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The Bearing of Public International Law on Agreements between a Government and a Foreign Corporation Not Governed by Domestic Law

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LIST OF ABBREVIATIONS

ANN 'DIG'	Annual Digest and Reports of Public International Law Cases (1919-50)
A.I.L.	American Journal of International Law
B.Y.I.L.	British Yearbook of International Law
Can Y.B.I.L.	Canadian Yearbook of International Law
Cornel J. Int Law	Cornel Journal of International Law
H.C.R	Hague Court Reports
Hague Recueil	Recueil des Cours del Academie de Droit International dela Haye
Indiana L.J.	Indiana Law Journal
I.C.L.Q.	International & Comparative Law Quarterly
I.C.J.	International Court of Justice Reports
I.L.R.	International Law Reports
I.L.M.	International Legal Materials
Israel L. Rev.	Israel Law Review
J. of Maritime & Commerce	Journal of Maritime and Commerce
P.C.I.J.	Permanent Court of International Justice Reports
Proc. A.S.I.L.	Proceedings of American Society of International Law
R.I.A.A.	United Nations Reports of International Arbitral Awards
U. Chicago L.R.	University of Chicago Law Review
Y.I.L.C.	Yearbook of the International Law Comission

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PART 1 INTRODUCTION

In this research paper the writer is faced with the task of scrutinizing the bearing of public international law, as the topic suggests, on contracts or agreements entered into between private foreign corporations and states. Such contracts are usually called State Contracts. It should be noted that the writer is concerned with State Contracts that are not governed by the domestic law of a particular State or States. In this regard the writer will begin the research paper by briefly describing the parties involved in State Contracts and the nature of such agreements. The writer will then look at the circumstances where it may be deemed to be a breach of international law arising out of a breach of a State Contract. This section of the research paper is the crux of the whole research paper and the bearing of public international on State Contracts will be discussed in detail there. The third section of the research paper will be devoted to the discussion of the World Bank Convention, 1965. This Convention is interesting in that it expressly stipulates that public international law may be chosen by the parties to be the law governing a particular contract. Finally in the Conclusion, the writer will briefly discuss the growing trend towards adopting an international commerical law or usually called international law of contract which will apply to State Contracts of the type concerned in this research paper. The writer will then end the paper by discussing that the changing structure of international law makes it inevitable that public international law should also govern contractual relations between a State and a private corporation as opposed to the traditional notion that public international law only applies to state/state relations.

A. PARTIES

State is the typical and most obvious example of an international person. The typical of a traditional definition of what is a State is the often quoted provision of the Montevideo Convention of 1933 which stipulates that a State :

> "as a person of international law should possess the following qualifications :
>
> (a) a permanent population;
> (b) defined territory;
> (c) a government; and
> (d) capacity to enter into relations with other States".[1]

Another definition is that :

> "a State, for the general purposes of international law, is a territorial unit, containing a stable population, under the authority of its own government, and recognised as being capable of entering into relations with other entities".[2]

Both definitions, by analogy, have one thing in common for our purpose, that is, a State is an international legal person capable of entering into relations with other entities with or without international personality. Why then do States enter into agreements with private corporations not being international personalities? Private corporations are known as legal persons once registered under a system of registration in a municipal legal system and once having that corporate legal entity they are capable of entering into transactions as would an ordinary individual do, that is, a corporation or company is an artificial person with perpetual succession, thus, may own property, make contracts and sue and be sued.

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Over the years, nationals[3] of one State have entered into business transactions not only with their counterparts in another State, but also with the foreign State itself. These contracts are usually called "international contracts" although this term is not a perfect description of such transactions.[4] McNair tends to prefer the expression "Economic Development Agreements",[5] but it would seem that such a description is too specific and a bit one sided. It is also suggested that such contracts be called "transnational agreements",[6] however because of the confusion the name of such transaction might make, for our purpose such transactions will be referred to as " state contracts".

These contracts have increased in numbers in recent years with the intensification of international trade and with the emergence of new States, particularly the 3rd World countries, desirous of developing rapidly their economy and industry through the promotion of their external trade and the encouragement of foreign investors and technical assistance. In this way untapped natural resources can be utilized, thus, contributing immediately to the welfare of the State.

