INDIRECT INJURIES TO FOREIGN CREDITORS IN INTERNATIONAL LAW

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INTRODUCTION

The study undertaken here deals with the following question : Is State C responsible under general international law to State A, if, by interfering with the rights of an individual or a company, it indirectly harms the interests of a national of State A, who is a creditor of the individual or company in question ? If assets of a company, for instance, have been confiscated by a government, can the United States put forward a claim on behalf of the American debenture holders and other creditors of the corporation, on the ground that the assets of the debtor company have diminished as a result of the taking ?

In connexion with this issue, further questions arise : Should a distinction be made between secured and unsecured debts ? Do legal solutions vary according to whether the debtor whose rights are directly affected, is a subject of State C, State A, or a third country ?

Problems pertaining to the legal position of foreign insurers [1], to the diplomatic protection of corporate entities and their shareholders [2], and to contracts concluded between a sovereign State and a foreign national will not be considered in detail, although they have some bearing on the subject-matter. Furthermore, we will disregard cases in which a foreign creditor seeking to recover

[1] For an excellent survey of this problem, see RITTER, « Subrogation de l'assureur et protection diplomatique », 65 *R.G.D.I.P.* 765 (1961).

[2] *Cf.*, on this point, P. DE VISSCHER, « La protection diplomatique des personnes morales », 102 *R.C.A.D.I.* 395-511 (1961, I); D. BINDSCHEDLER, « La protection diplomatique des sociétés et des actionnaires », 100 *Revue des juritses bernois* 141-189 (1964); BATTAGLINI, *La protezione diplomatica delle società* (1957); UBERTAZZI, *L'espropriazione di compagnie commerciali straniere nel diritto internazionale pubblico* (1948); BORCHARD, Report on « Protection diplomatique des nationaux à l'étranger », 36 *A.I.D.I.* 256; etc.

a contractual debt in a domestic court suffers a denial of justice [3], as well as instances in which the foreign creditor himself is the victim of confiscatory measures, such as the taking of bonds issued by a private company and owned by him.

The topic thus outlined — whose practical importance is evident [4] — constitutes one of the many problems arising with regard to the protection of foreign investments. Thus far it has received but little attention in contemporary legal writings [5] and in the considerable number of draft conventions on the protection of foreign investments or on State responsibility and diplomatic protection. The few drafts and codes which form a commendable exception, such as the Foreign Relations Law of the United States formulated by the American Law Institute [6], are somewhat incomplete [7]. The factual background of the case law pertaining to the rights of foreign creditors is not always

[3] See the *Romberg* case, [1863] United States and Peru, Mixed Claims Commission, 2 LAPRADELLE / POLITIS, *Recueil des arbitrages internationaux* 564-567 (1923); 2 MOORE, *International Arbitrations* 1627 (1898).

[4] Particularly in view of the numerous claims presented on behalf of foreign bondholders in nationalised enterprises.

[5] See, however, DE BEUS, *The Jurisprudence of the General Claims Commission, United States and Mexico* 230-266 (1938); BORCHARD, Report cited *supra,* note 2, at 336-342; AL-SHAWI, *The Role of the Corporate Entity in International Law* 59 (1957); D. BINDSCHEDLER, *op. cit. supra,* note 2, at 185-187.

[6] Restatement of the Law (2nd). The Foreign Relations Law of the United States, par. 191 (1965), with comments.

[7] Restatement Second of the Foreign Relations Law provides that interference with « property » rights of aliens entails international responsibility; the term « property »

> « ... includes tangible property, whether real or personal, movable or immovable, and intangible property. *It also includes any interest in property if such interest has a reasonably ascertainable value.* » (par. 191; italics ours).

To judge from the examples adduced by the drafters — no practice is cited in support — the rule quoted above seems to embrace rights *in rem* only; thus, unsecured creditors would go unprotected.

Art. 12 (1)-(3) and 20 (2) (c) of the Harvard Draft Convention Concerning Responsibility of States for Injuries to the Economic Interests of Aliens, 55 *A.J.I.L.* 545-584 (1961), with comments by SOHN and BAXTER, are also relevant in this connexion. Art. 12 (1)-(3) admits liability for violations of contracts by a contracting State as well as for interference by a State with any contract or concession

> « ... to which the alien and a person or body other than the central government of a State are parties... ».

Art. 20 (2) provides that a claim may be presented (directly or through the alien's national State, *cf.* Art. 22 *et seq.*) by

> « ... (c) an alien who holds a share in, or analogous evidence of ownership or interest in a juristic person which is a national of the respondent State or of any State of which the alien is not a national, and who suffers an injury to such interest, through the dissolution of, or any other injury to, such juristic person, ... »

If our interpretation of this text is correct, the provision may well apply to bondholders and possibly to other creditors of legal entities.

clear [8]. The value of the cases available is furthermore lessened by the fact that some of the arbitral awards dealing with creditors' rights were rendered *ex aequo et bono*. Hence, the principles expressed in these cases do not necessarily reflect positive rules of international law.

The outline of this article is as follows : The international practice and the practice of domestic agencies relating to the rights of indirectly injured creditors under international law will be examined first; a distinction will be drawn between unsecured and secured debts or contractual rights. A discussion of the opinions of writers will follow. In the concluding section, the results of our enquiry will be summed up and a few theoretical problems analysed.

INDIRECT INJURIES TO FOREIGN CREDITORS : ANALYSIS OF INTERNATIONAL PRACTICE

1. — UNSECURED DEBTS

a) *The debtor whose rights are interfered with by State C is a national of State C and his creditor is a national of State A.*

In the first claim of *Alsop & Co.* (United States v. Peru) [9], an American partnership was the creditor of a Peruvian merchant. Alsop & Co. and other creditors initiated bankruptcy proceedings against him in a Peruvian court. Before any bankruptcy decree could be rendered, and against the court's will, the merchant's assets were seized by the provincial administration for military reasons. The Alsop claim was rejected by the American-Peruvian Mixed Claims Commission [10], because the merchant had not yet been bankrupt at the moment of the seizure. Thus, the assets were still his property at that time and had not passed to his creditors. It follows that Alsop & Co. possessed no right *in rem* over their debtor's assets, but only had a contractual claim against a Peruvian national. This claim had been indirectly affected by the provincial administration through its direct seizure of the debtor's property. By rejecting the claim, the Commission thus negated international responsibility for direct interferences with the rights of foreign creditors.

The claim of *Dr. Bance* (United States v. Venezuela) [11] bears some resem-

[8] See in particular the claim of the *Société civile des porteurs d'obligations du Crédit Foncier Mexicain* (*infra*) and the *Bain* and *Rodriguez* cases (*infra*).

[9] [1863], 2 LAPRADELLE and POLITIS, *op. cit. supra,* note 3, 266-267 (1923); 2 MOORE, *op. cit. supra,* note 3, at 1627.

[10] Commission instituted under the Claims Convention with Peru of Jan. 12, 1863, 8 MILLER, T. & O.I.A. 915. This treaty permitted the settlement of claims *ex aequo et bono* (art. III and V), but the Commission made no reference to equity.

[11] [1903], 9 *U.N.R.I.A.A.* 233-234.

blance to the *Alsop* case. The estate of a Venezuelan citizen who owned a claim against his Government was declared bankrupt. The receiver of the estate, through the United States Government, presented a claim on behalf of three American firms, creditors of the bankrupt. The American-Venezuelan Claims Commission [12] dismissed the claim, holding that the rights against the Venezuelan State continued to vest in the bankrupt; consequently, it was impossible

> « ... to consider any individual credits from the total estate as the property of any one creditor » [13].

