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Actions by One State Against Another for Transboundary Pollution

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ACTIONS BY ONE STATE AGAINST ANOTHER FOR TRANSBOUNDARY POLLUTION

Transboundary Pollution and International Law

The view of the vast majority of scholars is that customary international law does not yet provide that a State is generally liable for pollution damage caused by sources within that State to another entity. In an effort to explain why this is the case, one authority has written as follows:

> The rules of international law relevant to the responsibility of a state for pollution damage inflicted inside the borders of another state from sources within the state of origin are in an embryonic state, amorphous and ill-defined. The responses of international legal processes to transnational environmental damage have been hesitant, piecemeal and haphazard, provoked usually too late after the event by an ecological catastrophe. Development and growth are still taking place but, despite significant recent developments, it is true to assert both that transfrontier pollution is not internationally actionable in all circumstances and that the conditions in which the international responsibility of a state will be engaged by transnational pollution damage emanating from it cannot be predicated with certainty. International law still equivocates between traditional doctrines of state sovereignty in relation to national resources and the emerging obligation to protect and preserve the global environment. [1]

Another commentator has more recently added:

> Principle 21 of the Stockholm Declaration on the Human Environment of 1972 places on nations a "responsibility to ensure that activities within their jurisdiction and control do not cause damage" outside of their jurisdiction. Responsibility implies a corresponding legal obligation to provide reparation or compensation should the responsibility be breached. Because the Stockholm Declaration left the responsibility under Principle 21 undefined, the corresponding obligation to compensate for transboundary environmental damage remained a hollow concept. In the hopes of giving it content, the Stockholm delegates adopted Principle 22:

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[1] P. McNamara, *The Availability of Civil Remedies to Protect Persons and Property from Transfrontier Pollution Injury* 9-10 (1981).

> States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

> Since Stockholm, international organizations such as the Organization for Economic Cooperation and Development (OECD), the United Nations Environment Programme (UNEP), the International Law Commission, and even the recent World Commission on Environment and Development, have striven to fulfill the mandates of Principles 21 and 22. Individual scholars have also contributed to the effort. The persistent obstacle has been the unwillingness of governments to yield State sovereignty over national resources in order to secure a clear definition of State responsibility.

Without international agreement on the affirmative responsibility to prevent environmental injury to other States, it might seem that the obligation to remediate and compensate when transboundary harm occurs must remain an empty abstraction. Scholars and international organizations have accordingly attempted to give substance to the concept of liability through more explicit international agreements, or more expansive concepts of the responsibility not to cause transboundary damage.[2] The above principles are equally true for pollution damages occurring over a long period of time and pollution damages brought about by an accident or disaster.[3]

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[2] Gaines, International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impass? 30 *Harvard International Law Journal* 311-313 (1989) (photocopy enclosed).

[3] Thus, it seems doubtful that the Soviet Union will ever reimburse any foreign states in connection with the Chernobyl accident. *See* Levy, International Law and the Chernobyl Accident: Reflections on an Important but Imperfect System, 36 *The University of Kansas Law Review* 81-113 (1987) (photocopy enclosed).

Conventions and Agreements

Since customary international law does not contain a rule that generally imposes liability upon States that emit transboundary pollution, many persons and organizations concerned with the deterioration of the environment have proposed the adoption of conventions or agreements establishing State liability for certain types of transboundary pollution or reestablishing mutual liability within certain regions. For example, the creation of a multilateral nuclear liability treaty and a bilateral United States-Canada pollution liability treaty have both been strongly advocated.[4] However, resistance to these types of arrangements has been strong.[5] For this reason, there are no pertinent bilateral agreements and only one multilateral convention that imposes a duty upon States to make reparations for transboundary pollution.[6]

Article II of the unique Convention on International Liability for Damages by Space Objects states that "[a] launching state shall be absolutely liable to pay compensation damage caused by its space objects on the surface of the earth or to aircraft in flight."[7] Article I of this treaty defines the term "damage" to include "loss of or damage to property of States or of persons" and Article VIII provides that "A state which suffers damage . . . may present to a launching state a claim for compensation for [that] damage . . . ."[8] In the event that the parties to a dispute cannot agree on the

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[4] Sadler, The Management of Canada-U.S. Boundary Waters: Retrospect and Prospect, 26 *Nat. Resources Journal* 359 (1986).