It should be noted that the status of the parties to such " state contracts" is unequal in law, in fact or both in law and fact because of the fact that the foreign party is a private corporation whereas the second party is either an international legal person or often a government owned agency. Further, the relationship between States or other international persons is subject to public international law, while relations between a private person and a foreign State is governed by some municipal legal system (which is determined by the rules of conflict of laws) except in so far as universally recognized principles of customary international law have been incorporated into such municipal rules so as to become an ingredient thereof. Because of the confusion as to which law is applicable to the latter relationship, discussion on that subject will be made in the next chapter.

B. NATURE OF AGREEMENT

1. State Contract

Firstly, I take "State Contracts" for our purpose to mean Contracts between States (and in some cases State Corporations and other public bodies) on the one hand and a foreign private individual, firm or corporation on the other.

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The typical factual background is as follows :

> A State has entered into a contract with a private person the national of another State. Under the contract the foreign party to the contract may undertake, for example, to build a railway or to supply goods or make a loan, whether on security of bonds or otherwise or may be granted a concession.[7] In other words, I exclude intergovernmental agreements as well as agreements between governments and public international institutions.

II. International Contract

In simple terms, it is submitted that once a contract has moved to the international plane, it cannot lawfully be affected by unilateral, national legal action. Since States cannot invoke their sovereignity to abrogate an international treaty by analogy, it is argued, neither can they do so to alter an internationalized contract.

It is difficult to precisely define what is an "international contract",[8] but an attempt to define it is worthwhile. Basically, the factors on[9] which the overall definition of international contract should be based are :

i. nationality of the parties;[10]
ii. the character of the negotiations;
iii. the subject matter of the contract.

Firstly, contracts between parties whether corporate or individual must be of different and clearly identifiable nationalities and that their principle place of business and bulk of their activity must be carried out in their respective countries. When it comes to a contract between a parent company and foreign subsidiaries or agents it must be established that they are effectively independent in handling their own operations without depending on their parent company. Provided such factor is proved, the contract entered may not be classified as an "international contract".

Secondly, although the character of the negotiations would seem to bear little weight on the definition of "international contracts" it is essential[11] because it shows that parties who enter such contracts are very experienced and sophisticated businessmen who are assisted by legal and other experts.

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Further, that armslength negotiations result in freely agreed agreements which are far from ordinary contracts. Negotiations also reveal the complexities of such contracts. However, usually the courts are satisfied by the fact that the parties are from different countries and operate within the context of legal systems different from the other party's or that the contract involves a commercial transaction that relates to international trade and business operations.[12] It is submitted that such approach should be favoured because the needs of international commerce are not necessarily commensurate with the size of the transaction, its complexity, the use of experts or the degree of sophistication of the parties.[13]

Thirdly, in regard to the subject-matter test, legal and economic considerations seem to play a complementary role. "On the legal side the contract must have contact with several countries, expose the parties to the vagaries of Conflicts Law, enable them to forum shop and 'jockey' in order to secure 'tactical litigation advantages'. On the economic side, the factors to be taken into account are the particular transnational nature of the services rendered on the aggressive economic penetration of new fields of activities by one of the partners".[14] State practice of two major industrialized countries, namely France the United States of America support the above view.[15] The French view is that a contract would be considered as 'international' if it affects the interests of international trade.[16] In contrast, the United States view is that the contract must show that :

i. the parties are of different nationalities with their principla place of business and the bulk of their activity in their respective countries;
ii. negotiations took place in several countries;
iii. the subject-matter of the contract concerns international trade.[17]

Thus, the writer is of the opinion that "it is the multifarious contracts of the transaction with several legal systems which gives it its 'international' status."[18]

III. Internationalization of Contract

Once the possibility of some kind of internationalization of contracts between a government and a foreign corporation is established the question that is asked is : What are the conditions under which it can be said that contract is internationalized?[19]

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The Texaco/Calasiatic Case[20] suggests three possibilities any of which is said to suffice. The contract may refer to "general principles of law" as the applicable law, it may provide for an arbitration clause, or it may be an "economic development agreement". It should be noted that the Texaco/Calasiatic Case did not list the simplest and most obvious possibility that of express reference to public international law.[21] The omission might have been because it is probably rare to refer to public international as the governing law of the agreement. However it has been suggested that contracts between States and aliens can be governed by international law, if such is expressly chosen by the parties as the proper law of the contract.[22]

