of more weight in determining the existence of a de facto government under Tinoco than the policy of the United States, already considered. Moreover, it should be noted that all the signatories to the treaty but Nicaragua manifested their conviction that the treaty requirement had been met in the case of the Tinoco government, by recognizing it after the adoption of the constitution of 1917 and the election of Tinoco.

It is further objected by Costa Rica that Great Britain by her failure to recognize the Tinoco government is estopped now to urge claims of her subjects dependent upon the acts and contracts of the Tinoco government. The evidential weight of such non-recognition against the claim of its de facto character I have already considered and admitted. The contention here goes further and precludes a government which did not recognize a de facto government from appearing in an international tribunal in behalf of its nationals to claim any rights based on the acts of such government.

To sustain this view a great number of decisions in English and American courts are cited to the point that a municipal court cannot, in litigation before it, recognize or assume the de facto character of a foreign government which the executive department of foreign affairs of the government of which the court is a branch has not recognized. This is clearly true. It is for the executive to decide questions of foreign policy and not courts. It would be most unseemly to have a conflict of opinion in respect to foreign relations of a nation between its department charged with the conduct of its foreign affairs and its judicial branch. But such cases have no bearing on the point before us. Here the executive of Great Britain takes the position that the Tinoco government which it did not recognize, was nevertheless a de facto government that could create rights in British subjects which it now seeks to protect. Of course, as already

emphasized, its failure to recognize the de facto government can be used against it as evidence to disprove the character it now attributes to that government, but this does not bar it from changing its position. Should a case arise in one of its own courts after it has changed its position, doubtless that court would feel it incumbent upon it to note the change in its further rulings.

Precedents in American arbitrations are cited to show that an estoppel like the one urged does arise. They are Schultz's case (Moore, International Arbitrations, Vol. 3, 2973), Janson's case (id. at 2902), and Jarvis's case (Ralston, Venezuela Arbitrations, 150). In the opinions of these cases delivered by American commissioners, there are expressions sustaining the view that the bar of an estoppel exists, but an examination shows that no authorities are cited and no arguments are made in support of the view. Moreover, the array of facts in the cases was conclusive against the existence of a de facto government, and the expressions were unnecessary to the conclusion. In Schultz's case the claim of an American citizen was against the Juarez government for loss of goods by fire between the lines of battle waged by Miramon's forces against Juarez's government. The claim against Juarez's government was plainly not sustainable, first because it occurred in the train of war and, second, because the Miramon forces never had in fact constituted a de facto government. The Janson case before the same tribunal was for the value of an American bark seized by Miramon's soldiers to escape out of the country from the victorious army of Juarez. The commissioner devotes many pages to a resume of evidence to show that neither Miramon nor Maximilian, with whom he acted, had ever had a de facto government; that Juarez was always in control of the greater part of Mexico and always resisting. The truth is that the language of the decisions should be more properly construed to emphasize the great and overwhelming weight to be given to the recognition of Juarez by the United States and its non-recognition of Miramon as evidence against the de facto character of the government of the latter, than to uphold the theory of a bar by estoppel.

In Jarvis's case the facts were that Paez, a Venezuelan citizen, was an insurgent against the existing government of Venezuela in 1849, and enlisted in his conspiracy Jarvis, the American claimant, who furnished him a ship and arms and ammunition. This was a crime against the United States on Jarvis's part, because the United States was on terms of amity with Venezuela. The expedition failed. In 1861, thirteen years later, however, when Paez was in Venezuela, a sudden outbreak placed him in power. In 1863, just as he was about to retire with the collapse of his government, he issued bonds to Jarvis to repay him for his outlay in the unsuccessful insurrection of 1849, twelve years before. The commissioner held that there was no lawful consideration for the bonds. Certainly this was a righteous conclusion. It was a personal obligation of Paez, if it was an obligation at all. It was not a debt of Venezuela. It was invalid and unlawful because of its vicious origin, both by the laws of the United States and the laws of Venezuela. The commissioner also by way of additional but unnecessary support to his conclusion said the United States was estopped to urge the claim. These are, so far as I am advised, the only authorities to be found either in decided cases or in text writers applying the principles of estoppel to bar a nation seeking to protect its nationals in their rights against the successor of a de facto government.

It may be urged that it would be in the interest of the stability of governments and the orderly adjustment of international relations, and so a proper rule of international law, that a government in recognizing or refusing to recognize a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on this issue. Arguments for and against such a rule of public policy occur to me; but it suffices to say that I have not been cited to text writers of authority or to decisions of significance indicating a general acquiescence of nations in such a rule. Without this, it cannot be applied here as a principle of international law.

