durch die österreichische Staatseisenbahn auf Grund eines einheitlichen Vertrages in Betrieb genommen worden, auch hätten die jährlichen Betriebsrechnungen, welche die Staatseisenbahn der Gesellschaft erteilt habe, weder die Einnahmen noch die Ausgaben für die einzelnen Linien unterschieden; ferner seien das Anlagekonto und die Jahresrechnungen, nach denen sich die Staatsgarantie bestimmt habe, stets einheitlich aufgestellt worden. Schließlich seien auch Verzinsung und Amortisation der beiden Anleihen, welche die Gesellschaft für den Bau der Eisenbahnen aufgenommen habe, durch das Vermögen und die Einnahmen beider Linien gesichert worden, und auch die dafür bestehende Staatsgarantie sei einheitlich gewesen. Aus allen diesen Umständen und namentlich der finanziellen Unteilbarkeit der beiden Linien sei zu folgern, daß diese ein *réseau concédé* im Sinne des Art. 320 darstellten. v. Nostitz-Wallwitz

3. Schiedsurteil auf Grund des Abkommens vom 30. September 1932 zwischen Großbritannien und Finnland betr. die Erschöpfung des nationalen Rechtsweges in dem Streit über die Frage einer Entschädigung wegen der Beschlagnahme finnischer Schiffe während des Weltkrieges, vom 9. Mai 1934 [1]).

Vom Jahre 1916 an hatte die britische Regierung 13 finnländische Handelsschiffe für Kriegszwecke in Benutzung genommen und bis zum Ende des Krieges zu Seereisen nach Frankreich usw. verwandt [2]). Da die privaten Eigentümer der Schiffe eine Entschädigung von Großbritannien nicht erhielten, nahm der finnische Staat ihre Ansprüche auf und trat am 5. Okt. 1920 mit Großbritannien in Verbindung. Die britische Regierung wies gegenüber dem finnischen Vorschlag, die Sache einem internationalen Schiedsgericht zu unterbreiten, darauf hin, daß für die Verfolgung der angeblichen Ansprüche der nationale Rechtsweg offen stehe. Nunmehr erhoben die Eigentümer Klage vor dem "Admiralty Transport Arbitration Board", dem auf Grund des "Indemnity Act" von 1920 zuständigen Sondergericht. Dieses wies die Klage mit Urteil vom 29. Januar 1926 ab [3]), indem es feststellte:

[1]) Decision Rendered in Conformity with the Agreement Concluded on September 30th, 1932, between The Government of Finnland and The Government of Great Britain and Northern Ireland for the Submission to Arbitration of a question connected with a claim in respect of certain Finnish vessels used during the war. (Centraltrykeriet, Stockholm 1934).

[2]) Weitere Einzelheiten S. 3ff. des Urteils; vgl. auch das finnische Memorandum vom 30. 7. 1931 (Soc. d. Nat., J. O. 1931, Annexe 1322 p. 2201) und das britische Memorandum vom 28. 8. 1931 (Annexe 1322a, p. 2213).

[3]) Die Entscheidung ist abgedr. in Soc. d. Nat., J. O. 1931, p. 2228.

"We find as facts: I. That these steamers were not, nor was either of them requisitioned by or on behalf of Great Britain. II. That they were each of them requisitioned by or on behalf of the Government of Russia."

Von dem an sich gegebenen Rechtsmittel der Berufung an den "Court of Appeal" machten die Eigentümer keinen Gebrauch. Erneute diplomatische Verhandlungen führten zu keinem Ergebnis [4]). Daraufhin legte Finnland mit Schreiben vom 30. Juli 1931 [5]) den Streit dem Völkerbund vor und berief sich am Schlusse seines gleichzeitig überreichten "mémorandum" insbesondere auf Art. 13 Abs. 2 des Paktes und auf Art. 36 Abs. 2 des Courstatuts [6]).

Die Erörterungen über die Zuständigkeit des Rates interessieren hier nur insoweit, als sie mit der später dem Schiedsrichter vorgelegten Frage der Erschöpfung des nationalen Rechtsweges im Zusammenhange stehen. In seinem Memorandum vom 28. August 1931 [7]) berief sich Großbritannien auf die im Völkerrecht anerkannte Regel, daß ein Staat die Ansprüche seiner Staatsangehörigen auf diplomatischem Wege erst dann geltend machen dürfe, wenn der nach dem nationalen Recht des anderen Staates offen stehende Rechtsweg erschöpft sei. Dies sei hier nicht der Fall, da einmal eine Berufung gegen das Urteil des "Admiralty Transport Arbitration Board" gegeben sei, und da auch die Möglichkeit bestanden habe, im Wege einer "petition of right" die ordentlichen Gerichte damit zu befassen:

"under this well-established rule, the Finnish Government has not now, and never has had, any right under international law to make any diplomatic claim with respect to this matter at all. Still less can it claim as of right that the matter be referred to arbitration." [8])

Demgegenüber hat der finnische Vertreter, Baron Yrjö-Koskinen, darauf hingewiesen, daß der nationale Rechtszug schon erschöpft sei, «si . . . un appel n'avait pu avoir d'autre résultat que de faire débourser,

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4) Die letzte Weigerung Großbritanniens ist in der Note vom 18. April 1931 enthalten (vgl. J. O. 1931, p. 2202).

