

1999 Niagara International Moot Court Competition

**IN THE INTERNATIONAL COURT OF JUSTICE
CASE CONCERNING GROWTH HORMONES**

BETWEEN:

CANADA

Applicant

AND

UNITED STATES OF AMERICA

Respondent

BENCH BRIEF

This brief is intended solely for the use of the judges in the 1999 Niagara International Law Moot Court Competition. It should not be discussed with or read by any competitor.

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1. Introduction

1.1 Purpose of the Bench Brief

This bench brief is intended to provide a rapid means for judges to review the issues, law and arguments the applicants may present to the Court. For judges whose expertise lies outside international law, the brief should provide background sufficient to allow active questioning of the participants and an evaluation of the participants' preparation and understanding of the law. For experts in the field, it is hoped that the brief will supply a helpful compendium of relevant sources of international law applicable to the problem.

The International Court of Justice (the ICJ) is required by its statute to decide cases "in accordance with international law".¹ For the benefit of those judges whose area of expertise lies outside international law, the brief begins with a primer of what constitutes international law. The remainder of the brief is devoted to a discussion of the substantive legal issues raised by the problem.

The brief is not intended to provide exhaustive or definitive answers to the issues raised by the problem. Neither is it intended to foreclose any line of argument or questioning. Litigants before the ICJ will undoubtedly raise legitimate issues and cite relevant authority not discussed in this brief.

1.2 Sources of International Law²

Article 38 of the Statute of the International Court of Justice sets out what is commonly referred to as the sources of international law. It states:

- 38(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognized by civilized nations;
 - (d) subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 59 provides that decisions of the ICJ have no binding force except between the parties.

The sources of law overlap to a considerable degree. For example, treaty provisions may codify customary law, or may be used as evidence that customary law exists. Although "teachings of

¹I.C.J. Statute, Art. 38(1).

²This section is adapted from previous Niagara bench briefs.

the most highly qualified publicists" and decisions of international tribunals are defined as subsidiary sources, they are frequently used as evidence of the existence of customary law.

The problem assumes that the U.S. has withdrawn from NAFTA. The problem therefore raises primarily issues of customary international law. Customary law results from a general and consistent practice that states follow from a sense of legal obligation. Both the existence and the content of the custom must be established. In order to prove that a custom exists, the litigant must show both state practice and *opinio juris*, or the shared sense of legal obligation. State practice means that states have acted consistently towards each other in accordance with the alleged custom. The proof of state practice should include the following:

- Generality: More than a simple majority of states, representing different economic, geographic, social and size categories, must engage in the practice;
- Consistency: States must adhere to the practice systematically and consistently, not on an ad hoc or sporadic basis (although perfect adherence to the alleged custom is not necessary); and
- Governmental Conduct: The practice must be reflected in governmental conduct that may take a variety of forms including official statements at international conferences, diplomatic exchanges, national court decisions, legislative measures or other actions taken by governments to deal with matters of international concern.

The second component of custom is *opinio juris*, or the community's acceptance of the state practice as law. This requires a showing that states have acted according to the alleged custom because they believe themselves legally obliged to do so. This subjective element is rarely established by evidence of a particular state's motivation, or of other states' explicit acceptance of its claims; rather *opinio juris* is usually proved simply by the fact of general acquiescence in the practice under consideration. In addition to laying down duties, there are also permissive rules under customary international law that permit a state to act in a certain way. In the case of permissive rules, *opinio juris* means a conviction felt by states that a certain form of conduct is permitted by international law.³

Litigants may refer to a broad range of materials as evidence of customary international law. In the present case, which focuses on exhaustion of local remedies, denial of justice and expropriation, evidence of custom cited to the Court may include:

- International judicial and arbitral decisions. The decisions of international tribunals, including the ICJ, have no binding precedential value. In practice, ICJ decisions are given great weight as evidence of customary rules.

³ P. Malanchuk, ed., *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997).