It is urged that the subjects of Great Britain knew of the policy of their home government in refusing to recognize the Tinoco regime and cannot now rely on protection by Great Britain. This is a question solely between the home government and its subjects. That government may take the course which the United States has done and refuse to use any diplomatic offices to promote such claims and thus to leave its nationals to depend upon the sense of justice of the existing Costa Rican Government, as they were warned in advance would be its policy, or it may change its conclusion as to the de facto existence of the Tinoco government and offer its subjects the protection of its diplomatic intervention. It is entirely a question between the claimants and their own government. It should be noted that Great Britain issued no such warning to its subjects as did the United States to its citizens in this matter.

The fourth point made on behalf of Costa Rica against the claim here pressed is that the claimant is bound either by its own contractual obligation entered into with the Government of Costa Rica, or by the laws of Costa Rica, to which it subscribed, not to present its claims by way of diplomatic intervention of their home government, but to submit its claims to the courts of Costa Rica. This is in effect a plea in abatement to the jurisdiction of the arbitrator, which, under the terms of the arbitration, Costa Rica has the right to advance.

Costa Rica cites Articles 19 and 21 of the concession agreement:

19. The present contract shall elapse, and the government may so declare by an Executive Order, in the following cases only:

--If the contractor has recourse to diplomatic action in connection with any dispute or litigation as to the rights and privileges granted by this contract, but the forfeiture of this concession shall not be pronounced by the government

without having given to the concessionaire the opportunity to defend himself nor without having submitted the point to arbitration.

21. Any dispute arising between the parties in respect to the interpretation or execution of this contract which cannot be compromised, shall be submitted to arbitration and decided according to the laws of Costa Rica. If the parties fail to agree on one arbitrator, each shall appoint one, and the two arbitrators in case of disagreement shall choose a third as umpire.

These two limitations do not seem to include within their scope such a question as the power of the Tinoco government to grant the concession, or the obligation of the present government of Costa Rica to recognize it. They cover the interpretation and construction of the contract rather than the fundamental question of its existence.

The concession was in the form of a contract between Aguilar, Minister of Public Works, authorized by the President of the Republic, and John M. Amory and Son, of 52 Broadway, New York, as party of the second part. The Chamber of Deputies of the Tinoco government approved the contract June 26, 1918. The concession is now owned by the Central Costa Rica Petroleum Company, Ltd., of Canada, and all its stock is owned by the British Controlled Oil Fields, Ltd. The concessionaire was given the right during twelve years to prospect or cause to be prospected the territories of the provinces of Cartago, Alajuela, Heredia and San Jose, constituting four of the eight provinces of Costa Rica, comprehending half her territory, in order to find deposits of petroleum, hydrocarbons and allied substances. On his finding them, the concessionaire was granted the exclusive right to locate all of the deposits discovered. At the end of twelve years, any territory that might remain unexplored, or of which the concessionaire did not present topographical and geographical plans to the government, might be otherwise disposed of by the government for the mining of petroleum, hydrocarbons and allied substances. The concessionaire was granted the exclusive right during fifty years to develop and exploit the deposits located by him; to establish pipe lines and pumping stations; to erect refineries and bore wells; to build aqueducts, roads, railways, transmission lines and all other works necessary for the extracting, warehousing and handling of petroleum and allied substances; to use the national and public highways and the unoccupied land for such purpose; to utilize the rivers, springs, and water courses which may cross the national, municipal or private lands; to install hydraulic or electrical plants required by the company for the generating of electric power for this purpose; to cut and fell timber on national lands free of payment, and stone, slate, lime, clay, and other things that may be necessary for the operation of the enterprise, and to locate and mine such coal deposits as he might discover in his exploration. The enterprise was declared to be a public utility under the protection of the government so as to enable the concessionaire to exercise the right of expropriation for the purpose of the grant. He was given the right to export the petroleum and hydrocarbon products and by-products, or to sell the same within the republic.

The grant was made on condition that the concessionaire should spend $20,000 American gold in exploration during the first two years, and to deposit $25,000 in the public treasury to secure this expenditure; invest in the three years following the two years, not less than $125,000 gold in an investigation and exploitation of the petroleum deposits, and secure this action by the deposit of 40,000 colones[5] in internal bonds of Costa Rica in the treasury at San Jose or in a bank in England or in the United States, and during seven years succeeding the previous five, invest a sum of not less than one million colones, to continue the work of investigation and exploitation, and deposit, as security for this, in the treasury of the republic, or in a bank of England or of the United States, 30,000 colones of the interior debt of Costa Rica; commence explorations within four months; use the best kind of machinery and methods for doing the work; organize a company called the Central Costa Rica Petroleum Company; transfer all the rights of the concessionaire to that company, as well as the obligations of the latter to Costa Rica, and organize the company within four years with a capital paid up of not less than one million dollars in United States currency.

