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INTRODUCTION

The problem of method in the presentation of international claims to the Department of State has received inadequate analysis.[1] Remedial or procedural aspects of international law have been viewed largely as international arbitration, adjudication of disputes before the International Court of Justice or the determination of claims by national claims commissions.[2] This article will consider some procedural aspects of presenting international claims to the Department of State for espousal to foreign governments or for other assistance. Since much international litigation between states originates in this fashion, it is appropriate that an inquiry into procedures should begin with the first stage in the international process rather than at a later point.

Too often the internal process of espousal is brushed aside with the casual observation that the Department of State has discretion whether to espouse on behalf of an aggrieved national and that traditionally this remedy is unsatisfactory because it is tied too closely with political considerations which damn the claim before it is presented. Obviously oversimplified but true enough to be plausible, this assumption implies that international politics always dictate the decisions made by the Department of State regarding international claims and their diplomatic espousal without concern for legal merit.[3] However, closer scrutiny and analysis of the

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1. Literature has considered the preparation but not the presentation of an international claim or the procedures by which an individual seeks redress through the Department of State. Thorpe, Preparation of International Claims (1924) is outdated. Wormser, Collection of International War Damage Claims (1944) only incidentally considers procedural problems of possible claims arising from World War II. Hackworth and Whiteman both have mentioned the preparation of a claim but only casually refer to the process for its presentation. 5 Hackworth, Digest of International Law 741-42, 751, 755-56, 812, 817, 846 (1943); 3 Whiteman, Damages in International Law 2063-64 (1943). See also Knight, International Claims and Their Preparation, 3 Fed. B.J. 205, 282 (1938). The most attention given to procedures is Professor Bishop's note, "Practical Suggestions on International Claims," in his casebook, International Law, Cases and Materials 738-43 (2d ed. 1962).

2. See generally Carlston, The Process of International Arbitration (1946); Lillich, International Claims: Their Adjudication By National Commissions (1962); Lissitzyn, The International Court of Justice (1951); Ralston, The Law and Procedure of International Tribunals (1926); Simpson & Fox, International Arbitration (1959).

3. Professor Roger Fisher of Harvard Law School has recently said that it is now "considered a purely political act for the United States State Department to espouse a claim of one of its nationals." 1961 Proc. Am. Soc'y Int'l L. 72.

internal factors affecting the position of the Department of State in regard to the espousal of claims reveal patterns emerging in modern practice which modify or qualify the traditional views about the procedure of espousal.

To the extent that a process for claims begins to be identifiable inside the Department of State, then to the same extent the political process is limited and made less arbitrary. This does not mean that political reasons are not often decisive in any diplomatic interposition. It does mean that the procedure for determining the validity of claims by the Department of State is a process different from that of political decision-making. Perhaps the distinction is only one of degree and not of kind, for a supportable thesis can be made that the legal process itself is simply a formalized method for protecting political or other values which have grown up in a country or society. That thesis suggests that early legal process is initially indistinguishable from political process or statecraft, while at some later point less subjective formal standards slowly develop in order to provide stability by limiting the arbitrary power of decision. The thesis of this article is that the process by which the Department of State decides that a case is valid under international law is more formal and certain than if political interest alone determined the merits of the case.

STATEMENT OF CLAIM

The formal "statement of claim" is the document by which an aggrieved American national asserts his complaint.[4] It contains allegations which if true warrant his government's taking up through diplomatic means his grievance against another country. Procedures in municipal law are highly developed for the purpose of getting to the substantive merits of a particular cause of action with the least delay. The one action form of pleading developed in the Federal Rules of Civil Procedure and in many state rules usually requires only three formal allegations which must be proved:[5] (1) jurisdiction of the forum, (2) a statement of the wrong and (3) a request for damages or remedy. Attempts to distill a comparable procedural system from the present state of international law seldom get further than treatises on international arbitration. But there is no reason why an attempt should not be made to simplify, condense and restate the procedures an aggrieved American national can use in presenting a claim to the Department of State. The form international claims take in fact when presented to the Department noticeably follows the form of modern rules of procedure in use in American courts, although in a much less refined degree. Contemporary international claims practice requires a

4. Suggestions for Preparing Claims for Loss of or Damage to Property—Real or Personal, Dep't of State Memorandum of March 1, 1961 (mimeographed); Suggestions for Preparing Claims for Personal Injury or Loss of Life, Dep't of State Memorandum of July 1, 1955 (mimeographed).

5. Fed. R. Civ. P. 84, Forms 3 and 9, illustrating the formal requirements.

statement of claim in which three distinct elements must be alleged and proved. Comparable to modern civil procedure, these are: (1) eligibility to claim,[6] (2) a statement of international wrong[7] and (3) a request for damages or some other remedy.[8] Satisfactory proof of every allegation traditionally entitles a claimant to the formal presentation of his claim or to such other assistance as may be appropriate.