The leading case in this field — *Dickson Car Wheel Company* (United States) v. *Mexico* [14] — is also negative as far as indirect rights of unsecured foreign creditors are concerned. The United States put forward a claim on behalf of an American company for non-payment of a contractual debt by the Mexican National Railways, a private corporation, the majority of whose shares were owned by the Mexican Government at the time the contract was concluded. The non-payment was allegedly due to the fact that during the the revolution (1914-1925), the railways were operated by the Mexican Government. The company had continued to exist throughout the revolution, and the railways were later restored to it. In a frequently quoted, and excellent opinion, the American-Mexican General Claims Commission disallowed the claim, the American Commissioner Nielsen dissenting. After having pointed out that owner of a majority of the corporation's shares by the Government did not make the latter a party to the contract [15], and after having rejected an argument based on unjust enrichment, the Mexican Commissioner Fernandez McGregor, speaking for the Commission, said :

> « I. A State does not incur international responsibility from the fact that the subject of the claimant State suffers damage as a corollary or result of an injury which the defendant State has inflicted upon one of its own nationals or upon an individual of a nationality other than that of the claimant country, with whom the claimant is united by ties of relationship.
>
> II. A State does not incur international responsibility from the fact that an

[12] Commission created under the Protocol of Agreement of Feb. 17, 1903, *ibid.*, at 115, 2 MALLOY, Treaties ... between the United States and Other Powers 1776 (1909). Although Art. I (3) of the Agreement allows the Commission to decide

> « ... upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation »,

the Commission did not seem to avail itself of this faculty.

[13] 9 *U.N.R.I.A.A.*, at 234.

[14] [1931] General Claims Commission, United States and Mexico, 4 *U.N.R.I.A.A.* 669. The Commission had been created by the General Claims Convention of Sep. 8, 1923 (extended twice), 43 Stat. 1730, 4 *U.N.R.I.A.A.* 11.

[15] 4 *U.N.R.I.A.A.*, at 670. Commissioner NIELSEN's dissent was based on the assumption that the Mexican National Railways were a government instrumentality. In his findings, Nielsen heavily relied on *Oliver American Trading Co., Inc.* v. *Government of the United States of Mexico*, 5 F. 2d 659 (2d Cir. 1924).

> individual or company of the nationality of another State suffers a pecuniary injury as the corollary or result of an injury which the defendant State has inflicted upon an individual or company irrespective of nationality when the relations between the former and the latter are of a contractual nature » [16].

This concise and lucid statement contains the essence of the legal principles applicable to claims of unsecured foreign creditors [17].

The case of the *Société civile des porteurs d'obligations du Crédit Foncier Mexicain* (France v. Mexico) is unpublished but briefly reported by Feller [18]. The Crédit Foncier Mexicain, a company whose nationality is unknown, held mortgages on real property which had been damaged by revolutionary forces. The claim put forward by France on behalf of French bondholders of the bank was disallowed by the reorganised French-Mexican Claims Commission, for the reason that only landowners, and not the bondholders or the Bank, had a valid claim. As far as the rights of unsecured foreign creditors are concerned, no conclusions can be drawn from this case, since we do not know if the French bonds were secured or not.

The *Ziat, Ben Kiran* case (Great Britain v. Spain) [19], decided by Max Huber within the framework of the arbitration concerning the *British Interests in Spanish Morocco,* contains an interesting *obiter dictum* relating to the problem at hand. A claim was presented by Great Britain against Spain on behalf of an association founded and established in Spanish Morocco, which consisted of a Spanish national, Ben Kiran, and a British subject, Mohammed Ziat. Spain demurred to the claim, on the ground that under Spanish law, the association was a juristic person distinct from its owners and consequently possessed Spanish nationality. The Arbitrator pronounced the claim to be

[16] 4 *U.N.R.I.A.A.*, at 681.

[17] Comments on the *Dickson Car Wheel* award range from enthusiastic approval to utter rejection.

The Commission's attitude meets with the approval of FELLER, *The Mexican Claims Commission* 1923-1924, 124 (1935), who writes :

> « At any rate, the notion that the prevention of the fulfillment of contract is a taking of property, goes beyond the existing limits of the law and opens up an unbounded and unexplored range of state responsibility. »

DE BEUS, on the other hand, is extremely critical of the award, mainly on the ground that, the problem being one of causation, the decision should have been based on the foreseeability or absence of foreseeability, for the Mexican Government, of the injury caused to the American company (*op. cit. supra,* note 5, at 253-264). For a refutation of this criticism, *cf. infra.*

Finally, FRIEDMAN, *Expropriation in International Law* 168 (1953), ventures the debatable suggestion that the Commission would have granted the claim, had the Mexican Government deliberately ruined the National Railways in order to prevent payment of the debt to the American claimant.

[18] [1931] French-Mexican Claims Commission reorganised under the Convention of Aug. 2, 1930, FELLER, *op. cit.*, at 423. Case reported *ibid.*, at 122-123.

[19] [1924-1925] Max HUBER, Rapporteur, 2 *U.N.R.I.A.A.* 729.

ill-founded on the merits, but made an interesting comment on the Spanish demurrer. Huber conceded that in international law a distinction can be made between a juristic entity and its owners. International law having established no criteria for such a distinction — said the Arbitrator — considerations of equity should apply. He continued as follows :

> « Under these circumstances it would become necessary, even if the Spanish contention were to be accepted, to consider the merits of each case, in order to determine whether the injury in question has immediately affected the person on whose behalf the claim was presented, or whether this person is but the creditor of another person whose rights have been directly impaired » [20].

Huber thus suggested that injuries to foreign creditors due to interference with the rights of their debtors will not give rise to international responsibility *vis-à-vis* the creditor's national State. The atitude of the Arbitrator is in complete agreement with the earlier cases discussed above.

In the arbitration concerning the *Forest of Central Rhodopia* (Greece v. Bulgaria) [21], the atitude which had thus far been taken by national tribunals was confirmed by another *obiter dictum*. Undén, the sole arbitrator, stated :

> « According to one generally accepted opinion, a claim can be made not only in cases of violation of property rights resulting from measures taken by the authorities of another country, but also, for example, when the claimant possesses in a foreign country a mortgage on realty or on a ship which has been confiscated. But generally, in a case in which the demand of the claimant is based, for example, upon the fact that his debtor in the foreign country has become insolvent as a result of confiscation, diplomatic intervention or action before an international tribunal based on common international law will not be allowed... » [22].

Among the few cases which seem to be favourable to the rights of foreign creditors the claims of *French and British Bondholders in the Port of Pará Company* [23] may be mentioned, where Great Britain and France had taken certain steps in order to protect their nationals who were bondholders in a Brazilian company. As a precedent, the case is, however, of a very doubtful nature, for we do not know if the steps taken by the French and British Governments on behalf of the bondholders constitue a genuine diplomatic intervention or are to be qualified as mere good offices. Moreover, the legitimacy of the Franco-British intercession was not tested before an international tribunal.

[20] *Ibid.*, at 729-730 (our translation).

[21] [1933] 3 *U.N.R.I.A.A.* 1405, at 1425-1426.

[22] 3 *U.N.R.I.A.A.*, at 1425-1426; translation quoted from 2 WHITEMAN, *Damages in International Law* 1478 (1937). The award cites BORCHARD, *The Diplomatic Protection of Citizens Abroad* 295-300 (1928). The pages referred to deal with international and domestic practice in respect to « direct » breaches of contract by foreign States and thus are not directly in point.

[23] France/Great Britain v. Brazil, *British Practice in International Law*, 1963-I, 25. See also the French intervention on behalf of *Bondholders of the Royal Company of Portuguese Railways* reported by 3 KISS, *Répertoire de la pratique française en matière de droit international public* 466-470 (1965).

b) *The debtor whose rights are interfered with by State C is a national of State B and his creditor is a national of State A.*

Only one precedent, it would appear, can be mentioned here. In the case of the *Dickson Car Wheel Company,* already discussed [24], the Commission held that, whatever be the debtor's nationality, indirect injuries to (unsecured) foreign creditors do not entail international responsibility [25].

c) *Both debtor and creditor are nationals of foreign State A and the debtor's rights are interfered with by State B.*

If both debtor and creditor are nationals of the same foreign State, the latter may recover on behalf of the debtor alone. The question as to whether the indemnification obtained from the defendant State will eventually benefit the debtor or the creditor is, of course, a problem of municipal law, to be solved in accordance with the national legislation of the claimant State.