The considerations for this concession are that the concessionaire agrees to pay 25 cents, American currency, on every ton of crude petroleum or other hydrocarbon products exported or sold in the republic, deducting what he may use in his work of production, refining and transport. He undertakes to supply gratuitously all fuel and lubricating oil needed to run the present government railways and extensions thereof, provided that the total net output from the petroleum fields shall be at least 1000 tons a day, the storage and transportation to be at the expense of the government. The concession agreement further provides:

The royalty of 25 cents shall be the only tax or duty payable by the concessionaire to the Government of the Republic or to the local governments or municipalities in respect to this concession; but the concessionaire shall not be exempted from any national taxes payable by the public in general at the present rates. The government exempts the concessionaire from the payment of general or partial taxes which may be levied hereafter, unless they be for public services established or conducted by the government and of which the concessionaire shall make regular use, or by which he may directly and permanently benefit.

Costa Rica's first objection to an award in favor of the Amory petroleum concession in this proceeding is that it was granted to an American firm and that there is no evidence that British subjects were interested in it until after it had been repudiated, so that they acquire nothing but a law suit. It is urged that Great Britain may not protect her subjects in prosecuting a claim acquired from American owners after it had become the subject of controversy. Great Britain

argues that British capital was engaged in the concession from the first, and that Amory & Son were only agents of a large English Company known as the British Controlled Oil-fields, Limited, and that all the capital has been furnished by that company since the concession was granted and work done under it. No formal proof is made of this. In a letter of the Secretary of State of Costa Rica to a representative of the British Government, of September 29, 1920, he says:

When the Amory contract was being negotiated, assurance was given that the responsible firm was North American and documents presented to the Department of Public Works show that the transfer provided by the contract was made to a concern domiciled in the State of Delaware of the United States of America. In spite of this, and in view of the repeated assertions contained in the notes to which this is a reply, we now have no doubt that a part at least of the capital is English or of English origin, and that the interest that moves you to intervene in the matter is born of that circumstance.

No objection of this kind by Costa Rica was made in the Congressional resolution of the 13th of December, 1921, or, so far as I can discover, in previous correspondence. It appears for the first time in the counter case. Had it been clearly made in previous correspondence, the failure to make proof might have raised the question of law urged, but in view of the admission above and the lack of distinct challenge previous to the counter case, I cannot regard it as substantial.

Nor do I deem it necessary to go in detail into the question of performance. It seems to me that substantially everything was done by the concessionaires or their assignee required by the contract in the way of an advance of one million dollars of capital, of the security to be given, and of considerable expenditure to he made. The accounts show the actual outlay of at least 200,000 colones in exploration in Costa Rica, and of 300,000 colones in importation into the country of machinery and other preparation enough certainly to manifest good faith and to appeal for equitable treatment in case this concession cannot be sustained as a contract.

The most serious objection to the concession is that it was granted by a body without power to grant it. Its validity is, as I have already said, to be determined by the law in existence at the time of its granting; and that means the law of the government of Costa Rica under Tinoco. This concession was granted, with the approval of the President, by the Chamber of Deputies of Costa Rica. By the constitution of June 8, 1917, established under Tinoco, the Government of the Republic was vested in three different powers independent of each other, to be known as the legislative, the executive and the judicial powers. The legislative power was vested in a congress composed of two chambers, one of Senators and the other of Deputies, whose members in both were elected by the citizens and might be reelected indefinitely. By Article 76, the Congress was to meet as a single body and exercise ten powers, which were within its exclusive jurisdiction. The tenth power was as follows:

To approve or disapprove laws, fixing, enforcing or changing direct or indirect taxes.

The Chamber of Deputies was given the power to decree the alienation of property of the nation, or the application thereof for public uses; and especially to empower the executive to negotiate loans or to enter into other contracts upon mortgage security of the national revenue. The Senate was given the power to approve or disapprove the loan contracts which might be entered outside of the country, after the contract had been approved by the Chamber of Deputies; to approve or disapprove the contracts which the government might enter into, when on account of the nature and importance of the subject matter the executive power of the Chamber of Deputies, at the request of one-third of the members present, considered necessary the sanction of the Senate.