A claimant is eligible to make a claim under customary international law if he proves that the claim has been held continuously by American nationals from the date of the wrong until at least the date of presentation.[9] The dual requirement of nationality and ownership is here involved. Individuals establish nationality by furnishing proof of citizenship at birth or by naturalization. Partnerships and corporations must not only be American by organization but must have beneficial ownership which is substantially American. American shareholders in foreign corporations with substantial American interest also are eligible if proper nationality and ownership are established. The ownership of a claim means the right to receive any compensation obtained by the Department of State. As claims are assignable, inheritable and otherwise transferrable, a claimant must show an uninterrupted chain of title to the right to receive a settlement.

The international wrong is the heart of an international claim. It is generally said that some act or omission must be attributable to a foreign country before there is an international wrong.[10] Usually this can be determined only after an injured person tries to obtain a remedy through local legal or administrative procedures and is unsuccessful.[11] Although it is arguable whether an international wrong accrues at the time a person is injured or after local remedies have been exhausted without success, the analysis in this article treats the local remedies rule as procedural. Examples

6. Eligibility is divided into two parts, nationality and ownership. As early as March 5, 1906, the Department of State issued instructions on what a statement of claim or "memorial" should contain. Nationality and ownership were required to be proved by those instructions in paragraphs 3 and 4. 3 Whiteman, op. cit. supra note 1, at 2063.

7. The memoranda currently used by the Department of State require "a clear chronological statement of the essential facts relating to: . . . [t]he action taken against the property which is considered as giving rise to a claim against a foreign government," and "[t]ime, place, and circumstances under which the injury or death occurred, including the identity of persons, officials, or agencies causing the injury or death." Supra note 4.

8. The Department requires a statement of "[t]he nature and amount of damage resulting from action complained of" or "[n]ature and extent of damages sustained." Supra note 4.

9. The Matter of Nationality With Respect to International Claims, Memorandum of the Department of State, printed in Hearings on Bills to Amend the War Claims Act Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 699 (1959). It concludes: "There is no doubt that generally accepted principles of international law and practice require that a claim be continuously owned from the date the claim arose, and at least to the date of presentation, by nationals of the state asserting the claim." Id. at 708.

10. See Restatement, Foreign Relations § 103 (Tent. Draft No. 5, 1961).

11. Id. §§ 601-05.

of the wrongs which are attributable to foreign countries and which also give rise to international claims are: killing or injuring persons wilfully, taking property of aliens or injuring their economic interests without paying compensation, denying access to the courts and unlawfully detaining or imprisoning aliens.

In establishing damages claimants have wide latitude in proof. The purpose of damages in international law is to place the injured person through his country in a position comparable to that he would have been in had the injury not occurred;[12] the injured person should be restored to his original position or made whole.

The foregoing elements of an international claim (eligibility, wrong and damage) are best presented in a statement of claim in a clear, narrative style in chronological order. When presented, such a statement commences the process inside the Department of State. While complicated forms were at one time used by the Department, there is no form required at the present time, although guidance may be found in the Department's mimeographed suggestions for preparing claims. It is beyond the scope of this article to discuss the preparation of an international claim.

Presenting a Claim for Espousal

As recently as March 1, 1961, the Department of State considered the possible methods in handling claims against Cuba:

> In the past the Department has settled similar problems (1) by submitting individual claims through the diplomatic channel to the foreign government concerned and obtaining restitution or compensation; (2) by obtaining a lump sum in settlement of all claims, with the amount paid distributed by an agency of the United States Government; or (3) by an agreement submitting all claims to an international arbitral tribunal for adjudication.
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> Since the United States Government has not obtained agreement with Cuba for restitution, payment of a lump sum or for international arbitration, the only possibility at present would be for the United States Government formally to espouse through the diplomatic channel individual claims of American nationals. While the Department can give no assurance that claims it espouses would be paid by the Cuban Government, it is ready to receive and consider for presentation any claim which is properly prepared and documented and is valid from an international legal standpoint.[13]

A request for espousal is often the only remedy possible, particularly if the claim is an isolated occurrence. After an aggrieved national of the United States determines that he has a valid international claim against a foreign government which the Department would consider espousing under the same practice as quoted above, he faces the problem how best to present his claim to the Department. He may spend time and money to produce a final and complete dossier which is impressive, but he does so subject to

12. 5 Hackworth, op. cit. supra note 1, at 719.

13. Dep't of State Memorandum of March 1, 1961 (mimeographed), reprinted in Contemporary Practice of the United States Relating to International Law, 56 Am. J. Int'l L. 166-67 (1962).

the risk of having the claim turned down. On the other hand, a claimant risks prejudicing his claim if he presents an ill-prepared case with the idea that he will later prepare a more formal claim if the Department is sympathetic.

1. *Procedural safeguards.* Since the decision whether or not to present a formal international claim to a foreign government as a claim of the United States is said to be entirely within the discretion of the Department of State,[14] claimants do not have as a matter of right any administrative hearing for presenting a request for diplomatic interposition.[15] However, in practice any claimant or his attorney may make appointments to meet with officers of the Department as frequently as they like in order to present a claim. As no procedural rights are formalized, the validity of a claim must be demonstrated by convincing evidence which is presented to the Department of State.