The principle enunciated above — recovery on behalf of the debtor alone — is illustrated by the ruling of the American-Venezuelan Claims Commission [26] in the *Turini* case [27]. This case related to the rights of American creditors of a deceased American citizen who, in turn, owned claims against the Venezuelan Government. The creditors' rights had been indirectly impaired by Venezuela's refusal to pay the debt owed to the deceases or to his estate. The Commission admitted that the United States had a valid claim on behalf of the heirs who were American nationals, but not on behalf of the creditors of the deceased, who were to be paid out of the amount received by the estate [28].

d) *Practice of the United States Foreign Claims Settlement Commission in respect of indirect injuries caused to the interests of unsecured American creditors.*

The practice of the Foreign Claims Settlement Commission — a United States municipal agency, whose authority is defined by the International Claims Settlement Act of 1949, as amended [28bis] — relates to claims of American nationals resulting from foreign nationalizations and other takings of property. The Commission has settled claims based on lump sum agreements concluded between the United States and certain foreign countries. It also adjudicates claims of American nationals against States with which no agreement has yet been reached. In particular, the Commission has settled claims against Yugo-

[24] *Cf. supra,* at .

[25] 4 *U.N.R.I.A.A.,* at 681.

[26] Commission under the 1903 Agreement mentioned in note 12.

[27] [1903] 9 *U.N.R.I.A.A.* 161.

[28] See also the *Christern & Co.* (*Liquidators*) case (Germany v. Venezuela), [1903] German-Venezuelan Mixed Claims Commission, 10 *U.N.R.I.A.A.* 435. The Commission had been set up under a Protocol concluded between the two countries on Feb. 13, 1903 (*ibid.,* at 359).

[28bis] 22 U.S.C., par. 1621.

slavia [29], Bulgaria, Hungary and Rumania [30], Italy [31], Russia [32] and Czechoslovakia [33]. At the present time, it is appraising claims against Poland and pre-adjudicating claims against Cuba.

On numerous occasions, the Commission has set forth its views on claims arising out of indirect interference with unsecured interests of American citizens. The practice of the Foreign Claims Settlement Commission covers private and Government bonds, bank deposits and other secured and unsecured claims. Although the Commission is a domestic agency, it applies the principles of international law [33bis]. The case law of the Foreign Claims Settlement Commission relating to creditors' interests having been the object of a recent, very exhaustive analysis [34], a brief outline will suffice.

Claims presented by owners of bonds issued by private enterprises have usually been rejected [35], whereas claims based on deposits in foreign banks, which were nationalised, have been allowed subject to the proof that the deposit as such had actually been confiscated [36]. On the one hand, this practice has been highly prejudicial to American depositors, for mere evidence of the nationalization of the bank without proof of the actual taking of the deposit has led to the dismissal of their claims. Such proof, however, could not be furnished in cases of factual confiscation without express declaration [37]. On the other hand, subject to the proof mentioned above, recovery for the taking of deposit accounts — *i.e.* unsecured debts owed by the nationalised bank — has been possible. Therefore, the attitude of the Commission in respect to bank deposits has not been in harmony with the negative attitude hitherto observed by international tribunals in regard to unsecured debts. The Foreign Claims Settlement Commission cases pertaining to ordinary unsecured debts seem, on the contrary, to be in line with international practice, for such claims have generally been dismissed. This observation applies particularly to the Yugoslav

[29] Yugoslav Claims Agreement of July 19, 1948 (62 Stat. 2658), and 22 U.S.C. par. 1623.

[30] The so-called Balkan Claims Programme, *cf.* 22 U.S.C. par. 1641 (b).

[31] For claims arising out of World War II but not covered by the 1947 Peace Treaty; *cf.* 22 U.S.C. par. 1641 (c).

[32] 22 U.S.C. par. 1641 (d).

[33bis] *Cf.* 22 U.S.C. par 1623 (a), which provides that

> « ... the Commission shall apply the following in the following order : (1) The provisions of the applicable claims agreement as provided in this subsection; and (2) the applicable principles of international law, justice, and equity. »

[33] 22 U.S.C. par. 1642.

[34] Note, 16 *Syracuse L. Rev.* 809-844 (1965).

[35] In the *Claim of Rogers,* a claim based on a bond issued by a private company was upheld, because the principal debt and interest were guaranteed by the Russian Government. Foreign Claims Settlement Commission (FCSC), 10th Semiann. Rep. 180 (1959); Note 16 *Syracuse L. Rev.* 809-844, at 815 (1965).

[36] *Ibid.,* at 819-825, 841, 842; see also Panel Opinion No. 17 (relating to Balkan claims), FCSC, 4th Semiann. Rep. 17 (1956).

[37] Note, 16 *Syracuse L. Rev.* 809-844, at 842 (1965).

Programme. It should be noted, however, that the Yugoslav Government had expressly agreed to assume the liabilities of the nationalised entreprises towards United States nationals [38]. In the claim of the *European Mortgage Series B Corporation* (Hungarian Programme) [39], the Commission temporarily changed its practice and ruled that creditors' claims, *whether they be secured or not*, could not be compensated either under general international law or under Section 303 (2) of the International Claims Settlement Act. As far as unsecured debts were concerned, the Commission's attitude still conformed to the international practice analysed above. The rejection of secured claims under international law, on the contrary, is more debatable and was later abandoned. Similar problems arose under the Czechoslovak Programme. In the case concerning the *Skin Trading Company* [40], the Commission decreed that ordinary unsecured cerditors could recover, provided they proved the express annulment or repudiation of the debt owed to them. The Commission, however, seems to nullify its own conclusion by stating that

> « ... such a claim of an American creditor whose interests had been indirectly affected by the nationalization of its debtor would be defeated by the weight of authority under international law to the effect that such losses as a creditor may suffer as a result of a wrongful act committed against his debtor are not the proximate result of the wrongful act, and are too remote or indirect to sustain an award to the creditor » [41].

Judging from a subsequent award of the Commission [42], the statement quoted above applies to unsecured debts alone.

From this utterly confused situation, the following conclusions seem to emerge : the hard and fast rule laid down by the Commission in the *European Mortgage* case has been considerably attenuated. Claims of secured creditors will succeed, at least if express cancellation of the collateral security can be proved. The success of unsecured claims, on the contrary, is problematic indeed, although it has been suggested that even an unsecured American creditor showing non-payment

> « ... coupled with some affirmative act or expression of a specific unwillingness to pay, or formal annulment of the debt, or an express repudiation thereof, always stands an excellent chance of recovery » [43].

[38] Yugoslav Claims Agreement of 1949 (*vide supra*, note 29), Art. 4 (b) and (c); Senate Committee on Foreign Relations, S. Rep. No. 810, 81st Cong., 1st Sess. 11 (1949); *Menton* claim, FCSC, Report 1949-1955, 86, and the other cases condensed at 85-89.

[39] FCSC, 10th Semiann, Rep. 72 (1959). Commissioner's PACE's dissent (*ibid.*, at 78-79) applies only to secured debts.

[40] FCSC, 17th Semiann. Rep. 202 (1962).

[41] *Ibid.*, at 203. It is to be noted that the Commission commits the familiar error of viewing the issue as one of causation. *Cf. infra.*

[42] The *Schatten* claim, FCSC, 14th Semiann. Rep. 122 (1961). *Accord* : Claim of the *Singer Sewing Machine Company*, 16th Semiann. Rep. 22 (1962); claim of *Unger et al.*, *ibid.*, 12.

[43] Note, 16 *Syracuse L. Rev.* 809-844, at 841 (1965).