[5] *Supra* note 2, at 316.

[6] *Supra* note 1, at 22-23 (photocopy enclosed).

[7] 24 U.S.T. 2389 (photocopy enclosed).

[8] *Id.*

amount of compensation owed by the offending State, the aggrieved State can elect to have a Claims Commission formed. A decision rendered by a Claims Commission must be considered "in good faith" unless the parties have previously agreed that it shall be "final and binding."[9]

States Suing as Private Parties

The idea that the government of an injured State should be able to sue the government of an offending State for transboundary pollution in the latter's courts is one that holds considerable appeal to many environmentalists. This is particularly true with respect to situations in which the pollution has emanated from many sources and has caused harm to many properties. However, it does not appear that any nation has yet amended or so structured its laws as to specifically allow a foreign government to sue its government for transboundary pollution in defined circumstances.[10] Nevertheless, this does not mean that such an action could never be entertained in any nation. Many countries now have environmental laws that allow private parties in foreign countries to employ their own courts to seek compensation from domestic private parties in at least limited circumstances.[11] Civil remedies to protect foreign persons and property from transfrontier pollution injury often extend to government entities responsible for enforcing domestic environmental laws. These laws would also seem to generally allow foreign States carrying on commercial or quasi-commercial activities to maintain suits in that capacity, but there are no reported cases on point. This absence of relevant case law is largely attributable to the problem of proving that environmental damage was caused by

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[9] *Id*. Art. XIX.

[10] *See* attached country reports.

[11] *Supra* note 1.

transboundary pollution. Like private parties, foreign States have been reluctant to enter into expensive and time-consuming litigation when the prospects for a successful outcome have not been very bright.

Conclusion

As the deterioration of the environment becomes an increasingly international concern, a number of States may become willing to enter into agreements providing for direct binding arbitration of environmental disputes and to open up their legal systems to specifically allow foreign nations to maintain actions in their own domestic courts. Until now, however, the field of international environmental litigation between governments has just barely begun to open up and develop.

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BELGIUM

Belgium does not have any statutory provision entitling a person to seek redress for damages against a foreign country or entity. In case of an environmental accident occurring abroad with effects in Belgium, the matter would have to be dealt with by negotiation between the government of Belgium and the foreign country and by established procedures such as arbitration. A Belgian individual may be able to sue in the foreign country under established legal principles. Belgium has a Law on Civil Defense of December 31, 1963,[1] which outlines measures to be taken by the authorities in case of a disaster, and its provisions would apply in case of a foreign disaster that has an effect in Belgium. It has no provision on compensation for loss suffered by any person.

Concerning environmental accidents that may occur in Belgium, there is a Law of January 21, 1987, on Risks of Major Accidents in Certain Industrial Activities,[2] which aims at their prevention and at the action of public authorities in case of their occurrence, but it does not refer to any possible claims made by those who suffered loss thereby. Persons suffering loss are left to follow existing legal remedies.

Responsibility for nuclear accidents is dealt with separately by the Law of July 22, 1985, on Civil Responsibility in the Field of Nuclear Energy.[3] It incorporates the Convention of Paris on

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[1] J. Servais *and* E. Mechelynck, *comps.*, 3 *Les Codes Belges* 658/35 (Bruxelles, Bruylant, 1989).

[2] *Id*. at 658/39.

[3] *Id*. 2 *Les Codes Belges* 413.