- Scholarly writings. Litigants may refer to treatises and articles by authors of standing; resolutions of scholarly bodies such as the International Law Association and draft texts and reports of the International Law Commission, the views of which are sometimes considered especially authoritative. The authority of scholarly writing as evidence of international law varies widely.
- Domestic legislation and judgments and opinions of national courts and tribunals. Domestic legislation and judicial opinion may be cited as evidence of state practice.
- Clauses that appear regularly in treaties. When treaties in a particular subject area regularly include certain obligations, such provisions may be used as evidence of a rule of customary law. This is not strong evidence of custom on its own as an express treaty provision may have been adopted because of the absence of a customary rule on the matter in question.
- Declarations and resolutions of intergovernmental organizations, including United Nations resolutions. Declarations and resolutions of intergovernmental organizations may be cited as evidence of customary law. Declarations and resolutions do not necessarily have a law creating effect and it is important to review voting patterns on the resolution and other sources of customary law in assessing the importance of a declaration or resolution.

Unlike treaties, which generally only bind the parties to the treaty, customary international law binds all nations, regardless whether those nations have specifically agreed to the custom. The limited exception is when a state has persistently objected to a practice while the custom is in the process of development. Historically, however, such exemptions have rarely been recognized.

2. Does the rule requiring the exhaustion of local remedies preclude Canada from advancing a claim?

2.1 Key Facts

1. The South Dakota Supreme Court, without giving reasons, set aside the jury verdict that was in favour of MacInnes.
2. After the South Dakota Supreme Court decision, the United States Supreme Court released a decision that affirmed a state's right to impose regulatory restrictions, including bans, where the purpose of the legislation is the protection of health and even where there is no definitive scientific evidence of health risks.
3. MacInnes was told by legal counsel that he could appeal to the United States Supreme Court but that, even if the United States Supreme Court agreed to hear the appeal, the appeal

would be very expensive and, given the decision referred to in paragraph 2, his chances of success were less than 10%. MacInnes was in a precarious financial situation and he did not proceed with further court action.

4. By the time the WTO decision on the South Dakota legislation was released, the time period for appealing to the United States Supreme Court had expired.

2.2 The Rule Requiring Exhaustion of Local Remedies⁴

2.2.1 Brief Summary

It is customary international law that a person must exhaust remedies in the courts of the defendant state before another state may bring an international claim against the defendant state on the person's behalf. The International Law Commission's Draft Articles on State Responsibility codify the exhaustion rule in Article 22 as follows:

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

The exhaustion rule is generally considered to be a procedural rule that governs when a state may make an international claim on a person's behalf. Several reasons have been offered for the exhaustion rule. It expresses respect for the sovereignty of states; it offers protection against the abusive exercise of international claims; it is a recognition that an alien must submit to the law of the state in which the alien resides; it prevents the premature exercise of international claims and allows states to rectify illegal acts within their own legal systems; and finally, it recognizes an equality of status among nationals and aliens.

The U.S. has the burden of proof to show that other local remedies were available to MacInnes. It is quite clear that MacInnes could have petitioned the United States Supreme Court for relief. As the U.S. will discharge this burden, Canada has the burden to show that the requirement to exhaust local remedies does not apply in the circumstances.⁵

⁴This section is substantially based on C.F. Amerasinghe, *Local Remedies in International Law* (Cambridge: Grotius Publications Limited, 1990), A.A. Cancado Trinade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge: Cambridge University Press, 1983) and Karl Doehring, "Exhaustion of Local Remedies", R. Bernhardt, ed., *Encyclopedia of Public International Law*, (1985) Volume 8, 136.

⁵Cancado Trinade, *supra* note 4 at 142.

2.2.2 Caselaw

A number of cases illustrate the application of the exhaustion rule. In the *Finnish Ships Arbitration*⁶, the shipowners had failed in a claim before the British Admiralty Transport Arbitration Board regarding the taking of their ships by the British government. The British government argued that the shipowners had a right of appeal to the Court of Appeal that had not been exercised. In response the Finnish Government argued that the findings of fact by the Arbitration Board were final and that, as the success of the claim depended on a different finding of fact, an appeal to a higher court or a reference to a different body was obviously futile. The arbitrator agreed and found that the rule requiring the exhaustion of local remedies did not apply in cases of obvious futility.