At any rate, the only unqualified acceptance of unsecured creditors' claims is to be found in the cases relating to the Russian Claims Programme [44] and now in the provisions of Title V of the International Claims Settlement Act (Cuban Claims Act of 1964) [45].

2. — SECURED DEBTS

a) *Practice of International Tribunals and State practice.*

Contractual interests may be secured by collateral rights *in rem*. These rights are, of course, conditional; they materialise only if the debtors fail to discharge their contractual obligations. Nevertheless, mortgagees and other lien-holders are frequently allowed by municipal law to recover to the extent of their entire contractual claim, if their collateral right *in rem* has been seriously interfered with [46]. In international practice, the case law available on this point is still indecisive.

The first case to be considered here was brought before the Anglo-American Claims Commission [47]. The « *Circassian* » [48], a vessel owned by an Eglishman,

[44] Panel Opinion No. 32, FCSC, 5th Semiann. Rep. 10 (1956); cases reported in FCSC, 10th Semiann. Rep. 203, 227, 229, 234, 246, 256 and 263. The favourable treatment extended to « Russians claims » — as contrasted with the restrictive policy applied to « Balkan claims » — is, according to the Commission, based on the fact that 22 U.S.C. par. 1641 (d) (2) (relating to « Russian claims ») does not further specify the *claims* which fall under the Commission's jurisdiction, whereas 22 U.S.C. par. 1641 (b) (pertaining to « Balkan claims ») only covers creditors' claims against a Balkan *Government* or claims constituting *property* in the traditional sense of the term.

[45] 22 U.S.C. par. 1643-1643 (b), extending the Commission's jurisdiction to claims arising out of « ... debts for merchandise furnished or services rendered by nationals of the United States ... »; moreover, « property » is defined as including

> « ... debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba, and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba ».

[46] See FLEMING, *Torts* 43-81 (2nd ed., 1961); 59 *Corpus Juris Secundum* (*C.J.S.*), par. 338. In matters of « domestic » expropriation, mortgagees may be entitled to recover from the condemnor to the extent of their full contractual claim. See 29 *C.J.S.*, par. 201; Switzerland, *Loi fédérale sur l'expropriation,* of June 20, 1930, Art. 5, 18, 21, 23-24, 94-101, 4 *Recueil systématique des lois et ordonnances* 1848-1947, 1173 (1950).

[47] Commission established in pursuance of the Treaty with Great Britain for the Settlement of Pending Questions Between the two Countries, of May 8, 1871, 17 Stat. 863. Art. XII of this Convention provided that the Commission was to have jurisdiction over unsettled claims « ... arising out of acts committed against the persons or property ... » of English or American subjects, by the United States or Great Britain, respectively.

[48] Case of the « *Circassian* » (Great Britain v. United States), [1871] Great Britain and United States, Mixed Claims Commission, Report of Robert J. HALE, Agent and Counsel of the United States... under the Twelfth Article of the Treaty of 8th May 1871, between the United States and Great Britain, 141 (1874).

was heavily mortgaged to another British national. It carried freight belonging partly to British nationals, partly to French nationals. The freight owned by British subjects was, in turn, mortgaged to an English firm. The entire cargo carried by the vessel was insured by a British company. United States forces captured the « Circassian » off the Cuban coast during the American Civil War, and both vessels and cargo were condemned and sold. The Commission decided that the capture had been unlawful and allowed claims presented by Great Britain on behalf of the mortgagees of vessel and freight and on behalf of the insurance company.

In the *Bain* case [49], the same Commission rejected a claim presented by Great Britain on behalf of a British national holding a mortgage on property situated in the United States and destroyed by the United States Army. The nationality of the mortgagor is unknown. The Commission's ruling seems to contradict its findings in the case of the « *Circassian* ». The *Bain* case cannot, however, be relied on too much, the Commission's award not being available.

In *M.C. Rodriguez* (United States) v. *Spain* [50], a claim was put forward on behalf of the executrix of the Rodriguez estate. Property located in Cuba, on which Rodriguez held a mortgage (again the nationality of the mortgagor is unknown), had been seized and burned by Spanish authorities or by rebels. The Mixed Claims Commission established by the United States and Spain [51] dismissed the case, holding that the acts complained of afforded no ground for a claim on behalf of an American mortgagee or of his estate.

The fourth award to be dealt with under this heading relates to the claim of the *Banco de Londres y Tarapacá, Ltd.* (Great Britain v. Chile) [52], which was brought before the Anglo-Chilean Claims Commission [53]. A building owned by a Chilean citizen had been destroyed as a result of the civil war the going on in Chile. The bank, a company incorporated in Great Britain and having a branch in Chile, held a mortgage on the building for a loan granted to its owner. The British claim on behalf of the mortgagee was rejected on two grounds. In the first place, the Commission pointed out that the bank had only suffered an « indirect damage » [54], for which international law does not always impose

[49] [1871] Great Britain and United States, Mixed Claims Commission, BORCHARD's Report cited above, note 2, at 341.

[50] [1882], 3 MOORE, *op. cit., supra*, note 3, at 2336; 3 WHITEMANN, *op. cit., supra*, note 22, at 1768 n. 5 (1943).

[51] Commission established under the Claims Agreement of Feb. 12, 1871, 17 Stat. 839.

[52] [1895] 3 *Reclamaciones presentadas al Tribunal anglo-chileno,* 1894-1896, 689 (1896).

[53] Commission established under the Convention of Sep. 26, 1893, MARTENS, *Nouveau recueil général,* 2nd Series, vol. 22, 520. The Commission was to decide « ... all claims for which the Government of Chile may be held responsible... » (Art. 1) « ... according to the evidence tendered, and in accordance with the principles of international law ... » (Art. 5).

[54] 3 *Reclamaciones* ..., at 697.

responsibility upon the « belligerents ». Secondly, the Commission made the following statement which seems to apply to all claims of secured foreign creditors, whether they arise out of a civil war or not :

> « ... the owner of the building, not being a British subject and not being, therefore, personally entitled to present a claim to this Tribunal, cannot do so covertly, through the intermediary of his creditor, the Banco de Tarapacá i de Londres » [55].

The next case to be considered, the claim of the *Debenture Holders of the San Marcos and Pinos Company* (Great Britain v. Mexico) [56], is probably the best known instance involving indirect injuries caused to secured foreign creditors. A claim was brought before the British-Mexican Claims Commission established under the 1926 and 1930 Conventions [57] on behalf of secured [58] British bondholders of a British company. The latter was a creditor of a Mexican citizen, its claim being secured by a lien on cattle belonging to that citizen. The cattle were stolen by revolutionary forces. It should be added that at the time of the claim, the company was in receivership at the request of the bondholders [59]. The Commission dismissed the claim of the latter, stating :

> « Even assuming, then, that the cattle whose value is claimed had been stolen, the loss would have been sustained by ... [their owner]... but not by the debenture holders, who are only free to take action against the company, and the latter, in turn, against... [the owner], in order to collect their loan by having the mortgaged property put up for sale at auction, should this be necessary, as no proof has ever been shown of insolvency on the part of the principal debtor » [60].

Judging from the opinions of writers cited in the award [61], it may be presumed that the Commission would also have dismissed a claim presented on behalf of the company, even though the latter appears to have been in the process of dissolution.

The *Compania Agricola, Industrial, Colonizadora, Limitada, del Tlahualilo* [62], a corporation organised under Mexican law, held a concession from the

[55] *Ibid.*, at 697-698 (our translation).

[56] [1931] *Further Decisions and Opinions of the Commissioners* 135 (1933). The case is (inadequately) summed up in 5 *U.N.R.I.A.A.* 191.

[57] Convention of Nov. 19, 1926, 85 *L.N.T.S.* 51, extended and amended by the Supplementary Convention of Dec. 5, 1930, 119 *L.N.T.S.* 216. Both treaties are reprinted by FELLER, *op. cit. supra,* note 17, at 467 and 476, respectively, and contain an equity provision (Art. 2).