Civil Responsibility in the Field of Nuclear Energy of July 29, 1960,[4] and the Additional Protocol of January 28, 1964.[5] The Law of 1985 limits the indemnity payable by the operator of a nuclear facility to 4 milliards of francs for each accident.

Belgium is also a party to the Convention on Long-Range Transboundary Air Pollution, done in Geneva on November 13, 1979.[6] The Convention does not contain a rule on state liability as to damages.

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[4] Register of International Treaties and Other Agreements in the Field of the Environment, U.N. Environment Programme, Nairobi, May 1985. (UNEP/GC/Information/11/Rev. 1.), page 47.

[5] *Id*.

[6] *Id*. at 168.

FRANCE

There is no law in France that specifically allows a foreign state to sue the French State in the French courts for environmental damage that originated in France. The French State does, however, allow itself to be directly sued by foreign individuals, persons and corporations in its own courts for any tort for which the French State or a State-owned industry is liable. Thus, if a foreign state is represented by a person or corporation, it may indirectly sue the French State in the French courts. The proper courts that handle such cases are the *tribunaux administratifs*, and the *Conseil d'État* is the highest authority in this field.[1] So far there is no evidence that such choice of jurisdiction has ever been made. Indeed, France has ratified several international agreements on environmental damage due to nuclear pollution, air pollution and pollution of the waters and seas. In cases of disagreement concerning the liability or the damages and if the diplomatic action fails, the proper way to handle such an issue would be through arbitration or an agreement of both states to submit the dispute to an international tribunal rather than a domestic court. Moreover, suing a state in its own court will not offer the demanding state the same guarantee of fairness that an international court will provide with judges chosen from different countries.

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[1] 1 *De Laubadère: Traité de droit administratif* 463 (Paris, L.G.D.J., 1984).

FEDERAL REPUBLIC OF GERMANY

The Federal Republic of Germany has no domestic legislation specifying that foreign states can sue in German courts for environmental damage caused by an accident or industrial operations in Germany. Currently the liability for environmental damage is largely governed by the general fault-based provisions of torts law.[1] In addition, strict liability is provided for nuclear installations[2] and to some extent for polluters of waterways.[3]

On the whole, the torts law provisions have proven inadequate to compensate for environmental damage, and the desirability of an environmental liability law has been under discussion for some time. A preliminary government draft for such a law was made public in the fall of 1989. From the sources available in the Library of Congress, it appears that the draft imposes strict liability on certain environmentally dangerous instrumentalities. Liability extends to death, personal injury and property damage. The latter must be measurable, and the owner of the damaged property is entitled to compensation. It appears that the draft contains no special rules for foreign plaintiffs.[4]

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[1] Sec. 823 *et seq*. Bürgerliches Gesetzbuch vom 18. August 1896, *Reichsgesetzblatt* (RGBl., official law gazette of the German Reich), p. 195, as amended.

[2] Sec. 26, Atomgesetz in der Fassung vom 15. Juli 1985, *Bundesgesetzblatt* (BGBl., official law gazette of the Federal Republic of Germany) I, p. 1565.

[3] Sec. 22, Wasserhaushaltsgesetz in der Fassung vom 16. Oktober 1976, BGBl. I, p. 3017.

[4] P. Salje, "Zur Kritik des Diskussionsentwurfs eines Umwelthaftungsgesetzes," 22 *Zeitschrift für Rechtspolitik* 408 (1989).

Under current law, foreign plaintiffs have access to German courts under the general provisions on standing venue and jurisdiction of the Code of Civil Procedure.[5] Generally, foreign plaintiffs are granted access to the German courts.

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[5] Sections 1-40, Zivilprozessordnung in der Fassung vom 12. Dezember 1950, BGBl. I, p. 455, as amended.