In *Interhandel*⁷ Switzerland made a claim against the U.S. for the seizure of a Swiss company's assets during the Second World War. The Swiss company, Interhandel, began court proceedings in the U.S. in 1948 for the restitution of its property. After years of procedural delays the claim was rejected by the appeal court in 1957. The United States Supreme Court then rejected Interhandel's petition for review by *certiorari*, although it granted the company leave to file another petition. At this point Switzerland brought the case before the ICJ. Meanwhile, the United States Supreme Court agreed to review the appeal court decision and subsequently reversed the appeal court decision and referred the case back to the lower courts. The proceedings in the U.S. continued at the same as Switzerland pursued the case before the ICJ.

In *Interhandel* the ICJ affirmed that the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law. The State where the violation occurred should have an opportunity to redress the violation by its own means before another state may resort to an international court. The Court held that the rule must be observed when domestic proceedings are pending. In dissent Judge Armand-Ugon noted that the principle of exhaustion of local remedies is not absolute and rigid; it has to be applied flexibly according to the case. He questioned whether, after nearly ten years of litigation and a further unknown period of litigation, local remedies were adequate and effective given the undue delay.

The rule was further considered in *Barcelona Traction*⁸. Belgium brought this case against Spain for damages allegedly sustained by Belgian shareholders in the Barcelona Traction company (a holding company incorporated in Canada). The main issue in the case was whether Belgium had standing to bring a claim on behalf of its nationals, the majority shareholders. The ICJ upheld Spain's objection that Belgium did not have standing to bring a claim and for this reason did not consider Spain's objection to Belgium's claim based on the exhaustion of local remedies. This issue was, however, considered by a number of judges in dissenting judgments and, in particular, by Judge Tanaka.

⁶*Finnish Ships Arbitration* [1934], 3 UNRIAA 1479.

⁷*Interhandel Case* (Switzerland v. United States of America), [1959] I.C.J. Rep. 6.

⁸*Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), [1970] I.C.J. Rep. 4.

Judge Tanaka stated that some cases constitute exceptions to the application of the exhaustion rule. The exhaustion rule does not require a clearly futile and pointless activity or a repetition of what has been done in vain. He states:

The guiding principle for resolving questions concerning exhaustion of local remedies should be a spirit of diplomatic protection according to which, in addition to a juristic, technical construction, practical considerations led by common sense should prevail. The decision as to whether legal measures offer any reasonable perspective of success or not, should be flexible in accordance with the spirit of diplomatic protection. Even if, for instance, institutionally an administrative or judicial remedy exists whereby an appeal may be made to higher authority, this remedy may be ignored without being detrimental to the right of diplomatic protection, if such an appeal would be ineffective from the point of view of common sense.

From what has been said, "exhaustion" can be seen to be a matter of degree. Minor omissions should not be imputed to the negligence of those concerned. It is sufficient that the main means of redress be taken into consideration. The rule of exhaustion does not demand from those concerned what is impossible or ineffective but only what is required by common sense...⁹

Judge Tanaka then examined the evidence that showed that during the 14 years from when the matter arose to the date of the application to the ICJ over 2,736 orders and over 500 judgments had been delivered relating to the matter. He found that, in the circumstances, the exhaustion rule had been satisfied.

2.3 Outline of Arguments

2.3.1 Canadian Arguments

1. Exhaustion of local remedies is not required where further action is unreasonable or futile. The extremely low chances of success of an appeal to the United States Supreme Court made an appeal unreasonable and futile in the circumstances.
2. The failure of the South Dakota Supreme Court to provide reasons for its decision amounted to a denial of justice and contributed to the futility of an appeal by depriving MacInnes of the opportunity to review the substantive basis for the court's decision to overturn the jury verdict.
3. As the U.S. caused MacInnes' precarious financial situation, thereby depriving MacInnes of the financial ability to appeal, the U.S. cannot require MacInnes to have exhausted local remedies. MacInnes' financial situation is a contributing factor in assessing whether MacInnes was required to exhaust local remedies.

⁹*Id.*, at 149.

2.3.2 U.S. Arguments

1. The rule requiring exhaustion of local remedies requires that there be a final decision of the court that is highest in the hierarchy of courts to which the injured alien can have resort. MacInnes failed to seek *certiorari* to have the case heard before the United States Supreme Court and therefore failed to exhaust local remedies.
2. The exhaustion of local remedies rule requires that MacInnes exhaust all effective local remedies. An appeal to the United States Supreme Court was an effective remedy. The applicable test for assessing whether a remedy is effective is whether or not it would be obviously futile. A low probability of success does not justify not exercising a local remedy. MacInnes was obliged to exhaust all available remedies even if he or his counsel predicted a low probability of success.
3. Lack of financial resources is not a recognized justification for not exhausting local remedies.