5) J. O. 1931, p. 2201.

6) A. a. O. p. 2208; vgl. hierzu die Ausführungen des finnischen Vertreters Baron Yrjö-Koskinen, in der Sitzung des Rates vom 14. 9. 1931 (a. a. O. p. 2071).

7) J.O. 1931, Annexe 1322a, p. 2217, Ziff. 18 und 19.

8) League of Nations, C. 519. M. 218. 1931. VII; Brit. Memorandum vom 28. Aug. 1931, p. 5, auch J. O. 1931, p. 2217; ebenso in der Sitzung vom 14. September, J. O. 1931, p. 2080; vgl. auch die Ausführungen in dem 2. brit. Memorandum v. 17. Sept. (C. 573. M. 231. 1931 VII p. 1; auch J. O. 1931, Annexe 1322 b, p. 2231): "the claimants Government . . . must base its case on the failure of the country concerned to fulfil its international obligations to provide a system of law and of courts of justice through which private individuals may obtain redress in conformity with the requirements of international law."

en pure perte, à la partie demanderesse des sommes considérables [9])». Die finnische Regierung hat weiter ausgeführt, der nationale Rechtszug sei erschöpft worden, weil das Urteil des "Admiralty Transport Arbitration Board" auf der tatsächlichen Feststellung beruhe, daß eine Beschlagnahme der Schiffe nicht durch England, sondern durch Rußland erfolgt sei, und weil gemäß section 2 (1) (a) des "Indemnity Act of 1920" die Entscheidung des Gerichts endgültig sei, es sei denn, daß eine der Parteien sich durch die Entscheidung über einen "point of law" verletzt fühle [10]).

Der zum Berichterstatter ernannte [11]) spanische Vertreter Madariaga hat dem Rat am 30. Januar 1932 [12]) vorgeschlagen, in erster Linie zu prüfen, ob die Eigentümer der finnischen Schiffe den nationalen Rechtsweg erschöpft haben und ob — im Falle der Verneinung dieser Frage — dieser Umstand ein Hindernis zur Geltendmachung der Ansprüche durch den finnischen Staat bilden würde. Jedoch sollte es den Parteien überlassen bleiben, einen zur Lösung dieser Fragen geeigneten Weg miteinander zu vereinbaren. Die erneut aufgenommenen Verhandlungen führten zu dem Abkommen vom 30. Sept. 1932 [13]), das die Entscheidung der in Art. 1 des Abkommens noch einmal formulierten Frage Dr. Algot Bagge, einem Mitglied des höchsten schwedischen Gerichts, übertrug [14]) [15]).

Die am 9. Mai 1934 von Bagge gefällte, 119 Druckseiten umfassende Entscheidung, die sehr eingehend und überzeugend begründet ist, stellt einen außerordentlich wichtigen Beitrag zu der völkerrechtlichen Lehre von der Erschöpfung des nationalen Rechtswegs dar, da sie verschiedene Seiten des Problems behandelt, die in der Rechtsprechung internationaler Instanzen bisher kaum berührt wurden.

9) J. O. 1931, p. 2080; er spricht dort von einer «véritable signification de fond» des Wortes «épuisé».

10) a. a. O. p. 2073; über weitere Ausführungen zu dieser Frage vgl. auch das finnische Memorandum vom Dez. 1931 (J. O. 1932, p. 805 ss.) Der Standpunkt Großbritanniens zu dieser Frage ergibt sich aus dem Memorandum vom 17. Sept. 1931 (J. O. 1931, p. 2232 s.).

11) J. O. 1931, p. 2249.

12) J. O. 1932, p. 506.

13) Treaty Series Nr. 31, 1932; Cmd. 4179; der vorangehende Notenwechsel Soc. d. Nat., J. O. 1932, p. 1197.

14) Art. 1 hat folgenden Wortlaut: The Government of the United Kingdom and the Government of Finland agree to submit to the decision of Dr. Algot Bagge (hereinafter referred to as the Arbitrator) the first of the two questions set out in part IV of the Report of the Committee of the Council of the League of Nations (Annex I), that is to say: "Have the Finnish shipowners or have they not exhausted the means of recourse placed at their disposal by British law?"