GREECE

The rules of International Law regarding the responsibility of a State in case of transboundary pollution are still in a rather embryonic stage. Transboundary pollution may be generated within the state of origin either by the state itself or by a private action. The international responsibility of a state in case of environmental pollution can be twofold either because it actively caused the situation or authorized the conduct that generated the pollution. When private interests and property are adversely affected by transboundary pollution, the person affected has the right of recourse against the polluter or against the state where the pollution emanated.[1]

International legal obligations arising from environmental damage may be resolved on two levels. Various procedures exist at the international level to resolve disputes depending on the states willingness to submit to such procedures. International disputes are more frequently solved through diplomatic means, or arbitration. On the second level, individuals or states may seek to resolve international disputes through the domestic courts.[2]

In particular, the environmental laws of Greece do not contain any specific information regarding access of foreigners or states to national courts in case the environmental damage originated on Greek territory. According to the rules of Civil Procedure, the jurisdiction of the Greek courts

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[1] P. McNamara, *The Availability of Civil Remedies to Protect Persons and Property from Transfrontier Pollution Injury* (Frankfurt am Main, Alfred Metzner Verlag, 1981).

[2] Richard Levy, "International Law and the Chernobyl Accident: Reflections on an Important but Imperfect System," 365 *University of Kansas Law Review* 81-131.

includes both nationals and foreigners. In case of environmental damage, the Greek government may claim immunity only with regard to sovereign acts (*jure imperii*) but not contractual, commercial or tortius acts *jure gestionis.* In case of torts, the *lex loci delicti commissi* is established in article 26 of the Greek statute on Private International Law.

Greece has ratified a number of international environmental conventions. However, none of them expressly provide for liability for transboundary environmental damage, such as the International Convention for the Prevention of Pollution of the Sea by Oil signed in London in 1954, as amended, the International Convention of Civil Liability for Pollution Damage signed in Brussels in 1969, International Convention for the Protection of the Mediterranean Sea from Pollution, signed in Barcelona in 1976, etc.

An exception is the Vienna Convention on Civil Liability for Nuclear Damage which provides for adjudication of liability for injuries caused by nuclear accidents "only with the courts of the contracting party within whose territory the nuclear accident occurred."

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INDIA, PAKISTAN, AND BANGLADESH

The environmental laws of India contain no specific provisions allowing a foreign State to sue for damages if an environmental accident takes place. However, foreign States are entitled to bring civil actions in India generally, under qualified circumstances, for redress of their grievance. The Code of Civil Procedure provides:[1]

> §84. A foreign State may sue in any competent court: Provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.

The two conditions of the proviso indicate that the suit must be instituted in the name by which the State has been recognized by the Government of India and that the object of the suit must be to enforce a private right vested the ruler of such State or in any officer of such state in his public capacity.

The word "foreign State" means any State outside India which has been recognized by the Central Government, and the word "Ruler," in relation to a foreign State, means the person who is for the time being recognized by the Central Government to be the head of that State.[2]

The object of litigation by a foreign State cannot be to enforce the right vested in a private subject. It must be for the enforcement of a private right vested in the head of a State or in any officer of such state in his public capacity. In essence, the object of the suit that can be filed under the proviso must relate to a private right vested in the head of that State or of the subjects, meaning, some public

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[1] The Code of Civil Procedure,No. 5, of 1908, § 84.

[2] *Id*. § 87A.

officers of the said State.[3] The private right of an individual, as distinguished from the private right of the State, is not intended to be the subject matter herein.

The private rights of the State must also be distinguished from political rights or territorial rights. It is apparent that all political and territorial rights between States can be settled under International Law by agreement between them. Thus, the private right to which the proviso refers is, the right vesting in the State. It may vest in the ruler of a state or in the officer of such State in his public capacity. It is in respect of such a right that a foreign State is authorized to bring a suit.

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[3] Aki Akbar v. United Arab Republic, 1966 A.I.R. (S.C.) 230.