2.4 Discussion of Arguments

Canada will argue for a flexible standard in the assessment of what local remedies must be exhausted by arguing that the exhaustion rule only requires what is reasonable in the circumstances, or in Judge Tanaka's words, what is required by common sense. The decision by the United States Supreme Court to uphold a similar type of ban in California was a strong adverse precedent to MacInnes' claim and made it unreasonable to attempt an appeal. Where the resort to the courts will result in the repetition of a uniform line of decisions adverse to the alien, the remedy is obviously futile and the alien is not required to exhaust local remedies.¹⁰

The U.S. will respond that the exhaustion rule generally requires that there be a final decision of a court that is the highest in the hierarchy of courts to which the alien can have resort. A claimant must resort to a remedy if it can possibly achieve the object desired by the claimant. The decision by the United States Supreme Court was not necessarily an adverse precedent and can be distinguished. Even if the precedent was adverse, one contrary precedent does not relieve the alien from the exhaustion rule. In *Local Remedies in International Law*, Amerasinghe suggests that the test for determining whether a local remedy must be used is obvious futility or manifest ineffectiveness, not simply the absence of a reasonable prospect of success or the improbability of success. The U.S. may rely on further authority that the opinion of counsel as to the likelihood of success is not determinative in assessing whether a remedy would be effective or not.

Canada may argue that the South Dakota Supreme Court's failure to give reasons was a denial of justice that materially affected its ability to challenge the Court's decision. In *Barcelona Traction* Judge Tanaka suggests that if there is a denial of justice that makes fulfillment of the

¹⁰Amerasinghe, *supra* note 4 at 193 and 196.

exhaustion rule impossible, then there is no requirement to exhaust local remedies. The U.S. may respond that there was no denial of justice. In the alternative, even if there was a denial of justice, this did not make an appeal to the United States Supreme Court impossible.

Canada may argue that as the U.S caused severe financial losses to MacInnes, it cannot require MacInnes to use court processes he could not afford because of the U.S. action. The U.S. will respond that the authorities have held that financial ability does not constitute a valid reason for not pursuing local remedies.¹¹ Further, it would argue that the U.S. is not internationally responsible for any losses suffered by MacInnes. Canada may distinguish these authorities as they involve a failure to exhaust local remedies because of a pre-existing financial condition.

Canada may argue that the United States Supreme Court decision, the failure to give reasons and the inability to proceed with the appeal because of lack of financial resources cumulatively made it unreasonable for MacInnes to appeal and demonstrate a significant hardship. The U.S. may respond that there is no explicit authority to suggest that the exhaustion rule requires a balancing of interests between the interests of the state and the alien.

Amerasinghe suggests that the exhaustion rule is flexible and is to be applied in accordance with the circumstances of each case. While there is room for expansion of the categories of limitation of the rule, in each case a careful weighing of the conflicting interests must take place. He suggests that an exception should only be allowed where the interests of the alien claimant clearly outweigh those of the respondent state.

3. Is the South Dakota Supreme Court's decision to overturn the jury verdict a denial of justice under international law?

3.1 Key Facts

1. The Government of the State of South Dakota appealed the jury verdict to the South Dakota Supreme Court. The South Dakota Supreme Court heard the appeal over four days.
2. The South Dakota Supreme Court, without giving any reasons, set aside the jury verdict and reinstated the condemnation order.
3. MacInnes received legal advice that it is almost unheard of for a state supreme court to overturn a jury verdict unless there was evidence of jury tampering or unless the jury finding was totally perverse. Neither situation applied in this case.

¹¹For example, see *David Adams Case* [1921], 6 UNRIAA 85.

This applies *a fortiori* when the matter is before an appeal court and the appeal court overturns the decision of a lower court or jury.

2. The failure to give reasons is evidence of bad faith. No reasonably competent appeal court would fail to give reasons in like circumstances.