15) Die Prozeßvertreter der Parteien waren: für Finnland Sir Maurice Amos, Prof. Friedman und Mr. A. P. Fachiri, für Großbritannien Sir Boyd Merriman, Prof. Gutteridge und Mr. W. S. Morrison.

Der Schiedsrichter hatte zunächst zu untersuchen, ob die finnischen Schiffseigentümer gegen das Urteil des Arbitration Board Berufung einlegen konnten. Er ging dabei von folgenden Grundsätzen aus (p. 21 des Urteils):

> "The remedy of appeal relied on by the British Government may be said always to be open to a claimant in that sense that there is a right to file a notice of appeal and to have the contentions of the appellant as to his formal right of appeal dealt with by the Court of Appeal. It is, however, common ground that this is not sufficient to bring in the local remedies rule; the remedy must be effective and adequate.
>
> A remedy of appeal is effective only if the Court of Appeal may enter into the merits of the case. But even this does not exhaust the condition of effectiveness under international law."

Da die Parteien darüber einig waren, daß die *"effectiveness"* des Rechtsmittels als Voraussetzung für die Anwendung der Völkerrechtsregel über die Erschöpfung des nationalen Rechtsweges anzusehen sei, erörterte der Schiedsrichter zunächst die Bedeutung des Begriffes *"effective"* und führte hierzu folgendes aus (p. 22 f.):

> "The meaning of this term "effective" has however been discussed almost exclusively in connection with the question whether there is or is not a failure of law or courts to fulfil the requirements of international law, e. g. in cases where it is suggested that, as Borchard observes (a. a), it is unnecessary to exhaust local remedies because, as Secretary of State Fish once said, "there were no justice to exhaust". This is quite natural as amongst the cases of international claims for compensation the cases of alleged failure of law or courts have been beyond comparison the most frequent. But there may arise, and have arisen, cases where, without it being suggested that there is such a failure of law or courts, it is contended that the remedies open to the individual claimant were not effective. Such cases were e. g. the prize cases, cited by Borchard (a. a.) where it was held that in the face of a uniform course of decisions in the highest courts, a reversal of the condemnation being hopeless, an appeal was excused. Here, it appears, it was not a question of a failure of the courts nor of the law to fulfil the requirements of international law but the claim failed on its merits and it was hopeless to appeal."

Da die finnische Regierung das Vorliegen eines *failure of law or courts to fulfil the requirements of international law* nicht behauptet hatte, brauchte der Schiedsrichter auf diese Frage nicht weiter einzugehen. Dagegen hatte Finnland geltend gemacht, die Berufung sei nicht *effective*, weil einmal die nach den Vorschriften des "Indemnity Act" zu erwartende Entschädigung nicht den vollen Schaden decken würde, ferner weil "in consequence of the provisions of the Indemnity Act that appeal is allowed only on points of law, the only remedy open to the shipowners was barred, as the decision of the Arbitration Board that there was a Russian, and not an English requisition, was a finding of fact from which there was no appeal".

Der Schiedsrichter untersucht zunächst den Umfang der nach dem "Indemnity Act" zu gewährenden Entschädigung. Er kommt — in Übereinstimmung mit der britischen Auffassung und ohne nähere Begründung — zu dem Ergebnis, daß dieser Schadensersatz in ausreichender Weise den Schaden decke und daher als angemessen ("adequate") anzusehen sei (p. 26). Bei dieser Gelegenheit erörtert er die Frage, ob ein Rechtsmittel als *"effective"* anzusehen sei, wenn das Gericht zwar die Hauptpunkte der Entscheidung nachprüfen könne, aber nicht in der Lage sei, eine volle Entschädigung zuzusprechen. Hierzu nimmt er wie folgt Stellung:

> "... it appears hard to lay on the private individual the burden of incurring loss of money and time by going through the courts only to exhaust what to him — at least for the time being — must be only a very unsatisfactory remedy; and although the Arbitrator is aware that the contrary opinion has been frequently expressed, the Arbitrator is inclined to find it doubtful whether the fact that such kind of exhaustion has not taken place always can give the respondent State the right to object to an international interposition".