[58] *Cf. Further Decisions...,* at 138, where the Commission speaks of the claim of « holders of mortgage bonds of the company ».

[59] *Ibid.*, at 135.

[60] *Ibid.*, at 138.

[61] The Commissioners quote from BORCHARD, *op. cit. supra,* note 22, 645-646, and from RALSTON, *The Law and Procedure of International Tribunals* 158 (rev. ed., 1926).

[62] U.S. For. Rel. 1913, 993-1010; 5 *British Digest of International Law* (*B.D.I.L.*) 561-565 (1965).

Mexican Government to build an irrigation canal and to use its waters. The Mexican Cotton Estates of Tlahualilo, Ltd., a legal entity organised under British law, owned shares and bonds issued by the Mexican corporation [63], whilst other bonds of the Mexican company were held by United States nationals. These British and American owned bonds were secured by a lien upon the property and the franchises held by the Mexican corporation. Subsequently, the Mexican Government cancelled part of the concession, and Great Britain as well as the United States interceded on behalf of the British and American stock- and bondholders of the Mexican company. In respect to bondholders' interests, the Mexican Government expressed the view that

> « ... the only legitimate interest possessed by the holders of the mortgage bonds is that their loans be well guaranteed, and the only action open to the said bondholders is, not by proceeding against the Mexican Government, but against the Mexican Tlahualilo Company » [64].

The dispute was finally settled by a direct agreement between the Mexican corporation and the Mexican Government. The question which is of interest to us — the status of secured foreign creditors under international law — was thus left open.

The last statement also applies to the claims of *Ina M. Hofmann and Dulcie H. Steinhardt* [65], which came before the American-Turkish Claims Commission [66]. The two ladies in question had alledgedly inherited bonds issued by the Anatolian Railways, a Turkish « semi-public » corporation, whose capital stock was believed to be owned by the Turkish State. The bonds were secured by a lien on certain revenues of the railways and of the Turkish State. During the First World War, the Government took over the railways and withheld payment of revenues to the company, which was thus unable to pay its bondholders. The facts of this case are strikingly similar to those of the *Dickson Car Wheel Company* case, except for the circumstance that in the present instance, the claimants were secured debenture holders instead of ordinary creditors. Viewing the problem as one of causation, the Commission reached the conclusion that, contractual rights being property [67], an interference with such rights might give rise to a valid international claim. The lien securing the bonds, however, was not discussed and the case dismissed for lack of evidence. Unfortunately, the Commission also failed to point out under *what* circumstances indirect interference with foreign creditors' rights amounts to an international wrong.

[63] U.S. For. Rel. 1913, 1005; 5 *B.D.I.L.* 561.

[64] U.S. For. Rel. 1913, 1002.

[65] [1934 ?] NIELSEN, *The American-Turkish Claims Settlement..., Opinions and Report* 286-293 (1937).

[66] The Commission's findings were to lead to the conclusion of a lump sum agreement between the two countries. See NIELSEN, *op. cit*, at 7, 14, 45-48.

[67] *Ibid.*, at 289.

The next two cases to be examined do not directly deal with claims of mortgagees, but contain *obiter dicta* on that point. In the case of the *Société civile des porteurs d'obligations du Crédit Foncier Mexicain,* already considered [68], the French-Mexican Claims Commission expressed the view that the bank, a secured creditor, could only proceed against its debtor and had no claim against the Mexican Government. Since Feller omits to indicate if the bank was a foreign or a Mexican national, however, the Commission's *dictum* could have been based either on the bank's Mexican nationality or on the assumption that mortgagees have no valid claim under international law. This case is, therefore, inconclusive, although it is cited by Feller in support of his negative attitude towards the rights of mortgagees.

In the arbitration concerning the *Forests of Central Rhodopia,* which has also been discussed earlier, the situation was clearer, for the validity of claims presented on behalf of secured foreign creditors was expressly affirmed in an *obiter dictum* which has been quoted above [69]. Unfortunately, the Arbitrator did not elaborate on the subject.

Claims on behalf of secured creditors are allowed by approximately half of the awards hitherto analysed, while the other half reject them. Now, there remain three cases to be discussed. The first of them is very well known, but its significance is uncertain. The two other cases are favourable to secured creditors' claims, but were decided *ex aequo et bono.*

The meaning of the observations made by the *ad hoc* Arbitral Tribunal in the celebrated *Delagoa Bay Railway* arbitration (Great Britain/United States v. Portugal) [70] is uncertain.

The facts ware as follows : in 1883, Colonel McMurdo, an American citizen, obtained a concession from the Portuguese Government enabling him to build and operate a railway from Lourenço Marques to the Transvaal border. The concessionnaire was to found a company under the laws of Portugal. Pursuant thereto, the Lourenço Marques and Transvaal Railway Company came into being. McMurdo transferred the concession to the Portuguese company and in exchange acquired almost all its shares. He further agreed to build the railway in exchange for bonds issued by the company, the security of which was guaranteed by the concession. Being unable to float these bonds, McMurdo turned to British businessmen who set up the Delagoa Bay and East African

[68] *Cf. supra,* at p. 408.

[69] See above, at p. 409.

[70] [1899] *ad hoc* Arbitral Tribunal set up under a Protocol of June 13, 1891. The facts and documents relating to this dispute are te be found in 2 MOORE, *op. cit. supra,* note 3, at 1865-1899; U.S. For. Rel. 1902, 848-852; LA FONTAINE, *Pasicrisie internationale* 397-410 (1902, containing the Protocol and the full text of the award). For the text of the Protocol in English, see 2 MOORE, *op. cit.,* at 1874-1875. *Cf.* also U.S. For. Rel. 1900, 903-904 (incomplete text of the award in English).

Railway Company, an English corporation. The latter obtained the stock and debentures of the Portuguese company and, in turn, issued bonds. McMurdo held the total stock of the English corporation and apparently acquired some of its bonds, too. Two years later, the Portuguese Government cancelled the concession and seized the railway. According to the ensuing diplomatic correspondence between London, Washington and Lisbon [71], Great Britain and the United States decided to intervene jointly. Portugal objected to any foreign interference, claiming that the Portuguese company alone had been prejudiced Later, an agreement submitting the claims to three arbitrators was concluded by the interested Governments [72]. The agreement precluded any discussion on questions of standing and of the wrongful character of the Portuguese interference; the Tribunal's only mission was to assess the damages *equitably* due to the claimants [73].

Finally, the arbitrators awarded damages jointly to Great Britain and the United States. A part of that amount, proportionate to the interests of McMurdo's estate as a stock- and bondholder of the British company, was to be paid to the United States, the remainder to the British Government. However, the Tribunal carefully pointed out that in strict law, neither Great Britain nor the United States had a valid claim against Portugal [74].

It is not clear whether in making this sweeping statement, the arbitrators were fully aware of the fact that the bonds issued by the Portuguese company and owned by the British corporation were secured by a lien on the concession. The legal nature of the alleged lien on the concession under Portuguese law does not seem to have been explored by the Tribunal. We do not know, therefore, if the *dictum* of the arbitrators really applies to secured debts, or if it is intended to cover unsecured debts alone. If the latter were to be true, the *Delagoa Bay Railway* arbitration could have been analysed together with the cases relating to unsecured creditors.

The first of the two awards rendered *ex aequo et bono* relates to the *Heny* case (United States v. Venezuela) [75], decided by the Mixed Claims Commission at 1903 [76]. Heny, a naturalised American citizen, had married an heiress of the (Venezuelan) Benitz estate. The management of a property owned by the Benitz heirs and located in Venezuela was then entrusted to him. Heny invested some of his own money in the estate and thereby acquired contractual rights against the heirs. His claim was secured through a document which purported to transfer to him

[71] U.S. For. Rel. 1902, 850-852; 2 MOORE, *op. cit. supra,* note 3, at 1866-1873.