3.3.2 U.S. Arguments

1. There is no obligation under international law for a court to give reasons. The failure to give reasons, while not an ordinary occurrence, did not materially prejudice MacInnes' right to appeal and is not, in itself, a denial of justice. MacInnes had a fair hearing before an impartial and independent court.

2. International law assumes the integrity of the judicial processes of a state. A judicial decision can only be impugned if it is actuated by bad faith, bias or malice. There is no evidence of bias, malice or bad faith in the judicial process.

3.4 Discussion of Arguments

Canada will argue that international law provides a minimum standard of justice and that certain protections are indispensable to an objective determination of an alien's rights. Reasons for judgment, especially from an appeal court, are a minimum requirement. This is reflected in state practice in the major legal systems of the world. And the failure to give reasons is anomalous by U.S. and international standards. Reasons are required where an appeal court overturns a jury decision. In the circumstances, the court had a duty to give reasons as reasons for judgment are a minimum requirement for a reasonably competent forum.

The U.S. may respond that in order to constitute a denial of justice the alleged misconduct must be such as to materially prejudice the alien's defence or espousal of the alien's rights. If MacInnes disagreed with the judgment, he had the opportunity to appeal the decision. The lack of reasons did not materially prejudice his right to appeal.

Canada may assert that reasons are a necessary element of a fair and impartial judicial proceeding. There is clear authority that secrecy in criminal and civil proceeding is incompatible with the protection due to an alien. The same principle applies to a failure to give reasons as it cloaks the judicial decision-making process behind a veil of secrecy. Without knowing the reasons for a decision, Canada is unable to assess whether the decision meets international minimum standards. Canada may also argue that while some cases on erroneous judgments have considered bad faith or ill will as an element of a denial of justice claim, in principle there is no requirement to prove ill will or bad faith in order to make a claim that a judgment or a procedural irregularity represents a denial of justice.¹⁵

¹⁵Freeman, *supra* note 12 at 323

The U.S. may respond that U.S. regulatory takings law is an extremely complicated area of law. The South Dakota Supreme Court clearly decided that MacInnes' claim had no validity. The United States Supreme Court decision, which upheld the ban on herbal remedies in circumstances similar to South Dakota's ban on the hormone, demonstrates that the South Dakota Supreme Court's judgment is a justifiable reflection of current U.S. law.

The U.S. may also contend that there must be an element of bad faith present in a judicial decision to constitute a denial of justice. There is a general presumption in international law that the legislation and jurisprudence of a state meet the requirements of a well-ordered state. In *Barcelona Traction*, Belgium alleged the acts and omissions of the Spanish Courts constituted a denial of justice. The complaints were mainly concerned with the interpretation of Spanish law and the jurisdiction of the Spanish courts under Spanish private international law. Judge Tanaka emphasizes the high threshold required for an action to constitute a denial of justice:

It is an extremely serious matter to make a charge of a denial of justice vis-à-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary.¹⁶

4. Does the South Dakota legislation, the regulation and the condemnation order amount to expropriation (or regulatory taking) without compensation contrary to international law?

4.1 Key Facts:

1. The Government of the State of South Dakota banned the distribution in the state and the export from the state of pork that had been grown using the hormone "Incregrow". There was some anecdotal evidence that Incregrow might create health risks but no scientific studies had ever been commissioned that established that the hormone is a health risk. Codex Alimentarius standards govern maximum safe dosages of the hormone.¹⁷

2. A state inspector ordered MacInnes to shut down his pork facility because the inspector determined the facilities were contaminated with the hormone. The order was indefinite, as it is not possible to decontaminate facilities contaminated with the hormone. MacInnes appealed the order but an administrative review board dismissed his appeal. The board did not give reasons for its decision.

¹⁶*supra* note 8 at 160.

¹⁷The Codex Alimentarius Commission is an international government organisation of 163 member countries. The Commission is jointly funded by the Food and Agriculture Organisation and the World Health Organisation. It develops international standards for food.

3. As a result of the legislation and condemnation order MacInnes lost his business including two long-term contracts. After the South Dakota Supreme Court overturned the jury verdict, MacInnes sold the South Dakota facility at fire-sale prices.
4. A WTO panel found that the ban on the hormone was not based on a scientific risk assessment and did not comply with the requirements in the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the SPS Agreement).