Thus, it is again repeated that once an agreement has moved to the international level, it cannot lawfully be affected by an unilateral national legal action.[23] It is argued that since States cannot invoke their sovereignity to abrogate an international treaty, neither can they do so to alter an internationalized contract.

a) Clause identifying that international law governs the contract

It is possible for parties to contract where one of them is a State that their legal relationship will be governed by public international law.[24] This is only a choice-of-law clause, adopted for convenience or other purposes.[25] It has been suggested that :

> "It is possible, however, for contracts between parties only one of whom is an international person to be subject to public international law. (a) According to the theory referred to, a contract could be internationalized" in the sense that it would be subject to public international law stricto sensu; that, therefore, its existence and fate would be immune from any encroachment by a system of municipal law in exactly some manner as in the case of treaty between two international person; but that, on the other hand, it would be caught by such rules of jus cogens as are embodied in public international law."[26]

Thus, where the parties have consented that the proper law of the contract is public international law, it follows that either party has a right to invoke public international law to settle any disputes arising out of the contract. Any breach of such contract either by the State party or by the foreign corporation would amount to a breach of international law.

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It would then follow that the whole of the contractual relations has its existence in public international law and that the foreign corporation is assumingly given international personality by a mere choice of law. This seems to be a move away from the law regarding state responsibility since a breach of the contract is automatically a breach of international law vis-a-vis the foreign corporation personally and not vis-a-vis the State of the corporation by maltreating its nationals. It would also mean that where the foreign corporation breaks such contract, the State party may sue the foreign corporation at international law which is contrary to the present position of international law. The difficulty presented by the reciprocal nature of such contract may be solved if it is conceded that the foreign corporation acquires international personality either for these purposes or in general, but it is extremely doubted that this is possible in the present state of international law.

An alternative view is that despite the fact that a contract between a State or a foreign corporation may refer to public international law as the law governing the contract, such contract should not be raised up to the international plane as such, but that the contract should remain at the municipal level whereby principles of international law would be invoked to interprete and give effect to the contract.[27] This approach seems to have been taken by Lord Asquith in the Abu Dhabi Arbitration[28] whereby it is submitted that the sole arbitrator was correct in applying or extracting applicable criteria from general principles, while not committed to the view that the contract had its existence in the international legal system as such.

It is submitted that the present position of international law and the State of authorities do not allow such internationalization, therefore a mere choice of law cannot convert a breach of such a contract by a State party into a breach of international law vis-a-vis the aliens State.[29]

The arbitration in the Texaco/Calasiatic Case agreed that the reference to "general principles of law" means a reference to "international law" as it was said that "general principles of law" are one of those elements, for example, international custom, state practice, which form the general principles of international law.[30]

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It was further said that international arbitration confirms that reference to the "general principles of law" is always regarded to be sufficient criterion for the internationalization of a contract.[31] However it should be noted that the exact meaning of "general principles of law" has not as yet been solved despite the efforts of many jurists to characterize what they are and it does not necessarily mean that such reference is made to international law[32] Lord Asquith in the Abu Dhabi Arbitration clearly refrained from the above trap by saying that :

> "The terms of that clause invite indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilized nations - a sort of "modern law of nature"...
>
> But albeit English Municipal law is inapplicable as such, some of its rules are in my view so finely grounded in reason, as to form part of this broad body of jurisprudence - this "modern law of nature."[33]

It is not clear whether what he meant by "modern nature of law" are those known as general principles of law as embodied in the Statute of the International Court of Justice as a source of international law or was it "general principles" of a different nature.

b) Arbitration Clause

It is said that the presence of an arbitration clause in a state contract suffices to bring the contract to the international level. In the Texaco/ Calasiatic Case[33] it was stated that :

> "Another process for the internationalization of a contract consists in inserting a clause providing that possible differences which may arise in respect of the interpretation and the performance shall be submitted to arbitration".[34]

Submission to arbitration could be a factor to be considered when deciding whether the parties intended to internationalize their contractual relationship, but in reality it would seem that the paramount purpose of an arbitration clause is to remove any dispute that may arise out of the agreement from the jurisdiction of the domestic courts of both parties to a neutral forum.[35]

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It is with this reason that I submit that the presence of an arbitration clause can hardly be construed as necessarily a sign of internationalization and also as a factor for determining the applicable law question. It is said that the arbitration clause has two-fold consequences. On the one hand, the institution of arbitration shall be established by international law and on the other hand, the inclusion of an arbitration clause leads to a reference to the rules of international law.[36] This conclusion was reached on the ground that, firstly, the mere fact that the sole arbitrator was appointed by the President of the ICJ. on the request of one of the parties it implied that international law applied and governed the arbitration.