Der Schiedsrichter geht nun über zur Prüfung der wichtigsten Frage nach der *effectiveness* der Berufung. Es handelte sich um drei Fragen, die von dem Schiedsrichter formuliert werden. Die im Anschluß daran folgende Erörterung der Fragen bildet das Kernstück des Urteils. Die dabei aufgestellten Regeln sind von grundsätzlicher Bedeutung. Sie werden nachstehend im Wortlaut wiedergegeben: (p. 27 ff.):

> "Firstly: Which contentions of fact and propositions of law are to be considered by the Arbitrator? Every plausible contention "by which the individual claimants can, or probably can, obtain from a tribunal a decision on the merits of their claim provided they formulate their claim in the right way" (British Memorial No. 45)? Or only the contentions brought forward by the Finnish Government before the Council of the League of Nations? Or added to these the contentions of the Finnish shipowners before the Arbitration Board, if there are any such additional arguments?
>
> Secondly: Are the contentions of fact and propositions of law which are thus to be taken into account when applying the local remedies rule to be considered as well founded? (British Memorial No. 44, 45 and Countermemorial No. 21; Finnish Memorial No. 31.) Is, as regards the legal propositions, the case to be considered upon the basis only of the propositions of law which reasonably arise out of the facts? (Finnish Memorial No. 31.)
>
> Thirdly: Is the local remedy under the local remedies rule to be held as not effective only where it is obviously futile to have recourse to the remedy on those merits of the case which are to be taken into account, or is it sufficient that such a step only appears to be futile? (British Countermemorial No. 21; Finnish Government at the oral hearing 6.2).
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> As to the first question it is to be observed that the British Government before the Arbitrator, in their Memorial (No. 45), say: A case is

not taken out of the operation of the local remedies rule because it can be formulated in a way and upon grounds so that there is no municipal remedy, if there are other grounds and other ways of formulating it upon the basis of which a municipal remedy exists.

The British Government, at the oral hearing, further contended that the points of law put forward at the proceedings before the Arbitration Board are to be considered, whether they afterwards may have been abandoned by the claimant State or not (3.49).

The British Government before the Arbitrator, at the oral hearing, added: A respondent state is only able to do justice in its own way or to obtain a decision of its Courts of justice on the facts and the law in a case, if the grounds of law and fact on which the international claim is based are actually raised and submitted to its tribunals. The very idea that you are going to do justice and that you are going to investigate a claim must mean that all the relevant questions of law and fact are before the tribunal. In order to satisfy the local remedies rule it is necessary that all contentions, both of law and of fact, should have been raised and submitted to the tribunal and pronounced on by them. Otherwise you could not carry out the raison d'être of the local remedies rule. It is therefore necessary in the present case to see how the claimants formulate their claim and to examine the grounds on which it is based and then to see whether the various contentions could have been taken before the Arbitration Board in the first place and before the Court of Appeal in the second place. If they could have been raised and taken then it is, in order to satisfy the local remedies rule, necessary that they should be taken (5.75).

The British Government further said that they would not contend that every possible legal argument which could have been used afterwards ought to have been taken before the Arbitration Board. But if it was a legal argument which, if sound, was necessary in order to establish the claim, viz. was an essential constituent element of the international claim in the legal sense, then you must treat it as one which must be raised before the Court of first instance (5.77; 1.78).

As to the second and third question it may be mentioned that the British Government before the Arbitrator, in their Countermemorial (No. 21) and in their Memorial (No. 44, 45), say that the local remedies rule does not require recourse to remedies which are obviously futile. But in deciding whether the local remedy is one which must be considered to be obviously futile, the case must be considered upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct. If, upon the assumption that the claim is a good one, there is a means by which the individual claimants can, or probably can, obtain from a tribunal a decision on the merits of their claim provided that they take the proper proceedings within the right time and formulate their claim in the right way, they must have recourse to this remedy. If there is a manner in which they can formulate their claim and obtain redress under the municipal law they must avail themselves of it.

The British Government before the Arbitrator, in their Memorial (No. 44) add: It is stated that there is no need to have recourse to

municipal remedies, if it is clear that this action can lead to no possible result other than the rejection of the claim. It may, however, be that there is no chance of success, not because the municipal law fails to provide adequate remedies, but because there are no merits whatever in the claim; it may be founded upon alleged facts which are palpably erroneous and be supported by contentions of law which would be rejected in the courts of any nation. It is clear that the fact that a claim is obviously ill founded and therefore it would be useless to pursue it in the municipal courts is not a ground for taking it out of the rule that municipal remedies must be exhausted. This would be equivalent to saying that the rule applied in the case of meritorious but not to unmeritorious claims, which is manifestly absurd. In order to ascertain whether, under the rule, the case is one where recourse must be had to the municipal remedies or whether without any such recourse it can be stated that no such remedies exist, the case must be considered upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct. It is obviously upon this basis that this question must be considered.