It is possible that a more formal, administrative procedure for presenting claims for espousal would increase the effectiveness of legal process by safeguarding against excessive use of subjective standards by officers in their determination of the validity of a claim for purposes of espousal. At present the insurance against arbitrariness is the built-in separation of the Legal Adviser's Office from the political and other bureaus of the Department of State. Using traditional international law and practice as a starting point, the Legal Adviser's Office applies a legal method in judging the validity of claims. Although even that method is subject to changing politics, as even more formal judge-made law is in the courts, the safeguards to individuals offered by the function of the Legal Adviser's Office are (1) that they may participate with legal officers in a decision-making process by presenting cases in their most favorable light, and (2) that political decisions will not be made by the Department without considering the force and weight of the Legal Adviser's opinion supporting a claim. Accordingly, there is a built-in legal procedure, differing in degree or kind from a political method, which allows the interests of individuals to be considered according to legal method even in the absence of a formal administrative hearing.

Other possibilities exist. The Department of State's function could be limited exclusively to political negotiation with foreign governments. Jurisdiction could be created for independent adjudication of international claims by a special United States court of international claims or by the present Foreign Claims Settlement Commission in advance of their political settlement by the Department.[16] However, the foregoing possibilities for

14. Restatement, Foreign Relations § 702 (Tent. Draft No. 5, 1961); 1 Whiteman, op. cit. supra note 1, at 164-65, 275.

15. 3 Whiteman, op. cit. supra note 1, at 2046 n.34.

16. The Foreign Claims Settlement Commission, for example, decided claims against Rumania before they were settled internationally, although funds were available from

formalizing the presentation of grievances of American nationals all beg the more important question which is how to insure that the formal determination will mean something. The problem thus is not simply one of creating formal domestic procedures but rather is how to establish international procedures in a world where political and economic problems overshadow legal institutions. It is easy enough to say that we Americans think a claim is valid. It would be simple enough to create institutions in the United States for the purpose of making that kind of determination in a formal manner. But national procedures will be effective only if some compensation is made available.[17] If funds are not available or if no international settlement is reached, the procedure for determining cases in advance of settlement is at most a hollow certainty. An exception is the use of domestic procedures to distribute to American nationals the proceeds of property taken by the United States Government pursuant to treaty[18] or unilaterally.[19] It might be argued also that domestic procedures for adjudication in advance of settlement will aid future claims negotiations or will preserve a claim's validity to a greater degree than could be achieved just by preserving the evidence. Nevertheless, it is questionable whether creating formal procedures to preserve claims until settlement justifies the time and expense required when no assurance exists that the determinations will mean anything. As lump sum settlements depend largely on economic and political factors, prior adjudication would not make an appreciable difference in result, since statistical estimates based on amounts claimed provide equally workable negotiating tools. Filing or registering claims with the Department of State seems to serve that function.

Special claims procedures of a slightly more formal nature become necessary when United States economic assistance to a country must be stopped if that country has not paid debts to American nationals and the debts are uncontested (as provided in the Foreign Assistance Act of 1961)[20]

vested Rumanian assets. See Christenson, The United States-Rumanian Claims Settlement Agreement of March 30, 1960, 55 Am. J. Int'l L. 617, 636 (1961).

17. Domestic claims programs have included the adjudication of claims against Rumania, Bulgaria and Hungary and payment from enemy assets vested during the war. The fund used in the Russian claims program was derived from the famous Litvinov assignment of 1933. The fund used in the Czechoslovak claims program was derived from the sale of a seized steel mill owned in the United States by the Czechoslovak Government, which was about to ship it to Czechoslovakia. 69 Stat. 562 (1955), 22 U.S.C. § 1641 (1958); 72 Stat. 527 (1958), 22 U.S.C. 1642 (1958).

18. Vesting of Rumanian assets was permitted by Article 27 of the Treaty of Peace With Rumania, Feb. 10, 1947, 61 Stat. (2) 1757, T.I.A.S. No. 1649 (in force Sept. 15, 1947). Similar provisions were in the treaties of peace with Hungary and Bulgaria.

19. E.g., the seizure and liquidation of a Czechoslovak steel mill in the United States under ¶ 2(b), Executive Order No. 9193, July 6, 1942, 7 Fed. Reg. 5205, issued under the President's constitutional powers, the First War Powers Act, 1941, and the Trading with the Enemy Act of Oct. 6, 1917, as amended. A state of war is not required under the executive order for seizure of foreign-owned businesses so long as the seizure is in the national interest.

20. Section 620(c) of the Foreign Assistance Act of 1961, 75 Stat. 424, 445 (1961) (P.L. 87-195, approved Sept. 4, 1961) provides:

or when a claim is made under the investment guaranty program.[21] However, until such time as the special procedures become more general, requests for espousals must continue to be made in an informal manner.