4.2 International Law on Expropriation

4.2.1 General Background

It is well accepted that it is lawful for a state to take alien property provided that the taking is not discriminatory and is for a public purpose.¹⁸ There is a concomitant duty in international law to pay compensation for the taking of alien property.

The traditional principles of customary international law require host states to observe an international minimum standard in the treatment of aliens and alien property. These principles are reflected in the 1962 United Nations General Assembly Resolution 1803 "Resolution on Permanent Sovereignty Over Natural Resources." The Resolution declares in paragraph 4 that:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law....

The traditional rule that states must observe an international minimum standard in dealing with the property of aliens has been intensely challenged by developing countries. Later United Nations instruments including the 1973 United Nations General Assembly Resolution 3171 "Resolution on Permanent Sovereignty over Natural Resources" and the 1974 United Nations General Assembly Resolution 3281 "Charter of Economic Rights and Duties of States" provide that compensation is to be determined based on state law. Both instruments omit any reference to international law or a minimum international standard in determining compensation. While

¹⁸This section is substantially based on R. Higgins, "The Taking of Property by the State: Recent Developments in International Law, (1982) 176 *Recueil Des Cours* 259, G.C. Christie, "What Constitutes a Taking Under International Law, (1962) 33 *B.Y.I.L* 307, B. A. Wortley, *Expropriation in Public International Law* (Cambridge: Cambridge University Press, 1959), R. Dolzer, "Indirect Expropriation of Alien Property" (1986) 1 *ISCID Rev.* 41, M. Sornarajah, *The International Law of Foreign Investment* (Cambridge: Cambridge University Press, 1994), B.H. Weston, "'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'" (1975) 16 *Va. J. Int'l L.* 103, S. Asante, "International Law and Foreign Investment: A Reappraisal", (1988) 37 *I.C.L.Q* 588 and R. Dolzer, "Expropriation", in Bernhardt, ed., *Encyclopedia of Public International Law*, (1985) Volume 8, 214.

there continues to be substantial debate regarding the standards for measuring compensation, the later instruments are generally not considered to reflect customary international law.

The U.S. as a capital exporting nation has always insisted that the deprivation of alien property is subject to international minimum standards. This bench briefs proceeds on the assumption that the U.S. would not present arguments contrary to this long-standing position and that U.S. arguments will focus on the content of the international minimum standard.

4.2.2 Caselaw

Two of the leading cases dealing with international expropriation are *Chorzow Factory*¹⁹ and *Norwegian Shipowners' Claims*²⁰. In *Chorzow Factory*, Germany claimed compensation from Poland for the expropriation of a factory, land and for the loss of a company's contract to administer and use the factory. The decision of the Permanent Court of International Justice supports two points of law. First, it held that expropriation for reasons of public utility, judicial liquidation and similar measures are lawful. Second, by seizing the factory and machinery, it held that the Polish Government also expropriated the patents and contract rights of the management company even though the Polish Government did not purport to expropriate these particular items of property.

Another leading case is the decision of an international tribunal in *Norwegian Shipowners' Claims*. In preparation for World War One the U.S. established a corporation that seized privately held ships in the U.S. These seizures applied to ships being built on contract in the U.S. for a number of Norwegian shipowners. The U.S. argued there was no expropriation of the contractual rights for the ships. The tribunal confirmed that just compensation was due to the shipowners under U.S. law and under international law based on the respect for private property. The decision is often used to support the proposition that a state can be responsible for a taking of contractual rights.

4.2.3 Indirect Expropriation

International law has not established clear criteria for determining what constitutes an expropriation of an alien's property, short of a transfer of title.

Such cases as there are recognize the principal laid down by the commentators, that interference with an alien's property may amount to expropriation even when no explicit attempt is made to affect the legal title to the property, and even though the respondent State may specifically disclaim any such intention.²¹

While numerous arbitral decisions have held that states are responsible for actions that amount to expropriation, state practice in this area is difficult to discern and *opinio juris* is difficult to

¹⁹1927 PCIJ, Series A, No. 7 (Judgement of May 25, 1926).

²⁰(1948)1 RIAA 307.

²¹Christie, *supra* note 18 at 309.

detect. The uncertainty in the law is a primary reason for the proliferation of bilateral investment treaties. Even though most bilateral investment treaties contain guarantees against indirect expropriation (often by referring to measures tantamount to expropriation), they offer little guidance regarding what amounts to indirect expropriation and simply state that the matter is determined in accordance with international law.