Secondly, the arbitration adopted the reasons invoked by the arbitral tribunal which decided the Aramco Case[37] which stated that :

> "It follows that the arbitration, as such, can only be governed by international law, since the Parties have clearly expressed their intention that it should not be governed by the law of Saudi Arabia, and since there is no ground for the application of the American Law of the other party. This is not only because the seat of the Tribunal is not in the United States, but also because of the principle of complete equality of the parties in the proceedings before the arbitrators....[38]

I disagree with the view of the sole arbitrator in the Texaco/Calasiatic Case that 'even if one considers that the choice of international arbitration proceedings cannot by itself lead to the exclusive application of international law, it is one of the elements which makes it possible to detect a certain internationalization of the contract.'[39] His conclusion, that the reference to an international arbitration is sufficient to internationalize a contract was based on the award of the arbitration in the Sapphire Case[40] which held that :

> "If no positive implication can be made from the arbitral clause, it is possible to find there negative intention, namely to reject the exclusive application of Iranian Law".[41]

Theoritically, it could be argued that the Sole Arbitrator's view is quite correct only on the issue of determining the intention of the parties to internationalize their contractual relationship, but on the practical side it would appear that the parties only intend to refer any dispute arising out of the contract to a neutral forum.

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C. CONCESSION AGREEMENTS

The Texaco/Calasiatic case lists "economic development agreements" (Concession agreements) as a possible manner in which a contract can be internationalized.[42] These are different kinds of State Contracts from the normal contracts between States and private persons.[43] The elements[44] that characterize these agreements are that :

i. their subject matter is particularly broad: different form the normal State Contracts, they tend to bring to countries particularly to under-developed 3rd World countries investments and technological assistance, especially in the areas of research and exploitation of mineral resources or general helping towards building the infrastructure of the countries. It is because of their participation in the developing of the country that they become very important.

ii. The long duration of these contracts infers that close co-operation between the State and the contracting party is essential and such contracts involve payment installations as well as the investor acquiring a greater amount of responsibilities.

iii. In addition to element II and the magnitude of the investment the private contracting party has agreed to perform, the nature of such contract is reinforced, that is, "the emphasis on the contractual nature of the legal relation between the host State and the investor is intended to bring about an equilibrium between the goal of the general interest sought by such relation and the profitability which is necessary for the pursuit of the task entrusted to the private enterprise".[45]

Because of the enermous risks involved in such large investments the investor must be given protection particularly from the effects of legislative enactments and State acts which would amount to the violation of the agreement in one way or the other. A classic example would be the incorporating of the so-called Stabilization clause that has the effect of removing the whole or part of the contract from the domestic law of the host State to another system of law 'sui generis' or as argued in the Texaco/Calasiatic Case to the public international law system.[46]

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Support for the view that concession agreements perse are internationalized contracts is had by reference to the Sapphire Award which held that :

> "Such a solution seems particularly suitable for giving the guarantees of protection which are indispensable for foreign companies, since these companies undergo very considerable risks in bringing financial aid and technical aid to countries in the process of development. It is in the interest of both parties to such agreements that any dispute between them should be settled according to the general principles universally recognised and should not be subject to the particular rules of national laws ....."[47]

It has been argued by jurists that concession agreements are of such a complex and different nature as distinct from other State Contracts that the relations of States and foreign investors as such should be treated on the international level and not as an aspect of the normal rules governing the position of aliens and their assets on the territory of a state.[48]

In principle private corporations which have their existence in a municipal law system do not have international legal personality and as such a concession agreement between a State and a foreign private corporation is not governed by the law of treaties.[49]

The arbitral tribunal in the Texaco/Calasiatic Case in its attempt to clarify and specify the meaning and the exact scope of internationalization of a contract came to the conclusion that legal international capacity is not attributable to a State and that international Law encompasses subjects of divesified nature.