JAPAN

Japan as a maritime nation has been confronted with various marine pollution problems, but it has not enacted any law that allows another state to bring suit against it in Japanese courts for environmental damage. Nor has it concluded any bilateral treaty that contains a state liability clause under which either state can bring an action in the court of the pollution-causing state.[1]

As for civil liability for oil pollution damage, Japan ratified the 1969 International Convention on Civil Liability for Oil Pollution Damage in 1976[2] and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage in the same year.[3] To implement the above two conventions, Japan enacted the Law on Liability for Oil Pollution Damage in 1975.[4] It should be noted that these two conventions and the 1975 Law are not concerned with state liability, but with civil liability involving private parties.

Under the Convention on the International Liability for Damage Caused by Space Objects,[5] which entered into force in Japan on June 20, 1983, a launching State is strictly liable for "damage caused by its space object on the surface of the earth or to aircraft in flight," regardless of

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[1] The Agreement on Cooperation in the Field of Environmental Protection concluded between the U.S. and Japan (T.I.A.S. 8172) contains no state liability clause.

[2] Treaty No. 9 of 1976; entered into force on Sept. 1, 1976.

[3] Treaty No. 18 of 1978; entered into force on Oct. 16, 1978.

[4] Law No. 95, Dec. 27, 1975, as last amended by Law No. 25, May 8, 1984.

[5] 24 U.S.T. 2389; T.I.A.S. 7762.

whether such damage is caused by government agencies or private individuals.[6] When two or more states jointly launch a space object, they are jointly or severally liable for any damage caused thereby (art. 5).

Under the Convention, a claim for compensation for damages is presented first to the launching State through diplomatic channels (art. 9). If no settlement of a claim is arrived at through diplomatic negotiations within one year from the date on which the claimant State notifies the launching State of its claim, the parties concerned are required to establish a Claims Commission at the request of either party (art. 14). The Commission is composed of three members: one appointed by the claimant State, one appointed by the launching State, and the third member, the Chairman, to be selected by both parties jointly (art. 15).

At present the Convention has been construed as being directly applicable in Japan without any implementing legislation. Such legislation has yet to be enacted, but there is a governmental plan for it.[7] Thus, by virtue of the Convention, Japan as a launching State is liable for any damage caused to another State. In the event that a Japanese national suffers from any damage, Japan as a claimant State would adhere to the following claiming procedure as contemplated in the governmental plan:

> (1) The Science and Technology Agency of the Japanese Government shall conduct an investigation;
>
> (2) The injured Japanese party may report the estimated damage to the Agency;

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[6] Masakazu Toshikage, "Kokusaiteki kankyo hogo to kokusaiho" [International Environmental Protection], 681 *Juristo* 46 (1979).

[7] Masahito Omori, "Uchuho ni okeru kokka sekinin no hori" [Legal Principles Concerning State Responsibility in Space Law], 29 *Kuho* 22 (1988).

(3) The Agency must notify the injured person of the amount of compensation to be requested by the Japanese Government to the launching State(s) and the amount of compensation agreed upon between the Japanese Government and the launching State(s), and must confirm that the injured person has no intention to claim by himself through the court or other means;

(4) In the event that compensation money was received from the launching State, the Agency must take necessary measures to pay the injured person.[8]

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[8] *Id.*

SCANDINAVIA

1. The major sources of international law are the customary law and international agreements, i.e., bilateral and multilateral treaties. Since the environmental issues are relatively new, there are no rules of customary international law governing environmental accidents.

2. The three universal treaties on Antarctica, Outer Space and the Law of the Sea contain certain environmental provisions. These provisions, however, have a limited scope of application and cannot form rules of general international law with respect to environmental issues. Nevertheless, there are some regional treaties concerning the environment. These treaties, which for the most part were concluded during the last two decades, govern the relations between the contracting parties. The rights and obligations stipulated in such treaties regulate only the conduct of the parties involved. Thus, although these treaties constitute regional law, they are not rules of general international law in the proper sense.