The Finnish Government before the Arbitrator, in their Countermemorial (No. 31), say: The relevant principle to be adopted in connection with the rule as to local remedies does not appear to have been discussed by authority. In theory there might be something to be said for the view that some investigation even of the facts would be permissible, in order to ascertain whether municipal means of recourse were open to the claimants, but this involves practical difficulties and it is certainly convenient to proceed upon the hypothesis that the allegations of fact in the claim are true. The Finnish Government, therefore, has no objection to this being adopted as the basis in the present case. But as regards the legal propositions, whilst we consider that, properly understood, those advanced in support of the present claim are substantially correct, the Finnish Government is quite unable to accept the principle laid down by the British Government. The true hypothesis is to consider the case upon the basis of the propositions of law reasonably arising out of the facts. In order to illustrate our meaning we would say that, if a contention of law which is manifestly absurd has been put forward at some time or other in support of a claim, it is idle to assume that that contention is well founded and to ask: What would the claimants rights be under the municipal law upon that erroneous hypothesis?, for it is clear that, in fact, they would have none. Some regard must be had to realities. But it is not necessary, on the other hand, to insist that before a legal proposition is taken into account its correctness must be conclusively established. It is sufficient if the proposition is reasonably arguable so that it cannot be said in advance that the municipal court would reject it, as in this case there may be ground for holding that a local remedy existed. A proposition of law of this character may, therefore, be assumed to be correct for the purpose of seeing whether, under the international law, resort should have been had to the municipal means of recourse. The rule as to local remedies is not a rule devised for the purpose of preventing international claims from being made because they are, or are thought to be ill-founded, but it is based upon quite different conceptions: in cases of the present cha-

racter the basis of the rule is that the foreign State should, first of all, be given the opportunity of redressing the wrong alleged. Whether a wrong has really been committed is a different question altogether, with which the international rule under discussion is not concerned; the only point under that rule is: Does the municipal means of redress exist?

The British Government before the Arbitrator, at the oral hearing, submitted that there is not a right to challenge the British Court of Appeal for not being an effective means of redress without approaching the question on the basis that the submissions were effective submissions in law and not bad points of law which, after having been rejected by the Court of first instance, could not be taken to the Court of Appeal (3.106). The Courts of England are being arraigned in an international procedure for not affording justice to people (3.50). This matter must be decided on the assumption that the propositions of law put forward at the Arbitration Board were sound propositions. A man has not the right to put forward a whole string of contentions, have them rejected, and then say that the appeal is illusory because they have been rejected, unless he is prepared to go on to say: "These propositions of law must be assumed to be sound, on the assumption that they are sound, was there an appeal"? (1.50, 51). Throughout the statements of the Finnish Government there is the assumption that there is the injury, that there is the right to compensation corresponding to the injury and that the British Government does not provide effective and substantial means of obtaining that redress. This leads to the basis that the submissions of law are valid and that the Finnish shipowners therefore have an *injuria* to which the British Government are unwilling to give a redress. You must not slip from the conception of a claim put forward by a wronged individual who has suffered an injury into the conception of a claim, however ill-founded, which it is idle to pursue (3.102). You can only see whether their injury will get no redress by assuming that their points are right, because if their points of law are right the decision ought to have been the other way. It is only by assuming that their points of law, or sufficient of them to change the decision of the Arbitration Board round, were right that you can put them into the position of being able to say that they have an injury which we have failed to redress (3.108). You have to approach the question, not on the truth but on the assumption that at least one or more of those submissions of law, being relevant to the decision, were right (3.111). It is a perfectly accurate statement of the Finnish Government that the hypothesis must be that the contentions of law reasonably arising out of facts are well founded, although, of course, the law may come in at the beginning or in the middle or mixed up with the facts or at the end. But the Finnish Government can not be allowed to say that any point of law which has actually been put forward by that side does not reasonably arise out of facts (3.104). If they argued them at the Arbitration Board or are trying to argue them before the League of Nations, they cannot be heard to say that they do not reasonably arise (1.105).

The Finnish Government before the Arbitator, at the oral hearing, contended that the question whether a claim is meritorious or not has nothing to do with the rule of exhaustion of local remedies. This rule

has nothing to do with the question of the merits of the case. It is not to be lightly assumed that a responsible and civilised Government is going to take up a completely and palpably bad claim. But if it did, it would be very easy for the other Government to deal with it from an international point of view, but the rule as to local remedies has nothing to do with the question whether the claim is a good claim or not on the merits. Neither can it be said that the fact that a contention has been put forward makes the contention resonable (4.78).

The Finnish Government before the Arbitrator, at the oral hearing, further contended that the international law requires that a foreigner should exhaust only such remedies as appear to be effective and adequate. (6.2).

In the view of the Arbitrator, the British Government, when saying that the Courts of England are being arraigned in an international procedure for not affording justice, cannot mean that here is an alleged case of failure of courts to fulfil the requirements of international law, creating liability for the British Government under international law. This is the case e.g. where there is a decision of the courts which is, as Borchard says (Diplomatic protection of citizens abroad §§ 130, 81) "grossly unfair and notoriously unjust". That this here should be the case has, of course, not been alleged. The contention of there being an arraignment can only mean to say that the Finnish Government contend that the claim rejected by the Arbitration Board is a meritorious claim. But a rejection of a meritorious claim by a British Court does not in itself under international law create any liability for the British Government.