This is a shift away from the purely "inter-state" international law, in response to contemporary developments, consequential demand and incidental claims. Conservative international lawyers would undoubtedly deny a place in international law of private corporations in view of the present position in international law.

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The arbitral tribunal's conclusion is not without support in that it is said that :

> "But if we regard international law as a system that has, from its very beginning, responded to the social needs of international life, and that must continue to respond to the changing structure of international relations, its limitation to the forms of yester-year is not only injurious but quite unnecessary".[50]

The arbitral tribunal stated that if States enjoy all the capacities by the international legal order then, other subjects would enjoy, not all capacities enjoyed by the State, but only limited capacities, that are assigned to specific purposes.[51] Thus, it was stated that a private person acquired only limited capacities for the purposes of interpretation and performance of the contract and could invoke in the field of international law the rights he derived from the internationalized contract.[52]

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PART 2 BREACH OF INTERNATIONAL LAW

A. STATE RESPONSIBILITY ON THE TREATMENT OF ALIENS

I. Circumstances of "breach of Contract"

The contracting State may act in breach of contract, legislate in such a way to the effect that the contract becomes worthless, use its powers under the municipal law to annul or repudiate the contract. What, then is the position in terms of international law. In principle, the position is regulated by the general principles governing the treatment of aliens. The general view[53] seems to be that a mere breach of contract does not in itself create state responsibility in international law. Wrongful interference by a State with the rights of an alien may occur in a number of ways, but the separation of cases into those arising out of breaches of contractual obligations as opposed to those relating to tortious acts is essential in view of the different principles of international law involved. More particularly we are concerned in this paper only with the role of international law where there is a breach of State contracts. Thus, it would be beneficial to attempt to look at and consider the factors which would amount to a violation of international law simultaneously with a breach of State Contract.

a) The Absence of Remedies/Denial of Justice

Under the conditions and in what circumstances can the conduct of the third branch of Government, namely, the judiciary, involve the international responsibility of the State? In cases of responsibility of this type, the problem that one faces is the question, what does the term "denial of justice" mean?[54] In the first place, the term "denial of justice" is often interpreted broadly as encompassing all the acts/omissions which are capable of amounting to international responsibility on the part of the State for injuries caused to an alien, independently of the organ which may have been the direct cause of such injury.

However, I would submit that the term "denial of justice" should be construed narrowly to include only acts or omissions of those judicial authorities, or some organ or officials directly connected with the administration of justice. Nevertheless this argument has not received unanimous support as yet and even international case-law on this point is somewhat conflicting.[55]

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It is with this argument that I form the opinion that the effect of the lack of remedies afforded to the alien amounts to a "denial of justice". What then are the conditions in which it can be said that there is an 'absence of remedies'?

The conditions which will be explained below are, denial of access to the courts of the State,[56] absence of independent courts,[57] illegally constituted courts.[58]

The International Fisheries Co. case is a good case that exemplifies this point. It was said that because the claimants had the right to appeal to the Mexican courts for justice, as the government of Mexico can, as a general rule, be sued in its own Federal Tribunals...'[59], that right of appeal to the Mexican Courts sufficed to prevent the breach of contract by administrative declaration illegal under international law. The inference that can be drawn from the above case is that if the State cannot be sued in its own courts of Law, then that amounts to a breach of an international obligation.

Where an alien is prevented from enforcing his contractual rights by legal process in the domestic courts of the State party, that denial of free access to the courts of the State party gives rise to an absence of remedies situation.[60] It was said in the Ambatielos Case (Greece v UK.) that :

> "The modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence the essence of 'free access' is adherent to an effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.[61]

The court further said that free access to the Courts meant that the foreigner shall enjoy full freedom to appear before the Courts of the State party for the protection or defence of his rights whether as plaintiff or defendant and in the words of the Court "to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country".[62]

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Although the principle of "free access to Courts" in this case was based on 'discrimination' between foreigners and nationals it is submitted that in effect it would have the same application in the situation where aliens were denied access to Courts of the State party to enforce their rights under State contracts where there was allegation by the alien of a breach of Contract by the State.