[72] See *supra,* note 70.

[73] Art. I and III of the Protocol.

[74] LA FONTAINE, *op. cit. supra,* note 70, at 409.

[75] [1903], 9 *U.N.R.I.A.A.* 125.

[76] Commission created under the 1903 Agreement, *vide supra,* note 12.

« ... all of the rights and actions that correspond to ... [the heirs] or may correspond to ... [them] in future in said property... » [77].

Later on, revolutionary troops damaged the property and the United States brought Heny's claim before the Commission.

Bainbridge, the American Commissioner, was inclined to allow the claim to the extent of the share of Heny's wife in the estate — she had in the meanwhile acquired American citizenship — and of Heny's own investment, thus qualifying the latter's claim as a right *in rem*. Paúl, the Venezuelan Commissioner, attempted to refute these findings in a most interesting opinion. According to him, Heny had no right *in rem*. His contract with the Benitz heirs had never been registered and thus could not, under Venezuelan law, create rights *in rem*. Secondly, the heirs sold the estate free of encumbrance after it had been damaged. Having authorised his wife to consent to a sale free of encumbrance, Heny was now estopped from relying on such an encumbrance. Paúl's third argument, the most important to us, runs as follows :

« To admit as competent for recognition as a claimant before the Commission, anyone who may advance money for the cultivation and development of estates or property belonging to Venezuelan citizens, would be equivalent to bringing before this Commission all foreigners who make a business of advancing money to the owners of real property either by private contracts or by virtue of contracts in which a mortgage on the property so benefited in this country is given... » [78].

Barge, the Umpire, admitted the argument based on estoppel, but rejected the first and the last contention of the Venezuelan Commissioner under a provision of the Claims Convention, which empowered the Commission to decide

« ... upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation » [79].

Therefore, the question as to whether Commissioner Paúl's views on indirect injuries to secured foreign creditors — see his third argument, quoted above — would have prevailed under strict law remains open.

The last case in point, involving a secured creditor and decided *ex aequo et bono,* is that of *Andreas Ardito* (Italy v. Mexico) [80]. According to Feller's Report, Ardito, an Italian national, owned a pawnshop in Mexico, from which pawned objects were taken by bandits. Italy interceded on behalf of its subject. Although the claim was allowed *ex aequo et bono* because Ardito had lost his security, the Italian-Mexican Claims Commission was careful to point out

[77] 9 *U.N.R.I.A.A.*, at 127.

[78] *Ibid.*, at 132-133.

[79] Art. I of the Protocol.

[80] [1932 ?] Claims Commission created under the Convention of Jan. 13, 1927, reprinted by FELLER, *op. cit. supra,* note 17, at 502. The case is reported *ibid.*, at 125, Art. II of the Convention permitted awards based on equity.

that « in 'strict law' the claimant still retained his rights against the pledgor... » [81]. In Feller's view, this award constitutes a departure from the (negative) general principles established in mortgage claims, due perhaps to the fact that the claimant had possessed the objects taken [82].

b) *Practice of United States domestic agencies.*

Three domestic agencies of the United States created with a view to adjudicating claims of American citizens against foreign countries have had to deal with claims of secured American creditors.

The first discussion of this topic took place before the Spanish Treaty Claims Commission instituted in pursuance of the Treaty of Peace between Spain and the United States [83]. The Commission was faced with numerous claims of American citizens who held securities on property belonging to Spanish nationals.

The United States Government argued that the interests of these claimants were too indirect to be taken into account [84]. Borchard reports that, in fact, all claims of creditors were rejected by the Commission [85].

The American Mexican Claims Commission, created to implement the lump sum Agreement concluded between Mexico and the United States on November 19, 1941 [86], took a different view and allowed claims of secured creditors [87].

In a general manner, the United States Foreign Claims Settlement Commis-

[81] *Op. cit.*, at 125.

[82] *Ibid.*, at 126. A somewhat similar factual situation characterizes the case of the « *Texan Star* », decided by the Court of Commissioners of the Alabama claims organised under the Act of Congress of June 23, 1874, 18 Stat. 245, and reported by 3 MOORE, *op. cit. supra*, note 3, at 2360. During the Civil War, the « Alabama » unlawfully sank the « Texan Star ». The latter, an American-owned vessel, had been fictiously sold to a British firm, in order to avoid sinking of the ship by Confederate forces. The effective American owners, however, retained possession of the vessel and, moreover, held mortgages on it. In an *obiter dictum*, the Court stated that it would uphold claims of American mortgagees who were also possessors. In view of the terms used in the Act of Congress defining the Court's jurisdiction, however, the relevance of this case on the international level is questionable (*cf.* secs. 11 and 12 of the above-mentioned Act of Congress).

[83] Treaty of Dec. 10, 30 Stat. 1755. On the basis of Art. VII of the Treaty, the Commission was brought to existence by Public Law No. 115, of March 2, 1901, 31 Stat. 877. The latter provided (sec. 1) for the application of public international law as well as of the principles of equity.

[84] Special Report of William E. FULLER ..., 31-32 (1907).

[85] *Op. cit. supra*, note 2, at 342.

[86] 56 Stat. 1347.

[87] See in particular : Claim of the *Laredo Electric and Railway Company*, American Mexican Claims Commission, Report to the Secretary of State, 247 (1948); *McIntosh* claim, *ibid.*, at 364; claim of the *General Finance Corporation*, *ibid.*, at 546. In the case of the *Corralitos Company*, *ibid.*, at 201, the facts are not clear.

sion has applied the same principle [88]. The case of the *European Mortgage Series B Corporation,* where it departed from this rule, constitutes an isolated case [89].

INDIRECT INJURIES TO FOREIGN CREDITORS : OPINIONS OF WRITERS

Most writers on international law negate the relevance of indirect interests of foreign creditors on the international level, whether these interests be secured or not [90]. One authority asserts international responsibility for indirect interferences even in respect of certain unsecured claims, namely, those of bondholders [91]. Another author seems to assert international liability for indirect interference with unsecured as well as with secured debts, subject only to the proof of foreseeability, *i.e.* of a causal relationship between the alledgedly wrongful behaviour of the respondant State and the loss sustained by the foreign creditor [92]. It should be noted, however, that these views are the result of abstract reasoning rather than of a careful appraisal of international practice.

CONCLUSION

The problems to be discussed under this heading are numerous. The first issue which should be debated relates to the following question :

Is the problem dealt with in this paper a matter of procedure, relating to the right of the cerditor's national State to extend diplomatic protection to its subject, or is it a question of substantive law, namely, whether the economic loss suffered by a foreign creditor through the treatment inflicted on his debtor

[88] FCSC, Report 1949-1955, at 52, 58, 92; claim of the *Guaranty Trust Company of New York,* FCSC, 10th Semiann. Rep. 224 (1959); *Schatten* claim, FCSC, 14th Semiann. Rep. 122 (1961); *Schuster claim, ibid.,* at 138; see also Note, 16 *Syracuse L. Rev.* 809-844, at 841 (see, however, *ibid.,* at 842-843).

[89] *Cf. supra,* at . In the same sense : *Brower* claim, FCSC, 9th Semiann. Rep. 11 (1958).

[90] FELLER, *op. cit. supra,* note 17, at 122-124; FRIEDMAN, *op. cit. supra,* note 17, at 167-169.

[90] KISS, « La protection diplomatique des actionnaires dans la jurisprudence et la pratique internationale », 18 *Travaux et recherches de l'Institut de droit comparé de l'Université de Paris : La personnalité morale et ses limites,* 179, at 199 (1960); NIELSEN, *International Law Applied to Reclamations* 60-61 (1933); RALSTON, *op. cit. supra,* note 61, at 158-159 (however, this author mentions the *Heny* claim and the case of the « *Circassian* » as exceptions). See, in addition, 3 DAHM, *Völkerrecht* 247 (1961), and BAGGE, « Intervention on the Ground of Damages Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders », 34 *B.Y.B.I.L.* 162-175, at 169 (1958, commenting upon the *Tlahualilo* case).