The international claim of the Finnish Government, in consequence, is not based on the fact of the rejection of the claim of the Finnish shipowners being a breach of international law. If the basis were an alleged failure of courts or law to fulfil the requirements of international law it would have been natural to hold that all relevant facts and points of law which could support the private claim should be taken into consideration. Otherwise such a failure, especially of law, could not be ascertained. But here the alleged fact, creating liability under international law, is an initial breach of international law, consisting in the alleged taking and using of the Finnish ships without paying for it.

In this case the local remedies rule serves only the function explained by the British Government (British Memorial, No. 49 note 32) and accepted by the Finnish Government (Finnish Memorial No. 23 and at the oral hearing 4.56) to the effect that the respondent State is entitled, first of all to discharge its responsibility by doing justice in its own way, but also to the investigation and adjudication of its own tribunals upon the questions of law and fact which the claim involves and then on the basis of this adjudication to appreciate its international responsibility and to meet or reject the claim accordingly.

The Finnish and the British Governments are of the opinion (expressed in the British Memorial No. 4 and the Finnish Countermemorial No. 23) that there may be cases where it can be said that a breach of international law has been committed by the very acts complained of and before any recourse has been had to the municipal tribunal. These acts must be committed by the respondent Government

or its officials, since it has no direct responsibility under international law for the acts of private individuals.

The Finnish Government, as has previously been mentioned, contend that the situation alleged to have arisen by the taking and using of the Finnish ships by the British authorities without paying for it, covers such a case.

If what the parties in these respects contend is right — and the Arbitrator is of the opinion that it is so — then it appears that the raison d'être of the local remedies rule, in a case of an alleged initial breach of international law, can be soleley that all the contentions of fact and propositions of law which are brought forward by the claimant Government in the international procedure as relevant to their contention that the respondent Government have committed a breach of international law by the act complained of, must have been investigated and adjudicated upon by the municipal Courts up to the last competent instance, thereby also giving the respondent Government a possibility of doing justice in their own, ordinary way.

The consequence is, in the opinion of the Arbitrator, that in a case of an alleged initial breach of international law, the rule that the respondent State »is entitled to the adjudication of its own tribunals upon the question of law and fact which the claim involves» can bear only on the contentions of fact and propositions of law put forward by the claimant Government in the international procedure and that the opportunity of »doing justice in its own way» ought to refer only to a claim based upon these contentions. If the claimant Government do not maintain certain of the contentions advanced and rejected in the municipal courts, though perhaps, in fact, these contentions are relevant to the success of the international claim, the disadvantage is on the side of the claimant Government. The respondent Government has no reasonable interest to insist upon that, as a previous condition to further international proceedings, such contentions, perhaps repudiated by the claimant Government and in all events not put forward as a basis of their claim, should be subject to the investigation and the adjudication and the decision by the municipal courts and it does not seem reasonable to ask the claimant Government in the international procedure to advance and defend propositions which they hold to be wrong.

The Arbitrator is aware of the fact that in learned works, at the conferences of Institut de Droit International and especially at the Codification Conference of 1930 the proposition has been advanced that no responsibility of the State can come into existence until the private claim has been rejected by the local courts, whether the basis brought forward for of the international claim may be a failure of the local courts or law to fulfil the requirements of international law or the basis is an initial breach of international law.

If this proposition means that the reponsibility of the State does not come into existence until the grounds upon which the claimant Government in the international procedure base their contention of an initial breach of international law have been rejected by the municipal courts, this proposition does not seem to result in any difference as to the question which contentions of fact or propositions of law should be considered under the local remedies rule.

It is, besides, of interest to observe that this proposition seems to be in conflict with arbitral decisions by United States and British claims Commission of 1871. The claims to be considered by this Commission were all claims on the part of corporations, companies or private individuals, citizens of the two countries, upon the Governments of the other country, arising out of acts committed against the persons or property of citizens of each country during 13 april 1861—9 april 1865, with the exception of the claims generically known as the Alabama claims, which were dealt with by another commission. In two of these cases the private claimant was excused for not having appealed because of the impossibility to communicate with counsel or because of the courts decision having been given so rapidly that the claimant, residing far away, had no opportunity to interpose any claim or defense. (Moore, Arbitr. p. p. 688—690; 3152—3159). If the international breach does not come into existence until the private claim is rejected by the highest competent municipal court, then the recourse to that court is a matter of substance and not of procedure and it is difficult to see how, if such is the case, an excuse as the one put forward in these cases could have been accepted.