Where the alien has access to Courts of the State party, but the Courts established to entertain the aliens grievances is not independent then the absence of such independency amounts to a denial of justice or an absence of remedies.[63] Thus, the acts of the courts are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.[64] The case of Robert E. Brown (U.S.A. v Great Britain)[65] exemplifies the situation that there is a denial of justice or absence of remedies where Courts are legally constituted under the domestic law of the host State, but the Court lacks the independency to make a just and unbiased judgement. The tribunal, although disallowing U.S.A. claims on behalf of her citizen on the grounds that Great Britain did not succeed to Acts of the South African Republic, agreed that there was a denial of justice or absence of remedies. The tribunal held that ...." we are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps taken by the Government of South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place. We cannot overlook the broad facts in the history of this controversy. All three branches of the government conspired to ruin his enterprise. The executive department issued proclamations for which no warrant could be found in the Constitution and Laws of the country. The Volksroad enacted legislation which, on its face, does violence to fundamental principles of justice recognised in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the executive to reach the desired result regardless of Constitutional guarantees and inhabitions".[66]

Similarly, where a Court has been established and adjudication has occurred, but the Court has been illegally constituted, then the effect of such illegality is that there has never been any adjudication, thus, an absence of remedies situation arises.[67]

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b) Legislative Interference

When the State resorts to its law making powers to modify or annul the rights and obligations of itself and the foreign corporation, it is submitted that such an act creates an issue of an international character.[68] In the first instance its act is the use of its Sovereign and Legislative power and not as a party to a Contract.[69] Secondly, the State in using its legislative powers in changing existing rights and obligations arising from a Contract to which it is a party.[70] Thirdly, it is taking away the contractual and obligations, including the right of litigation.[71] Finally, "when an alien enters into a Contact with a State, he is engaging in a business transaction. It is reasonable to expect that an ordinary businessman will acquaint himself with the existing laws of the State with which he contracts concerning the transaction into which he is entering. He equally freely consents to the application of the existing laws to that transactions".[72] Thus, foreign corporation in the ordinary course of business expects that its contractual rights and obligations should be respected and complied with and that such existing contractual rights and obligations should not be removed or altered by legislative process.

The distinction between a mere breach of contract and a State legislating to alter or annul the contractual obligations may be best explained by comparing the cases of Serbian Loans[73] and ertain Norwegian Loans.[74] The Serbian Loans Case is a dispute between France and Serbia in which the PCIJ was asked to consider the interpretation of a gold clause in a loan agreement where certain French bondholders, advanced money to the Serbian Government. France argued that the clause established a gold value for payments of interest protecting the bondholders from the effect of currency depreciation. If the argument postulated by France is correct then the actions of the Serbian Government amounted to a breach of Contract. The dispute rose to the international plane only because those who were in dispute were two international persons. The mere fact that the Serbian Government's actions breached the contracts with the French bondholders did not raise the question of international law. However, the question of international law would be raised only under the law of State responsibility where there was allegations of a denial of justice.

Thus, it was not the dispute between the Serbian Government and the French bondholders that characterized the dispute as an international one that come into the jurisdiction of PCIJ. but the difference of opinions of the two Governments.

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The Certain Norwegian Loans Case concerns a dispute between Norway and French bondholders which were taken up by France Governments and the dispute was primarily centred on the effect of Norwegian legislation which the bondholders argued that the effects of such legislation was to absolve the Norwegian Government from complying with the loan agreement. The ICJ. did not decide the case on its merits as it had upheld an objection submitted by Norway on the grounds of lack of jurisdiction, but individual judges did say something on the "internationalization" of the contract.

Judge Reed's dissenting view on the Norwegian contention that the subject matter of the dispute was within the domain of the municipal law of Norway and not of international law was that "when the French bondholder bought a Norwegian bond, there were only two parties to the executory contact which came into being - the bondholder and the Norwegian borrower, either the State or one of the two Banks. The Government of France had no part in the transaction. It was made under national law..... At this stage the transaction come solely within the plane of national law. It would therefore be a matter in which the Court was incompetent to adjudicate, and in which it would be necessary if dealing with the Merits to say that there were no rules of international law governing the transaction".[75] Judge Reed was of the opinion that "something more is needed than the mere adoption of a dispute under the national law to give rise to a question of international law within the meaning of the expression used in Article 36, paragraph 2, Clause (b). There must have been a breach by Norway of an obligation under international law due to France".[76] The passage of legislation by the Norwegian Government which consequently gave Norwegian Government the power to suspend payment in gold to the French bondholders, raised the question, whether Norway could in comformity with the principles of international law, by legislative action unilaterally modify the substance of the contracts between Norwegian borrowers and French bondholders?