2. *Method and Criteria.* Even an informal presentation of a claim should be prepared very carefully because at this stage the responsible officers will be objectively critical of weak points, gaps in proof and the theory of the case. The purpose of meeting with legal officers in the Department of State or in corresponding with them should be to prove the validity of the claim so that the United States Government should give its full support to the claim by espousing it formally as though it were its own. When a person presents a claim initially, he will have prepared a concise statement of the facts and the legal basis for the claim as indicated above. Such a statement of claim can be developed in detail at a later time if the Department requests.

The Legal Adviser's Office judges the legal merits of a claim. The organization of the Department of State, with the Legal Adviser's Office separate from any other bureau and responsible directly to the Secretary of State and the Under Secretary, is the most important factor in support of the thesis that legal judgment is somewhat different than political judgment. This semiautonomous structure enables the Legal Adviser to make objective decisions regarding individual claims, with emphasis placed on their legal merits rather than on political factors. While political judgment may override a legal opinion, an objective recommendation, once given, is not lightly rejected by the political bureaus.

In deciding first whether the claim is meritorious and second what assistance, if any, can be provided, the Department has a dual function. The first is the role of a judge of a cause or that of a lawyer who must decide whether to take a case.[22] This will illustrate that the reactions of the Department of State and its legal officers may be similar to those of a critical lawyer who cross-examines his client to get at all the relevant facts. The analogy is limited, however, for if the Department refuses to support a claim, a claimant may have no other advocate and no other procedure to follow. The second function of the Department is the role of traditional advocate in interposing in behalf of an injured American national. After deciding to assist a claimant, the Department has a choice of a number of

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No assistance shall be provided under this Act to the government of any country which is indebted to any United States citizen for goods or services furnished, where such citizen has exhausted available legal remedies and the debt is not denied or contested by such government.

21. See Dep't State Press Release No. 744, Oct. 27, 1961, regarding new guaranties for private foreign investment provided by Section 221 of the Foreign Assistance Act of 1961.

22. Whiteman compares this function to that of a tribunal of first instance. 1 Whiteman, op. cit. supra note 1, at 165.

various degrees of support that might be appropriate from a political point of view and at the same time productive.[23]

In deciding whether to assist a claimant, the Department first assesses the legal merits of the claim and next considers other criteria such as the legal defenses a foreign state might raise or the voluntary acts of a claimant by which he loses the right to diplomatic protection. Thus the Department considers (1) whether the claimant violated any law in connection with his grievance;[24] (2) whether the claimant was contributorily negligent;[25] (3) whether the claimant's acts in any way justified the action by the foreign government causing him injury;[26] (4) whether an unreasonably long time has passed since the claim arose, raising the possible objection of laches;[27] (5) whether the claimant has lost his right of protection by voluntary expatriation, express or implied;[28] and (6) whether the claimant has endeavored to exhaust his local remedies in the foreign country.[29]

Perhaps the most frequent objections made by the Department of State at the initial stages of presentation are the failure of the claimant to exhaust local remedies[30] and the lack of eligibility to assert a claim.[31] Political objections to immediate presentation also may be raised. Occasionally valid claims are not presented but are preserved for future settlement by political choice. Any attempt to be objective about the procedures of the Department of State in determining the validity of claims must postpone the question how international politics enters an espousal, until after the legal process is completed. That is beyond the scope of this discussion. Claimants who have strong feelings about foreign affairs probably would enhance their chances of receiving maximum United States support for their claims if they would confine their claims presentation to relevant facts and international law. If a claim is judged legally sound chances are good that some action will be taken. The device of the lump sum settlement is one method of obtaining some relief for claimants when political and economic barriers preclude earlier settlement by espousal.[32]

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23. Rather than espousing a formal international claim through diplomatic channels, the Department may resort to more informal means of obtaining a remedy. See notes 53-7 infra.

24. 1 Whiteman, op. cit. supra note 1, at 142-43, 146.

25. Id. at 144.

26. Restatement, Foreign Relations §§ 401-03 (Tent. Draft No. 5, 1961) (reasonable exercise of police power, currency control and protection of life and property in case of emergency).

27. 5 Hackworth, op. cit. supra note 1, at 713-17.

28. Id. at 709-10, 802-51.

29. Id. at 501-26. See text at and accompanying notes 44-51 infra.

30. The latest pronouncement is the Interhandel Case, [1959] I.C.J. Rep. 6.

31. Late United States nationals are frequently turned down if their claims arose at a time when they were foreign nationals. Supra note 9.

32. Lump sum agreements, since the war, have been concluded with the United States and Yugoslavia, Rumania and Poland, and negotiations are now in progress with both Bulgaria and Czechoslovakia and again with Yugoslavia.

THE DUTIES OF THE CLAIMANT

Even though international claims are theoretically claims of the United States Government, the responsibility for preparing and documenting them rests exclusively with the claimants. As stated in the Department of State's memorandum dated March 1, 1961, "it should be clearly understood that the responsibility for preparing their claims and obtaining appropriate evidence in support of allegations rests entirely with the claimants."[33] Thus, the claimants must pay for expenses involved, obtain necessary translations of documents, gather evidence and have the claim prepared in a careful manner before it can be presented. Failure to bear this responsibility may result in the denial of support for the claim.