The answer to the first question: Which contentions of fact and propositions of law in support of the international claim shall be considered by the Arbitrator? is then: All the contentions and propositions brought forward by the Finnish Government in the international procedure before the Council of the League of Nations, but only these, shall be taken into account.

The British Government before the Arbitrator, at the oral hearing, contended that the international claim is based on exactly the same legal grounds as those which were raised by the Finnish shipowners before the Arbitration Board (5. 75). If this contention were accurate the question now dealt with would be of no direct relevance. It will, however, be seen that, on important points, this is not quite the case.

The Finnish Government before the Arbitrator, at the oral hearing, declared to withdraw one of the contentions of law, advanced before the Arbitration Board by the Finnish shipowners and maintained by the Finnish Government before the Council of the League of Nations.

The British Government objected to this withdrawal as the formal arguments of the Finnish Government before the League of Nations are forming the very basis of the Arbitration (3.85).

The Arbitrator is of the opinion that the purpose of the proceedings before him is only to help him to answer the question whether the requirements of the local remedies rule have been fulfilled, and that that question includes the point whether the contentions put forward before the Council of the League of Nations have been tried in the competent municipal courts. Under such circumstances a point of law which has been urged before the Council can not properly be withdrawn before the Arbitrator.

As to the second question the Arbitrator wants to make the following observations.

According to the principles approved by the Arbitrator every relevant contention, whether it is well founded or not, brought forward by the claimant Government in the international procedure, must under

the local remedies rule have been investigated and adjudicated upon by the highest competent municipal court.

The parties in the present case, however, agree — and rightly — that the local remedies rule does not apply where there is no effective remedy. And the British Government, as previously mentioned, submit that this is the case where a recourse is obviously futile. It is evident that the British Government there include not only cases where recourse is futile because on formal grounds there is no remedy or no further remedy, e. g. where there is no appealable point of law in the judgement, but also cases where on the merits of the claim recourse is obviously futile, e. g. where there may be appealable points of law but they are obviously insufficient to reverse the decision of the Court of first instance. The British Government, however, contend that in this latter case the merits must be considered upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct.

The Arbitrator is of the same opinion, with the reservation only that, of course, where it is, as here, a question of remedy on appeal, and contentions of fact maintained by the claimant Government but rejected by the Arbitration Board, are not appealable, such contentions may not be taken as well founded.

The contentions to be taken into account must be considered well founded because otherwise the rule that where recourse is futile recourse is not required, would lead to the consequence, pointed out by the British Government, that unmeritorious international claims would be taken out of the rule that municipal remedies must be exhausted. But, as previously said, every relevant contention brought forward by the claimant Government in the international procedure — whether erroneous or not — must, according to the opinion expressed by the Arbitrator, under the local remedies rule have been examined by the municipal courts, ere the respondent State is bound to enter into further international proceedings.

The Finnish Governement agree that the case should be considered on the basis that the allegations of fact are to be taken as true and the contentions of law as well founded, provided that these latter contentions are reasonably arising out of the facts.

The British Government find this statement perfectly accurate, but contend that all contentions of law still argued by the Finnish Government before the League of Nations must be considered as reasonably arising out of the alleged facts.

The effect of this contention is, in fact, the same as the effect of the rule accepted by the Arbitrator, viz. that as every point of law put forward by the claimant Government in the international procedure must be examined by the municipal courts, it does not matter whether the point is erroneous or not. But it is evident that if the alleged facts deemed to be true or the facts which in the decision of the Court of first instance are stated to be true and are not appealable, are in conflict with the facts which, according to the contention of law, equally deemed to be true, are necessary for arriving to the contended act in the law, then the contention of law must be without relevance to the present case. It seems to the Arbitrator impossible to come to

another solution in this conflict of contentions which must all be considered as well founded.

As regards finally the third question, whether the local remedy shall be considered as not effective only where it is obviously futile on the merits of the case which are to be taken into account, to have recourse to the municipal remedy, or whether, as the Finnish Government suggest, it is sufficient that such a step only appears to be futile, a certain strictness in construing this rule appears justified by the opinion expressed by Borchard when mentioning the rule applied in the prize cases. Borchard says (a. a. § 383): »In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.«"