Judge Reed in upholding the French Final Submissions was of the opinion that 'in these circumstances, there can be no doubt that questions of international law are involved and that the court is competent to deal with the claim submitted to it'.[77]

It is therefore submitted that the dispute was raised to the international plane by the same action that France alleged the Norwegian Government to have had caused a breach of contractual, namely, the enactment of legislation to modify contractual rights and obligations.

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It therefore follows that once the dispute was raised to the international plane, such breach of contractual obligations amounted to breach of international law, however it should be noted that international proceedings could not be instituted unless local remedies were exhausted.

Judge Lauterpacht was of the opinion that "the relevance of these questions of international law raised by Norway cannot properly be denied by reference to the fact that unless and until Norwegian courts have spoken it is not certain that there has been a violation of international law by Norway. The crucial point is that assuming that Norwegian law operates in a manner injurious to French bondholders, there are various questions of international law involved. To introduce in this context the question of exhaustion of local remedies cannot in itself bring within the province of international law a dispute which is otherwise outside its sphere. The failure to exhaust legal remedies may constitute a bar to the jurisdiction of the court; it does not affect the intrinsically international character of a dispute".[78]

I submit that even if the international character of a dispute is established the local remedies must be exhausted before such dispute can be heard by an international forum.

There is also another view[79] that a Government in legislating to modify or annul contractual rights and obligations is analogous to confiscation and such contractual rights and obligations are equiparated as property. The breach of such rights and obligations would amount to confiscation.[80] In the Shufeldt Claim the arbitrator had to consider the responsibility of Guatamala for a decree made by the Legislative Assembly that declared null and void *ab initio* a contract, the benefit of which was assigned to Shufeldt an American citizen. Under the contract Shufeldt was entitled to extract circle from a piece of area on a public land but only for a certain period. The importance of this case is that both parties to the Contract agreed that if the contract was valid it created rights of property. Although the decree of the Legislative Assembly put an end to the contract, such decree could not deprive Shufeldt of his right to compensation for the loss of his property rights. Further, the decree of the Legislative Assembly which destroyed the property rights, for practical purposes amounted to an act of confiscation and such action, it is submitted, was prima facie a breach of international law.

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A distrinction should be drawn between the Shufeldt Claim and the Serbian Loans and Certain Norwegian Loans Cases because in the Shufeldt Claim international law looks at the alleged wrong from the point of view of the tortious act against property rather than from the contractual stand point whereas in the latter two cases the view taken is that a passage of legislation which has the effect of modifying or annulling contractual rights and obligations is at the same instance a breach of contract and a breach of international law once the contract is raised to the international plane.[81]

c) Breach of Treaty Obligations

It is quite clear that a breach of international law occurs when a party to a treaty commits an act prohibited by such treaty. It is submitted that, based on the same principle, where a treaty postulates that a particular contract between one of the states party to the treaty and nationals of the other states party shall be performed or that the rights created under the contract shall be recognized, a breach of such contract will amount to a breach of an international obligation to the other states party.[82] It also follows that where a treaty specifically prohibits acts which might interfere with contractual rights of nationals in foreign states the States being parties to such treaty, then a breach of contract by that State will amount to a breach of international law.[83]

The Martini Case is the best example that supports the above view. In that case the Venezuela Government entered into a Concession agreement with Martini & Co. an Italian Corporation whereby the Italian Company was to contruct and operate a railroad as well as to operate a coal mine.[84] This contract was terminated by a decree of the Federal Court of Cassation of Caracass on the 4/12/1905. The Italian Company in its counter claim argued that the Venezuelan Government had breached the concession agreement by granting to one Antonio Feo the monopoly of shipping oxen from the ports of Guanta and Puerto Cabello to the Island of Cuba. This argument was rejected by the tribunal on the ground that Martini & Co. did not invoke the treaty before the Court of Cassation at Caracass[85] and that the Feo Contract in no way constituted a violation of Martini's concession contract.