The recital of the concession shows that an important part of it dealt with the future taxes to be paid by the concessionaire and made very especial provision in reference thereto. He was to pay a revenue tax of 25 cents United States currency on every ton of crude petroleum to be exported from Costa Rica or sold within its limits. This was called a revenue tax. In addition to this the concessionaire undertook to supply the government with combustible and lubricating oil for the existing railways or for any extension within the provinces named, if the product of the enterprise was not less than 1000 tons per day within a given period. Article X limited the taxes to be paid to the royalty of 25 per cent and exempted the company from the payment of taxes to local governments or municipalities, and from all national taxes except those payable by the public in general at the rates existing at the time of the concession. It exempted the concessionaire from the payment of other general or partial taxes levied thereafter unless they were for public benefits furnished by the government of which the concessionaire should make regular use, or by which he might directly or indirectly benefit, i.e., unless they were special assessments for actual benefits. Considering the very heavy burden to which but for these exemptions the company might have been subjected in the event of successful exploitation, they were a valuable part of the concession. It is evident that it was the hope and expectation of both parties that oil would be discovered and that upon its discovery the company would develop a large production, refining and transmission of oil, involving the expenditure of large capital and the investing of it in plants of millions of value. The protection which these clauses afforded against the heavy reduction of dividends by increased future taxes, was one of the great factors of value in the contract.

It seems to be impossible to escape the conclusion that the power to grant such exemptions and to limit future taxation could only be exercised under the constitution of 1917 by Congress as a whole. The granting of this concession

certainly involved the power to approve laws fixing, enforcing or changing direct or indirect taxes. As the Chamber of Deputies was expressly excluded [by the Constitution] from exercising this power alone, Article X [of the concession agreement] was invalid.

It is urged that under the practical construction of the Tinoco constitution, the Chamber of Deputies did grant tax exemptions and five instances are cited from the official Gazette to show this. These were cases in which the customs duty on machinery introduced into the country was waived. They could hardly be held to amount to an amendment of the fundamental law by practice, or such a construction of it as to justify an exception by the Chamber of Deputies of ad valorem taxation, general and local, on the plant and property of the concessionaire for fifty years. My conclusion is supported by the action of President Tinoco himself in vetoing a law granting future exemptions from taxation to an insurance company enacted by the Senate, on the ground that only the Congress as a whole could grant them under its exclusive power to fix, enforce, or change direct or indirect taxes.

It is impossible to reject Article X and hold the remainder of the concession valid. That article is too vital an element in its value. The contract cannot be made over by this tribunal for the parties.

The result is that the government of Tinoco itself could have defeated this concession on the ground of a lack of power in the Chamber of Deputies to approve it.

My award is that the Law of Nullities in decreeing the invalidity of the Amory concession worked no injury to the Central Costa Rica Petroleum Company, Ltd., the assignee of the concession, and the British Controlled Oil Fields, Ltd., its sole stockholder, of which Great Britain can complain, because the concession was in fact invalid under the Constitution of 1917.

## NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

**1.** In the *Tinoco Arbitration*, what role did recognition play in determining continuity?

**2.** Would it have made a difference if Great Britain had been a dictatorship instead of a democracy?

**3.** How did Taft get around the problem of exhaustion of local remedies of Articles 19 and 21? Was his reasoning persuasive?

**4.** Why shouldn't Great Britain be estopped to claim that the Tinoco government's contract is valid when Great Britain had deliberately failed to recognize the Tinoco government?

**5.** Was it fair for Taft to base his decision on Costa Rica's failure to follow its constitutional procedures? What is the effect upon international investment if investors in foreign countries face the possible loss of their investment if they follow every procedure the foreign country lays down and yet it turns out at a later date that that very procedure might have violated the foreign country's own constitution? Does this mean that the investor must study and know the foreign country's constitution even better than the foreign government knows its own constitution?

**6.** The *Tinoco Arbitration* remains good law today. The *Tinoco* rule has complexified international investment. Is this bad news for investors? For their lawyers?

**7.** How much legal work is required in the investigation of a foreign country's local laws before an investor may safely invest in that foreign country? Would the Central Costa Rica Petroleum Company have been better off if it had relied on the advice of an expert Costa Rican constitutional lawyer instead of relying upon the decree of the Tinoco government? What if (perish the thought!) the Central Costa Rica Petroleum Company *had* relied upon a Costa Rican constitutional expert at the time, and what if that expert's advice was that the Company had a secure and enforceable deal with Costa Rica? Would evidence of that expert advice have made a difference to the Arbitrator?

FOOTNOTES CH. 2

**1** Former President of the United States.

**2** [Editor's Note: The same arbitration also concerned a second claim--a complex banking arrangement--that had also been nullified by the Law of Nullities. This part of Mr. Taft's judgment is omitted here.]

**3** [Editor's Note: A ``Barcelona Traction'' kind of problem does not arise here because there was a treaty of arbitration between Great Britain and Costa Rica that expressly allowed the arbitrator to deal with the merits of this dispute.]

**4** [Editor's Note: Arbitrator Taft, who of course was a former President of the United States, might well have added that the Constitution of the United States was ratified in contravention of the amendment procedures established in the Articles of Confederation--and yet no one claimed that the United States under the Constitution was not the legitimate successor to the United States under the Articles of Confederation.]

**5** [Editor's Note: A colon was, at the time, officially set at the equivalent of 46 1/2 cents in American money.]