3. All of the Scandinavian countries currently have legislation on environmental protection which contain rules on payment of damages to the injured parties. Moreover, the general tort laws of these countries may also be applied in certain cases if the proper cause of action is established. To bring an action under these laws, the injured party must follow the rules of procedure which are partly contained in the laws concerned and partly stipulated in the general law of procedure in each country.

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SPAIN

This nation originally responded to demands for environmental protection with a number of basic statutes;[1] soon thereafter, however, it began to reflect the concerns, thoughts and formulated responses of other nations in Europe and around the world, especially within the current framework of the European Community.

Basic standards for normal or acceptable levels of environmental degradation have been influenced in more than one way by the process referred to above, and are embodied to a large extent in statutes and regulations of administrative character with sanctions and penalties generally consisting of suspension or termination of licenses and permits, and fines involving substantial amounts of money within the context of the national economy. Most of these statutes and regulations, however, do not cover the damages caused by such violations. This circumstance leads one to believe that compensation for environmental damages must therefore be viewed and understood within the context of the provisions of the Civil Code, notwithstanding the criminal projections the specific cases might elicit.

It must be kept in mind, however, that national statutes, codes and regulations are basically intended for national enforcement when national persons, corporations, or the national or local government, dispute specific rights in legal conflicts with one another. Disputes involving another sovereign state is generally addressed through bilateral and multilateral agreements in which the

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[1] Decree No. 2414/1961 of Nov. 30 (*Boletin Oficial del Estado* [BOE] March 7, 1962).

Law No. 38/1972 of Dec. (BOE, Dec. 26, 1972).

Order of Oct. 18, 1976 (BOE, Dec. 3, 1976) etc.

difficult issue of jurisdiction is more likely to be settled to the satisfaction of the parties concerned. Reciprocity is also a frequently accepted standard.

Nevertheless, if the question of jurisdiction is not an issue, and the sovereign state which sustained damages wishes to pursue reparation from the offender, also a sovereign state, the next question to consider is that of whether such plaintiff has standing to litigate in the courts of the offending state. In this regard, the laws of Spain likely to be applicable are found in the Spanish Civil Code.[2] Even though the code does not appear to make direct reference to foreign sovereign states, it does make reference to "legal entities"[3] which are specifically recognized as having capacity to sue and be sued. The possibility of arguing against this interpretation of this concept, however, exists. The latter is weakened by the recognition the Spanish Constitution acknowledges to foreign powers to be parties in full standing to international treaties and agreements with Spain.[4] This implies that they have an equally full standing to assume rights and correlative obligations under the laws of Spain. The negative theoretical possibility is thus severely hampered by the general legal principles referred to.

In connection with the above, and closer to the subject of concern, the same source provides, very emphatically, that for those who abuse or violate the environment under the terms of the law, there shall be sanctions and penalties, as well as the obligation to compensate for damages.[5] Within this context it is very difficult to think that Spanish courts will refuse to assume jurisdiction to enforce such principles on the ground that the plaintiff is a foreign sovereign state. But there may be

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[2] *Código Civil*, compiled by Jaime de Castro-Garcia et al., Central de Artes Gráficas, S.A.

[3] *Id*. art. 35.

[4] *Id*. arts. 93 to 96.

[5] *Id*. art. 45.

formalities to be observed, such as those concerning the posting of bonds to cover the liabilities of a plaintiff who filed a frivolous action.

Once the viability for establishing jurisdiction and standing to litigate is set, the issue of damages caused by negligent action or omission and the corresponding compensation is governed by the provisions of the Civil Code.[6] Standards to determine negligence and resulting damage are provided by the Legislative Royal Decree No. 1302/1986 of June 28 on Environmental Impact Evaluation.[7] A photocopy extracted from the *International Environment Reporter* in English (Bureau of National Affairs, Washington, D.C.) summarizing the statute is enclosed.

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[6] *Id*. arts. 1902 through 1910.

[7] BOE, June 30, 1986.