[91] D. BINDSCHEDLER, *op. cit., supra* note 2, at 186-187.

[92] DE BEUS, *op. cit. supra,* note 5, at 230-266.

entails international responsibility towards the creditor's national State ? If the issue is a procedural one, objections to interventions on behalf of mere creditors must be raised on the threshold of arbitral or judicial proceedings. If the matter is a substantive one, on the contrary, no preliminary objection is possible; the respondent State may then argue — on the merits — that no international responsibility results from indirect injuries to foreign creditors.

In our own view, the matter is a substantive one, for the existence of an international wrong is at stake. In support of our conclusion, the following distinction should be made : When an individual claim is brought before an international tribunal, the latter will examine at the outset, if the person on whose behalf the claim is made possesses the claimant State's nationality. If an affirmative answer is given to this first question, a second problem arises : Has the behaviour of the respondent State towards the foreign owner of the claim violated the standards of international law for the treatment of aliens, thus entailing international responsibility towards the claimant State ? According to international practice, this second question is essentially — if not exclusively — substantive.

Turning now to creditors' claims, it is no doubt true that — as for any any other claim based on diplomatic protection — the problem of the creditor's nationality must be investigated at the threshold of any arbitral procedure. The decision reached on this point does not, however, resolve the question as to whether the creditor's claim is intrinsically valid or, to frame it differently, as to whether a State curtailing the interests of a foreign creditor through interference with the rights of his debtor incurs international responsibility. It is submitted, therefore, that the specific issue with which we are dealing is a substantive problem pertaining to the Law of State Responsibility. Our submission is corroborated by Undén's arbitral award in the case of the *Forests of Central Rhodopia* (Greece v. Bulgaria) [93].

The recent judgment of the International Court of Justice in the *Case concerning the Barcelona Traction, Light & Power Company, Ltd.* (Belgium v. Spain) [94] points in the same direction as far as the right of intervention on behalf of shareholders is concerned [95]. It should be noted, however, that international practice is far from being clear on this point; in the case of the

[93] [1933], 3 *U.N.R.I.A.A.* 1405, at 1425-1426; see also WITENBERG, « La recevabilité des réclamations devant les juridictions internationales », 41 *R.C.A.D.I.* 5-134, at 36 (1932, III); DAHM, *op. cit. supra,* note 90, at 247; AL-SHAWI, *op. cit. supra,* note 5, at 59.

[94] [1964] I.C.J. Rep. 6 (Preliminary Objections).

[95] *Ibid.,* at 44-46; diss. op. MORELLI, *ibid.,* at 110-114; sep. op. BUSTAMANTE, *ibid.,* at 82-84. *Contra* : Declaration SPIROPOULOS, *ibid.,* at 48; sep. op. WELLINGTON KOO, *ibid.,* at 53-64; diss. op. ARMAND-UGON, *ibid.,* at 163-166.

Banco de Londres y Tarapacá, for instance, the problem was considered to be a procedural one [96].

The second question which must be dealt with relates to an assertion made by some writers who contend that the problem discussed in this article is one of causation and has nothing to do with the question as to whether the behaviour of the defendant State was wrongful or not [97]. To understand this argument, it must be remembered that a State incurs international responsibility vis-à-vis another State under three conditions :

a) The State in question must be guilty of an *international wrong.* In the case of a claim presented on behalf of a foreign national, the State must have contravened the standards of customary or conventional international law regarding the treatment of aliens.

b) The plaintiff State must have sustained an *ascertainable injury.*

c) The ascertainable injury has to be a *consequence* of the wrongful behaviour referred to under a).

It is the contention of the writers mentioned above that indirect injuries to foreign creditors *do* constitue international wrongs towards the creditors' national States. However, the real question is — so runs their argument —, whether the loss sustained by the foreign creditor through the injury inflicted upon his debtor can, as a matter of law, be considered a consequence of the respondent State's unlawful behaviour. Accordingly, the existence or non-existence of a causal link between the defendant State's behaviour towards the debtor and the loss rebounding upon his foreign creditor would depend on whether

> « ... *the indirect damage of the third party could reasonably and normally* have been foreseen » [98].

The shortcomings of this theory are obvious. The problem of causation only arises once we have determined whether the defendant State's behaviour towards the creditor has been unlawful or not. Thus, one must first inquire whether, and under what conditions, indirect interference with the rights of foreign creditors amounts to wrongful behaviour under international law. Only in

[96] *Cf.* 3 *Reclamaciones presentadas al Tribunal anglo-chileno,* 1894-1896, *op. cit.,* 689, at 697-698.

[97] DE BEUS, *op. cit. supra,* note 5, 230-266; D. BINDSCHEDLER ,*op. cit. supra,* note 2, at 185; and probably 1 WENGLER, *Völkerrecht* 599 (1964), who asserts that no international practice exists on the subject-matter; *cf.* also the case of the *Banco de Londres y Tarapacá,* where the Anglo-Chilean Commission used the expression « indirect damage » (*supra*). *Contra* : R. BINDSCHEDLER, « La protection de la propriété privée en droit international public », 90 *R.C.A.D.I.* 179-306, at 217 (1956, II), and Commissioner FERNANDEZ MCGREGOR in the *Dickson Car Wheel Company* case analysed above.

[98] DE BEUS, *op. cit. supra,* note 5, at 258.

the event of an affirmative answer to this first question can we ask if the injury suffered by the claimant State's national *results* from that behaviour, and, subsidiarily, if the damage so caused is ascertainable. Apparently, our approach would accord with the rule enunciated by the American Mexican General Claims Commission [99] which, in one of the leading cases on indirect interference with foreign creditors' rights, the *Dickson Car Wheel Company* claim [100], expressed the view that

> « The problem in this case would consist in deciding whether damage caused directly to a company of Mexican nationality and which would recoil upon a company of North American nationality, remotely causing it an injury, *constitutes an act violative of the Law of Nations* » [101].

The method suggested above is also in harmony with the technique used in municipal law. This is particularly evident in some civil law systems, where special provisions make interference with contracts by third parties unlawful. No such provisions would be needed if the matter were one of causation and could be disposed of by simple reference to the principles governing causation [102].

Having elucidated these problems, an examination can be undertaken to see whether interference with the rights of foreign creditors constitutes a wrongful behaviour under general international law.

So far as *unsecured* claims are concerned, international practice is, on the whole, reasonably clear. When applying rules of strict law, international tribunals tend to discard claims presented on behalf of unsecured creditors, explicitly or at least implicitly [103]. The fact that the practice of the Foreign Claims Settlement Commission, a United States domestic agency, is somewhat inconsistent [104], does not invalidate our conclusion. The negative attitude generally

[99] Commission created under the General Claims Convention of Sep. 8, 1923 (extended twice), 43 Stat. 1730, 4 *U.N.R.I.A.A.* 11.

[100] *Supra*, 4 *U.N.R.I.A.A.* 669.

[101] *Ibid.*, at 678 (emphasis added). But see the *Hofmann/Steinhardt* case (*supra*).

[102] Not even in *common* law systems are questions of interference with contracts treated as a problem of causation. In common law, only *intentional* interference is wrongful. The existence of a causal link between the wrong and the injury, on the other hand, does not depend upon intention, but on the (objective) foreseeability of the result. See FLEMING, *op. cit. supra*, note 46, at 662.

[103] *Alsop & Co., supra;* case of *Dr. Bance, ibid.; Dickson Car Wheel Company, supra; Crédit Foncier Mexicain, supra; Ziat, Ben Kiran, supra; Forests of Central Rhodopia, supra; Turini* claim, *supra;* argument of the Venezuelan Commissioner in the *Heny* case, *supra.* To these instances, we must probably add, *a fortiori*, the cases negating international responsibility for indirect interference with secured claims, enumerated *infra*, note 105. The Franco-British intercession on behalf of the bondholders of the *Port of Pará Company* (*supra*) constitutes an isolated instance of intervention for unsecured creditors and hardly invalidates the principle expressed in the cases cited above.