Paragraph 712 of the *Restatement of the Law (Third) The Foreign Relations Law of the United States* (the Restatement) provides, in part, that:

- A state is responsible under international law for injury resulting from:
- (1) a taking by the state of the property of a national of another state that:
 - (a) is not for a public purpose, or
 - (b) is discriminatory, or
 - (c) is not accompanied by provision for just compensation.

The *Restatement of the Law (Second) The Foreign Relations Law of the United States* was substantially revised in the Restatement. The *Restatement of the Law (Second) The Foreign Relations Law of the United States* provides the following definition of taking²²:

Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all benefit of his interest in property, constitutes a taking of the property...even though the state does not deprive him of his entire legal interest in the property.

The jurisprudence the Iran-United States Claims Tribunal, set up to assess claims on the nationalization and expropriation of American investments after the 1979 Iranian revolution has produced a substantial amount of jurisprudence on indirect expropriation. While the cases illustrate many different types of indirect expropriations it is unclear to what extent the jurisprudence can be used to generalize about customary international law and state practice as the tribunal's jurisdiction covers "all measures affecting property rights" and the tribunal applied the terms of the 1955 Treaty of Amity between Iran and the United States.

The Tribunal found the Iranian government liable to pay compensation in a number of circumstances:²³

- By the appointment of Iranian government agents charged with some degree of managerial control over Iranian companies or offices in which American claimants had an ownership interest²⁴. In these cases the Tribunal emphasized that a deprivation of property may occur through interference with the enjoyment of its benefits, even where legal title to the property is not affected. It has held that compensation is warranted

²²This definition does not appear in the Restatement but is reflected in the Reporters' Notes. It is generally accepted that the Restatement does not change the meaning of what constitutes a taking.

²³ See Aldrich, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal" (1994) 88 AJIL 585.

²⁴*Starrett Housing Corp v Government of the Islamic Republic of Iran*, (1984) 23 I.L.M. 1090.

where the owner is deprived of fundamental rights of ownership and the deprivation is not ephemeral.

- By de facto nationalization of the petroleum industry. In these cases the timing of the taking was at issue and not the issue of whether a taking occurred.²⁵
- For failure to assist aliens in the exportation from Iran of equipment owned by the alien.²⁶

Aldrich concludes from the Tribunal's decision that under international law:

3. Liability is not affected by the intent or absence of intent attributable to the state.
4. Liability does not require the transfer of title to property.
5. Liability does not arise from actions that are nondiscriminatory and are within the commonly accepted taxation and police powers of states.
6. Liability is not affected by the fact that the state has acted for legitimate economic or social reasons and in accordance with its law.²⁷

The Tribunal applied the police power defence in the case of *Too v. Greater Modesto*.²⁸ In this case, an Iranian national brought a claim against the U.S. Government in respect of a seizure by the Internal Revenue Service of the liquor licence of his restaurant. The restaurant had been burned as the result of an act of arson and the Internal Revenue Service seized and sold the liquor licence to cover unpaid withholding taxes. Despite the fact that the procedures followed by the Internal Revenue Service were unfair in a number of respects, the majority of the Tribunal found that the police power defence applied and that there was no claim.

4.3 Outline of Arguments

4.3.1 Canadian Arguments

1. A state is responsible for a taking if the state deprives an alien of the use, benefit or enjoyment of property. The legislation, regulation and indefinite condemnation order deprived MacInnes of the use, benefit and the enjoyment of his property.
2. There is no requirement in international law for a state to acquire any property from an alien in order for the state to be responsible for the deprivation of the property.
3. While a state can regulate the use of property under its police powers, it cannot act unreasonably or arbitrarily. South Dakota had no scientific basis for banning the hormone. If a

²⁵*Amoco International Finance Corp. v Iran*, (1988) 27 I.L.M. 1324.

²⁶*Sedco, Inc. v National Iranian Oil Co.*, (1987) 15 Iran-U.S. Cl. Trib. Rep. 23.

²⁷Aldrich, *supra*, note 23 at 609.

²⁸23 IRAN-U.S. C.T.R 378