Aggrieved nationals sometimes are mistakenly of the view that the United States Government will father the claim and benevolently protect American interests so long as some complaint is registered with the Department of State.[34] This view is not only alien to principles of American government but also becomes prejudicial to meritorious claims which might need only proper preparation to warrant espousal. Claimants who are dilatory in exhausting local remedies, preserving the evidence available or translating documents and preparing clear statements of claim, are not likely to receive much help from the Department.

The services of an experienced attorney are valuable but not required before the Department of State. Attorney's fees incurred in the preparation and presentation of an international claim are borne exclusively by the claimant and normally are not recoverable.[35] In the course of informal dealings with the Department a formal power of attorney may not be required, but when an attorney presents a formal claim he must file a written power of attorney to accompany the claim.[36]

Part of a claimant's responsibility includes the preservation of a claim during a time when a foreign country is unfriendly or unwilling to consider settling it. Thus, making an early and complete record is particularly important in claims against countries in political foment or civil strife. Claimants are naturally discouraged from spending time and money in preparing and documenting claims against a country like Cuba when they dis-

33. Memoranda, supra note 4.

34. See Cowles, To What Extent Will American Lawyers Need an Understanding of International Law to Serve Clients Adequately During the Last Half of the Twentieth Century, 7 J. Legal Ed. 179, 195 (1954): "There is an impression that it is only necessary to inform the Department of State of the claim. But if the American client wants results within a reasonable time, his local attorney must take the initiative and do most of the work."

35. 1 Whiteman, op. cit. supra note 1, at 791; 3 Whiteman, supra, at 2028-29. But equity and fairness have been the basis for awarding legal expenses on occasion, Id. at 2026. Prior legal expenses incurred in the exhaustion of local remedies, on the other hand, may be included as a general rule. Id. at 2020, 2022-23, 2026-28.

36. The memorandum on preparing claims states: "In cases in which claimants are represented by an attorney, the latter should file a power of attorney evidencing his authority to act in such capacity." Supra note 4.

cover that the only method of presenting those claims is likely to be unfruitful. However, the responsibility for preserving rights requires gathering evidence while it is available and presenting it to the Department for the record or otherwise protecting it pending settlement. Hundreds of claims filed with the Department of State at an early date have been sent to the Foreign Claims Settlement Commission where they were useful in the determination of claims under the terms of lump sum settlement agreements.[37] If legislation is passed authorizing adjudication of war damage claims against Germany and their payment from German assets vested during the war, the records in the Department undoubtedly will be turned over to the Commission for its use.[38] Settlements negotiated on a lump sum basis also utilize records deposited with the Department or some other agency. In the Polish negotiations a registration of claims with the Foreign Claims Settlement Commission enabled the Department, working with the Commission, to compile statistical information to support the discussions.[39]

Control Over a Claim

Prior to the espousal of a claim, the claimant himself has control over it and may negotiate a settlement directly with the foreign government.[40] The control at this point is subject to the possibility that the Department of State in exercise of its power delegated from the President might waive or settle the claims of aggrieved American nationals. No responsibility appears to fall on the United States under the fifth amendment for the taking of property, since international claims are considered national and between governments. Consequently, individuals have no rights other than those procured for them by their governments. However, as a matter of practice claimants generally receive their share of any award or settlement. The abrogation by international agreement of a right or interest acquired under municipal law, on the other hand, might create a duty to pay compensation under the fifth amendment,[41] although the Supreme Court has not decided this precise question.

37. During the Yugoslav claims program, when the Commission initially was called the International Claims Commission and was part of the Department of State, it had no problem regarding transfer of records. When the Commission became the Foreign Claims Settlement Commission in 1954, it was separated from the Department of State and arrangements were made for transfer of records.

38. Section 216 of the Administration's war claims bill, H.R. 7479, 87th Cong. 1st Sess. (1961), directs the Secretary of State to "transfer or otherwise make available to the Commission such records and documents relating to claims authorized by this title. . . ."

39. Foreign Claims Settlement Comm'n of the U.S., 14th Semiann. Rep. to the Cong., June 30, 1961, at 17; see also a recent announcement regarding registration of certain claims against Yugoslavia with the Dep't of State, Dep't of State press release No. 285, of May 3, 1962.