[104] See above.

taken by international tribunals in respect to unsecured claims is sound, because it generally, though not always, corresponds to the solutions adopted by municipal law on interference with contract by third parties.

Unfortunately, the position of *secured* foreign creditors in international law is much less certain. Some international tribunals have rejected or would reject claims presented on their behalf [105]; others have or would have allowed them [106].

In view of this uncertain situation, can a distinction be made between the different cases on the basis of the factual circumstances which surround each of them ? In the first place, one might distinguish these different cases by taking into account the nationality of the directly injured debtor, *i.e.* by stating that secured creditors' claims can succeed only if their debtor is a national of the respondent State [107], or, conversely, by asserting that creditors' claims shall be allowed only if both debtor and creditor are foreign nationals. Neither theory would find much support in international practice [108]. Secondly, one might suggest that the secured foreign creditors will succeed only if the mortgaged property has been conveyed to the creditor. Such a proposal is not substantiated by international practice [109]. It could be asserted, thirdly, that the claims of secured — or, indeed, unsecured — foreign bondholders of corporations should at any rate be allowed, since their investment in the company is of a permanent character and can, therefore, be assimilated to the interests of foreign shareholders [110]. This proposition draws but meager support from international practice [111]. Generally speaking, the conditions, under which

[105] *Bain* case, *supra; M.C. Rodriguez v. Spain, ibid.;* case of the *Banco de Londres y Tarapacá, Ltd., supra;* claim of the *Debenture Holders of the San Marcos and Pinos Company, supra; Delagoa Bay Railway arbitration* (but see our observations concerning this case), *supra; Mexican argument in the Tlahualilo* controversy, *supra.* As for the case of the *Crédit Foncier Mexicain,* see our observations, *supra.*

[106] The « *Circassian* », *supra; Heny case, supra* (based on equitable grounds); case concerning the *Forests of Central Rhodopia, supra;* claim of *Andreas Ardito, supra.* The implications of the *Hofmann/Steinhardt* case are not quite clear (*cf. supra*). See, in addition, the Anglo-American intervention for the *Tlahualilo* bondholders, *supra,* and the British note of July 5, 1928 in the *Romano-Americana* case, 5 HACKWORTH, *Digest of International Law* 844 (1943).

[107] *Cf.* D. BINDSCHEDLER, *op. cit. supra,* note 2, at 186.

[108] In the case of the « *Circassian* » (*supra*), where the creditors' claims were allowed, both debtors and creditors were foreign nationals, whereas in the *Tlahualilo case* (*supra*), for instance, Great Britain and the United States intervened despite the debtor's being a subject of the respondent State.

[109] The only two instances supporting this theory are the case of the « *Circassian* » and the *Ardito claim* (*supra*), the latter having, moreover, been allowed *ex aequo et bono.*

[110] D. BINDSCHEDLER, *op. cit. supra,* note 2, at 186-187; see also AL-SHAWI, *op. cit. supra,* note 5, at 59.

[111] The only award which could be cited in support of this proposition relates to the claim of the *Deutsche Amerikanische Petroleum Gesellschaft* (United States v. Reparation Commission), [1926] *ad hoc* Arbitral Tribunal, 2 *U.N.R.I.A.A.* 777, at 790. Claims of

shareholders' and bondholders' claims have been allowed, differ. Whereas intervention on behalf of foreign *shareholders* appears to be permissible, at least if the company concerned is a national of the State committing the wrong [112], the same cannot always been said of foreign *bondholders* [113].

It follows from the foregoing considerations that the cases relating to secured foreign creditors, which have been studied here, cannot be distinguished on the basis of factual elements. Therefore, the international practice available on this point remains contradictory and thus does not disclose the existence of a clear-cut rule of positive international law with respect to secured foreign creditors. It is suggested, however, that a positive attitude towards these claims seems to be more consistent not only with the more recent trends in this matter (*i.e.* the practice of the American Mexican Claims Commission and the United States Foreign Claims Settlement Commission), but also with the general principles governing international responsibility and the treatment of aliens. No one can deny that lienholders are priviledged creditors, since their personal claims are guaranteed by collateral securities on the debtor's property. Thus, secured creditors enjoy a limited right *in rem* — enforceable against everybody — over the debtor's pledged or mortgaged property. It has been argued, however, that the creditors' collateral rights *in rem* materialize only if the contractual debt remains unpaid. Therefore — so runs the argument —, creditors cannot recover for the loss of their collateral security as long as payment of the contractual debt has not been refused and as long as personal action against the debtor remains open [114]. Whatever be the merits of such a

unsecured — and even secured — bondholders have been or would have been disallowed in the following cases : *Crédit Foncier Mexicain* (*supra*); *Ziat, Ben Kiran* (*supra*); *Debenture Holders of the San Marcos and Pinos Company* (*supra*).

[112] Ch. De Visscher, « De la protection diplomatique des actionnaires d'une société contre l'Etat sous la législation duquel cette société s'est constituée », 15 *R.D.I.L.C.* 624-651 (1934); Jones, « Claims on Behalf of Nationals who are Shareholders in Foreign Companies », 26 *B.Y.B.I.L.* 225-258 (1949).

It is sometimes asserted that intervention on behalf of foreign shareholders in a domestic company is restricted to cases where the company is in the process of dissolution or practically defunct : see, for instance, the British attitude in the controversy relating to the *Romano-Americana*, 5 Hackworth, *op. cit. supra*, note 106, at 842-844 (1943). It is uncertain whether a State may present claims on behalf of nationals who are shareholders in a company of a second State, which has been wronged by a third State. In favour of such interventions : D. Bindschedler, *op. cit. supra*, note 2, at 180-181; Art. 20 (2) (c) of the Harvard Draft Convention cited above, note 7. *Contra* : Ch. De Visscher, *op. cit.*, at 651; Jones, *op. cit.*, at 257; Beckett, « Diplomatic Claims in Respect of Injuries to Companies », 17 *Transactions of the Grotius Society* 175-194, at 188-194 (1931).

[113] See, in particular, the practice of the Foreign Claims Settlement Commission, *supra*. The *dictum* of Judge Huber in the *Ziat, Ben Kiran case* (*supra*) would also seem to apply to bondholders.

[114] Friedmann, *op. cit. supra*, note 7, 168-169; Mexican Memorandum in the *Tlahualilo* case, *supra*. This argument would not seem to apply to limited rights *in rem* other than liens, such as possessory rights and servitudes, for the latter are not merely intended to secure contractual debts.

contention, it should be noted that domestic law characterizes mortgages and other liens as rights *in rem* which, in principle, can be interfered with by no one, not even by governmental authorities. Thus, it seems that under international law, secured foreign creditors enjoy a vested right in the collateral security guaranteeing their contractual claim. It would follow that measures affecting that right constitute an international wrong, unless compensation is paid.

If this reasoning is correct, another problem immediately arises. Is the injury sustained by the foreign creditor *ascertainable,* and, if so, how can the extent of the damage be measured ? On the one hand, the injury suffered does not, in most instances, equal the entire amount of the creditor's contractual claim, for usually, personal action against the creditor remains open [115]. On the other hand, it stands to reason that the creditor's rights are impaired in *some* way by the loss of the collateral security. Those international tribunals which have allowed claims of secured foreign creditors, have cut the Gordian knot by acting as if the creditor's entire contractual claim were lost.

Although this solution is unsatisfactory from a theoretical standpoint, we are inclined to accept it, because it offers the only workable solution of a difficult practical problem.

[115] This is not so, however, if a corporate debtor is nationalised and if the nationalising State refuses to assume the liabilities of the corporation .In that case, the creditor has no one to proceed against; therefore, he has lost the entire amount of his contractual claim.