Nachdem der Schiedsrichter so die bei der Entscheidung anzuwendenden Grundsätze festgelegt hatte, mußte er untersuchen, ob nach diesen Regeln das Rechtsmittel der Berufung im vorliegenden Falle als effektiv anzusehen war. Hierzu mußte er zunächst feststellen, ob das Urteil des Arbitration Board "appealable points of law" enthielt. In dem folgenden Hauptteil des Urteils ist nun in außerordentlich eindringlicher und umfangreicher Untersuchung die hier allein nach englischem Prozeßrecht zu entscheidende Frage nach der Abgrenzung zwischen Tat- und Rechtsfragen (question of fact — point of law) behandelt. Der Schiedsrichter kommt — unter Heranziehung einer großen Zahl von Entscheidungen nationaler englischer Gerichte — zu dem Ergebnis, daß das Urteil des Arbitration Board einige "appealable points of law" enthalte. Hierzu rechnet er die Fragen, ob nach englischem Recht die Absicht ("intention") als subjektives Element zu dem objektiven Tatbestand der Beschlagnahme zu rechnen sei, ob das zwischen Großbritannien und Rußland im Jahre 1916 mündlich geschlossene Abkommen über die Übernahme der Schiffe durch Großbritannien wegen fehlender Form unwirksam sei und ferner die Frage der Gültigkeit der russischen Requisition nach russischem und finnischem öffentlichem Recht sowie nach Völkerrecht.

Da der Schiedsrichter das Vorliegen von "appealable points of law" bejahte, mußte er auch die weitere Frage untersuchen, ob diese angeführten Punkte geeignet waren, eine Aufhebung der Entscheidung des *Arbitration Board* herbeizuführen. Er verneint dies mit der Begründung, daß es sich um für die Entscheidung unwesentliche Nebenpunkte handele, die an der tatsächlichen Feststellung des Urteils, dass die Wegnahme der Schiffe durch Rußland erfolgt sei, — eine Feststellung, die das Berufungsgericht nicht nachzuprüfen vermag, — nichts ändern könnten.

Nach Lage des Falles hält der Schiedsrichter auch eine Klage vor

den ordentlichen Gerichten im Wege einer "Petition of right" oder eine Klage vor dem War Compensation Court für aussichtslos. Er kommt infolgedessen zu dem Ergebnis, daß der nationale Rechtsweg erschöpft war. v. Tabouillot.

Entscheidungen nationaler Gerichte in völkerrechtlichen Fragen

Vereinigte Staaten von Amerika

Bericht

In der Entscheidung Cook v. United States. The Mazel Tov, 288 US. 102, 53 S.Ct. 305 (1933), behandelt das Oberste Bundesgericht das Recht der amerikanischen Behörden zur **Durchsuchung und Beschlagnahme** von des Alkoholschmuggels verdächtigen **Schiffen außerhalb der amerikanischen Territorialgewässer** und die **Abänderung vertraglich gebotenen Landesrechts durch späteres Landesgesetz.**

Nach § 581 des amerikanischen Zolltarifgesetzes von 1930, der den gleichen Paragraphen des Zolltarifgesetzes von 1922 wörtlich wiederholt, können Schiffe innerhalb einer Zwölfmeilenzone durch die US. Coast Guard angehalten, durchsucht und bei Verdacht der Verletzung amerikanischer Gesetze beschlagnahmt werden. Der amerikanisch-britische Vertrag zur Verhütung des Alkoholschmuggels vom 23. Januar 1924 dagegen legt als äußerste Grenze, bis zu welcher die amerikanischen Behörden das ihnen vertraglich eingeräumte Recht zur Durchsuchung und Beschlagnahme eines des Alkoholschmuggels verdächtigen britischen Schiffes außerhalb der als amerikanisches Territorialgewässer anerkannten Dreimeilenzone ausüben dürfen, den Punkt fest, den das verdächtige Schiff innerhalb einer Stunde von der Küste aus erreichen kann. Die »Mazel Tov«, ein britisches Schiff mit einer Höchstgeschwindigkeit von zehn Stundenmeilen, war am 1. November 1930 11½ Meilen von der amerikanischen Küste entfernt wegen des Verdachtes des Alkoholschmuggels beschlagnahmt worden. Das Gericht erklärt die Beschlagnahme für unzulässig aus folgenden Gründen. Der amerikanisch-britische Vertrag von 1924 regele nach Wortlaut und Vorgeschichte die Durchsuchung und Beschlagnahme von des Alkoholschmuggels verdächtigen britischen Schiffen durch die amerikanischen Behörden außerhalb der Dreimeilenzone erschöpfend. Der § 581 *des Zolltarifgesetzes* von 1922 sei, insoweit er mit den Bestimmungen des Vertrages von 1924 nicht in Einklang stehe, *durch die Vorschriften dieses eines Ausführungsgesetzes nicht bedürftigen Vertrages als des späteren Landesgesetzes ersetzt* worden. Die Übernahme des § 581 des Zolltarifgesetzes von 1922 in das Zolltarifgesetz von 1930 sei auf die landesrechtliche Fortgeltung des Vertrages von 1924 ohne Einfluß. *Ein Vertrag gelte* als landesrechtlich *durch späteres Gesetz aufgehoben oder abgeändert nur*