40. Restatement, Foreign Relations § 701 (Tent. Draft No. 5, 1961).

41. Id. § 703. In Gray v. United States, 21 Ct. Cl. 340, 392 (1886), the Court of Claims suggested that a right against the government might exist under the fifth amendment when a claim has been waived, although "a right often exists where there is no remedy, and a not infrequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his government." The Supreme Court has not indicated that

Whether to lend support to a claim of an American national by making the claim one of the United States is traditionally within the ultimate discretion of the Secretary of State. A claimant cannot compel espousal and, as discussed above, has no right to be accorded a formal hearing on his claim. Once the Department of State espouses a claim, it acquires exclusive control over it under both traditional international law and United States practice and it may waive or settle the claim without consent of the individual claimant.[42]

The Requirement of Exhaustion of Local Remedies

Before the Department of State will consider espousing a claim under principles of international law, it must be satisfied that the condition precedent of the exhaustion of local remedies has been met by the claimant.[43] Although this requirement should be alleged as one of the points in a statement of claim,[44] it is viewed here as a procedural requirement rather than as a substantive element of the claim itself.[45] The Department has concluded that even with regard to claims against Cuba "evidence should . . . be submitted showing that the American national exhausted such legal remedies as were available in Cuba and in the process sustained a denial of justice, as that term is understood in international law, or that the laws of Cuba do not provide a remedy or, if provided, that it would be futile to attempt to exhaust such remedy."[46]

The local remedies rule is so well-established that the International Court of Justice declared in the *Interhandel* case:

> The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.[47]

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a fifth amendment problem is raised in holding that the United States has no legal obligation to nationals whose claims were settled without their consent. La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899); Frelinghuysen v. Key, 110 U.S. 63 (1884); Williams v. Heard, 140 U.S. 529 (1891). But see the dictum in Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) and Oliver, Executive Agreements and Emanations from the Fifth Amendment, 49 Am. J. Int'l L. 362 (1955).

42. 1 Whiteman, op. cit. supra note 1, at 275; 3 Whiteman, supra at 2035, 2046-47; note 41 supra.

43. 5 Hackworth, op. cit. supra note 1, at 501, 505.

44. It can be placed either in the eligibility section or the wrongful act section of the statement of claim; it may also be stated separately. See text at note 11 supra.

45. Restatement, Foreign Relations, Explanatory Notes § 601, comment f at 114, (Tent. Draft No. 5, 1961).

46. Contemporary Practice of the United States Relating to International Law, 56 Am. J. Int'l L. 167 (1962), quoting a Dep't of State Memorandum.

47. Interhandel Case, [1959] I.C.J. Rep. 6, 27.

The most recent pronouncement by the Department of State follows the traditional rule:

> The requirement for exhaustion of legal remedies is based upon the generally accepted rule of international law that international responsibility may not be invoked as regards reparation for losses or damages sustained by a foreigner until after exhaustion of the remedies available under local law. This, of course, does not mean that "legal remedies" must be exhausted if there are none to exhaust or if the procurement of justice would be impossible. . . . Each American national must . . . decide whether to "exhaust legal remedies" in Cuba, either with a view to obtaining restitution or adequate compensation or documentary evidence which could be used to show that justice could not be obtained by judicial proceedings. Generally, unsupported assertions to the effect that it would be useless to exhaust or attempt to exhaust legal remedies would, of course, have less evidentiary value than a court decree or other documentary evidence demonstrating the futility of exhausting or attempting to exhaust legal remedies.[48]

The customary international rule regarding local remedies grew up in a day when countries had a common interest in respecting and preserving the integrity of every other country. In some respects changed political and economic conditions have modified the assumptions underlying the traditional view. The rule can be used today by communist countries as a weapon against injured American nationals to delay international discussions of claims. Or it can be used as a legitimate insistence on independence. Underdeveloped nations needing social and economic reform and financial assistance from the United States may well find they must agree to compensate Americans for any property expropriated before receiving aid. Exhausting local remedies would serve no purpose at all against communist countries or countries unable to pay. It is not so out of place in the Western-oriented countries which continue to respect each other as political units.

There is little reason to change the traditional rule requiring local remedies to be exhausted before espousal in relationship to Western-oriented countries. However, in relationship to communist or bloc countries, as it is generally futile to exhaust legal remedies in those countries, the increasing United States practice has been to negotiate *en bloc* settlements of claims of American nationals without mentioning local remedies.[49] In relationship to underdeveloped or nonaligned countries, a United States practice has not evolved. The Department of State might be more inclined to take a claim up without the necessity for the exhaustion of local remedies in a country which is to be the recipient of United States economic assistance,[50] since it would be desirable to resolve claims problems very quickly to clear the way for policy objectives.

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48. Note 46 supra.

49. The lump sum agreements with Yugoslavia, Rumania and Poland, made after World War II, did not mention local remedies. Compare, however, the Department of State position with respect to Cuba at note 48 supra.

50. In the recent expropriation of a utility company by Brazil, a joint communique was issued by President Kennedy and President Goulart wherein the latter expressed the "intention of his government to maintain conditions of security which will permit private

Thus, changing events have an impact on the traditional assumptions underlying the well-established local remedies rule. The question which now must be explored is how the increased use of devices less formal than espousal affects the Department of State's view on the local remedies rule or other formal requirements.[51]

METHODS OF ASSISTANCE SHORT OF ESPOUSAL

If the Department of State may refuse to present a valid international claim for political reasons, is the implication true that for equally cogent political reasons it could raise a claim with a foreign government when a claimant does not have a valid international claim? What precludes the United States from insisting in a politically expedient case that a certain claim must be satisfied without regard for traditional rules regarding local remedies or eligibility? While the answer obviously is that nothing prevents the United States from raising matters politically, legal defenses developed through custom over many years undoubtedly would be thrown up against a demarche of that kind. A traditional distinction usually has been drawn between informal good offices on the political level and the more juridical concept of formal diplomatic interposition. One international lawyer has remarked, however, that "the difference between 'good offices' and 'diplomatic intervention' is not impressive."[52]

Many shades and variations of "informal good offices" can be requested as methods short of formal espousal to obtain assistance from the United States. The methods, not quite juridical or formal in nature, can be classified according to the degree of support desired: (1) information regarding remedies;[53] (2) consular services;[54] (3) good offices;[55] (4) mediation;[56] and finally (5) political intervention.[57]

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capital to perform its vital role in Brazilian economic development." He also said that arrangements would be made with companies for "fair compensation with reinvestment in other sectors important to Brazilian economic development. . . ." The communique said that "President Kennedy expressed great interest in this approach." 108 Cong. Rec. 5632 (daily ed. April 5, 1962). Note the impact of informal arrangements on the traditional rule of exhaustion of local remedies at and accompanying at notes 52-57 infra.

51. The other formal requirements include the rule of continuous nationality as well as the strict standards regarding preparation of a claim.

52. Schwebel, International Protection of Contractual Arrangements, 1959 Proc. Am. Soc'y Int'l L. 266, 267.

53. Consular officers often know where to inquire regarding possible local recourse through administrative procedures. Although officers are under no duty to provide such assistance, their interest in helping citizens abroad makes this simple device a very useful means of obtaining information which might be very difficult to obtain otherwise.

54. Notarial services, administration of estates, assistance to seamen, protection of rights of imprisoned citizens. See 4 Hackworth, op. cit. supra note 1, at 824-76, 912-47.

55. No difference in method is perceived between good offices when a dispute exists between two governments and good offices when a dispute exists between a foreign government and an American national. 6 Hackworth, op. cit. supra note 1, at 24; Schwebel, note 52 supra.

56. Mediation differs from good offices only in degree. See Hackworth, op. cit. supra note 1, at 24-26.

57. Political interests involve United States interests which in a sense differ from

Frequently an embassy abroad can ascertain that there are remedies available for particular wrongs if a claimant is unable to obtain that information by his own efforts. For example, a claimant might need simply to be placed in contact with the proper officials in order to begin negotiations on a settlement of a claim. A request for information regarding remedies normally is the kind of help a United States mission abroad can honor without much objection if help cannot otherwise be obtained. Slightly more work is involved when consular services available to Americans abroad are sought in connection with a claim. These services normally include furnishing lists of local lawyers, ascertaining the current status of a claim pending before local authorities, indicating to local officials the American interest involved in a particular case or performing certain estate, notorial or protection services in the event of death, imprisonment or misfortune abroad. Good offices in a narrow sense is concerned with arranging procedures for the settlement of a claim but not with its substantive merits. For instance, a claimant might wish to request the Department of State to instruct an embassy abroad to make an approach to a foreign government for the purpose of bringing the parties together to negotiate a settlement. Somewhat different in degree than good offices is the device of mediation which is used when the United States wishes to take a more active part in any negotiations even to the extent of suggesting a compromise, but without taking a position on the merits of the claim. Finally, in cases of very great importance, interposition might take place in which United States representatives could suggest a politically desirable, substantive settlement of a particular case without regard for legal merit.

A claimant who knows precisely what he is requesting the Department to do stands a better chance of accomplishing his objectives. If a person who has made a contract with a foreign government asks the Department to demand full compensation for him based on its breach without explaining what remedies he has sought in his own behalf, he is likely to get a negative response. In the same situation, if he makes a more modest request for assistance in determining what, if any, remedial procedures are available in the foreign country or which office of the foreign government handles the claim administratively, he is more likely to find a sympathetic attitude, especially if he cannot obtain the information through his own means. Similarly, if a recently naturalized citizen requests support for a claim arising prior to his naturalization, he would be politely turned down. If he just needs help in finding a remedy abroad, however, he stands in better stead since he is now a citizen entitled to the same privileges as any other citizen.[58] A person or corporation quite profitably could request the

private interests. If a government considers its own interests injured, the traditional rules of state responsibility for injury to aliens might not apply, since the matter is intergovernmental from the outset.

58. The rule of continuous nationality has been attacked with increasing frequency. Hearings, supra note 9, at 427.

Department's good offices in bringing the parties together for serious negotiations before resorting to local remedies. By the same reasoning, if action by a foreign country against an American concern affects vital United States interests, direct representation by the Department of State would be more likely for political reasons. Where the interests affected have little connection with national policy, less consideration from a political point of view could be expected.

Despite the fact that Department of State procedures for deciding the legal validity of claims are to a large extent insulated from international politics, the increased use of informal procedures is bound to have some effect on traditional international law.[59] Procedures developed politically may be incorporated into traditional legal practice. For example, the traditional local remedies rule seems to have different meaning for different political situations.[60] Regarding nationality, the customary rule, that a claim must have been continuously in an American national, has resisted as much change. The Department seems to look first to protecting persons who were nationals at the time of the wrong before protecting late nationals.[61] Some assistance nevertheless has been provided when a fund is more than adequate to compensate all persons who are eligible under traditional rules[62] or when provision is made for a local remedy.[63]

Settlement and Distribution

Several notable differences exist between informal assistance to a claimant and the formal espousal of an international claim on his behalf. One lies in the legal implications of settlement. With informal assistance provided, the claimant retains control over his claim to the extent that he is party to any settlement with the foreign government.[64] The United States merely helps him arrange a settlement with the proper authorities

59. However, in formal international arbitration or adjudication, the impact will not be felt so greatly since the traditional rules are changed very slowly. See, e.g., the Interhandel Case, supra note 47 where the traditional rule of exhaustion of local remedies was relied upon by the United States and sustained by the court.

60. It is too early to tell the significance of the joint Kennedy-Goulart Communique, cited note 50 supra. While strictly speaking the remedies available in Brazil are entirely local, they have been made available in greater measure through the good offices of the Chief Executive of the United States.

61. Memorandum printed in Hearings, note 9 supra.

62. As in the case of Italy's payment of $5,000,000 in settlement of claims not covered in the Treaty of Peace with Italy. After paying all claims of continuous American nationals, the Foreign Claims Settlement Commission was authorized to pay claims of persons who become American nationals after their claims arose. See Lillich, op. cit. supra note 2, at 79-81.

63. Procedures have been provided in Yugoslavia to pay claims of late American nationals which were not settled under the 1948 claims settlement with Yugoslavia. Article 3 of that agreement provided that Yugoslavia would provide compensation directly to such claimants. See 45 Dep't State Bull. 523 (1961) announcing these procedures.

64. Restatement, Foreign Relations § 701 (Tent. Draft No. 5, 1961).

or suggests possible solutions. An espousal is otherwise, for any settlement is within the complete control of the United States which may compromise or settle the claim for less than a claimant would consider fair. Another difference is that a claimant carries the burden of substantive negotiations in cases in which the United States merely uses good offices or mediates, but when the United States makes a formal, diplomatic interposition, it negotiates on the substantive merits.

When settlement with a foreign government is reached by a claimant, he receives payment directly as in any private settlement. When a claim has been espoused by the United States and settlement is intergovernmental, payment is made directly to the United States Government and its discharge of the international obligation releases the claim.[65] A claimant thereafter does not have any rights against the foreign government and receives from his Government an award within the discretion of the Secretary of State.[66] The determination of an award by the Secretary is final and not subject to review by the courts except in regard to conflicting claims of ownership of the right to receive the award made. If settlement is made for a large block of claims by means of a lump sum agreement, more formal procedures are prescribed for distributing the fund received in settlement. At the present time the Foreign Claims Settlement Commission has authority to receive and determine claims settled by lump sum agreements and to distribute the funds among the claimants.[67]

CONCLUSION

The Department of State continues to have wide discretion in determining whether it will espouse a claim or whether any other assistance can be extended to an aggrieved American national. Although this discretion has often been called absolute, it is limited by several factors. One is the decision-making structure of the Department itself, which relies heavily on the Office of the Legal Adviser. Another is the condition by which the Congress cuts off foreign aid if certain outstanding debt claims exist against a foreign government, which in effect forces a determination of the validity of those claims.[68] Moreover, Senator Long's recent bill which would cut off any aid to countries expropriating American property without compensation looks for an even broader limitation on the absolute discretion of the Department regarding international claims.[69]

65. Id. § 703.
66. Id. § 704.
67. 64 Stat. 13-14 (1950), 22 U.S.C. §§ 1622(c), 1623(a) (1958).
68. Supra note 20.
69. S. 2926, 87th Cong. 2d Sess. (1962) to amend the Foreign Assistance Act of 1961 so as to prohibit assistance under that Act to the government of any country which has not established equitable procedures for compensating United States citizens for loss of property by expropriation. See 108 Cong. Rec. 2851-52 (daily ed., March 1, 1962), referring to the Brazilian expropriation of International Telephone and Telegraph Co.

Informal assistance to injured American nationals seems to be increasing. Analysis of the exact help needed by a claimant often suggests that informal good offices will be a more desirable form of assistance than espousal. The criteria for informal assistance are not so strict. The fact that there may be some standards developing for each degree of assistance requested implies that espousal is not the only form or method for protecting nationals abroad. Although differences do exist between formal and informal diplomatic protection, the results in fact minimize the disparity. In settlement of a claim the injured national generally gets the compensation, whether he signs the release or whether his government does. In distributing a fund received, the Department of State looks to the damages suffered by the claimant which accomplishes little more than if the claimant were paid directly by the respondent government. So long as some of the weight of the United States is placed behind a grievance of one of its nationals, the difference in form of reparation appears to be only one of degree. When claims procedure before the Department of State limits discretion and provides standards for the degree of help sought, a distinct legal process emerges with form and predictability. That this is so has been the thesis of this article.