Article 5 of the Feo Contract reads :

> "The National Government engages, on its part, not to allow the establishment of any other steamship line for the transport of cattle from the Venezuelan ports herein specified to any of the ports of the Republic of Cuba".[86]

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Article 9 of the Treaty of Commerce between Italy and Venezuela of June 19, 1861 reads :

> "The two high contracting parties engage not to grant, in their respective states, any monopoly, exemption, or privilege, to the detriment of the commerce, the flag or the citizens of the other State. The provisions of the present article do not extend to the privileges for the articles of which the commerce belongs to the two nations respectively, to patents of invention of improvement and of introduction, which remain entirely governed by the particular laws and regulations in force in the two countries. The Coast wise trade will be governed in the two states, by the particular laws in force".[87]

The Italian government contended that the monopoly granted to Feo constituted a violation of the 1861 treaty by which the contracting parties agreed not to grant any monopoly to the prejudice of the citizens of the other state apart from certain exemptions in the treaty. The tribunal rejected this contention on the grounds that :

i. The tribunal was only concerned with matters in the compromis and not whether the Feo concession had breached the 1861 treaty namely whether the decision of the Court of Cassation constituted a violation of the above treaty.

ii. The decision of the Court of Cassation would have rendered the Government of Venezuela responsible for the violation of the 1861 treaty only if Italy, relying upon the treaty, had made a complaint against the Feo contract before the Government of Venezuela (assuming that Italy's interpretation of the prohibition of monopolies was correct) and the Court in the action against Martini & Co. had declared that the Feo contract was in confirmity with the treaty. But such was not the case.

II. Breach of Contract per se not a breach of international law

There is a school of thought which supports the view that a mere breach of a contract between a State and an alien by the State party will amount to a breach of international law.[88]

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Supporters of this view base their arguments inter alia on the doctrine of acquired rights[89] and the principles of 'pacta sunt servanda[90] and to support these arguments refer to decisions of international arbitration but these cases are usually not on the point because the tribunals were not applying international law or that the cases were decided upon some other elements and not on the breach of contract question. Carlston, for example, argues that :

> "When, however, the termination is effected by the exercise of sovereign power instead of claimed contractual right, there is very considerable authority for the proposition that international responsibility to the state of the concessionaire directly and immediately arises".[91]

He points out that termination of a contract by the exercise of claimed contractual right should not by itself entail international responsibility which is quite clear and need no further discussion,[92] however a unilateral termination by the state not in the exercise of contractual right will amount to state responsibility.[93]

State practice in relation to this view is very weak. For example in both the Losinger & Co. Case[94] and Certain Norwegian Loans Case[95] Switzerland and France respectively argued to the effect that a State is bound by obligations to an alien at the time when the contract is made.[96] No other state seems to have adopted the Swiss/France doctrine, however, in the Anglo Iranian Oil Co. Case, Britain also argued on the same lines as did Switzerland and France in the above cases in that it was argued in its memorial that acquired rights must be respecified by the State granting the concessions.[97]

The practice of the two leading western countries, USA. and UK. is that they require some other elements apart from the mere breach of contract before they can commence international proceedings for allegations of breach of international law. Thus, they do not support the view that a mere breach of state contract by a state will amount to a breach of international law.

International decisions show that there is little support for the view that a breach of contract by a State of a State Contract is perse a breach of international law. In contrast, there is solid evidence that breach of contract by a State of a State Contract is regarded not to be a violation per se of international law.[100]

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A well known case Martini[101] is a good example that supports the above view, but it should be noted that the tribunal's decision in that case was to a degree affected by the limited power granted to the tribunal by the compromis. Hence the tribunal was asked not whether the Feo Contract granted by the government was repugnant to the 1861 treaty but whether in the action brought against Martini & Co. there was a denial of justice or manifest injustice or a violation of the 1861 treaty. The tribunal thereby concluded that in the action against the Italian Firm there was no violation of the 1861 treaty. Although the tribunals competence was limited to the contents of the compromis, it seems that it did not take the view that the breach of contract alleged by the Italian firm as a result of Venezuela granting a monopoly to Feo amounted to violation of international law nor did it consider applying principles of international law to decide whether the allegation that Feo contract amounted to a breach of Contract also amounted to a violation of international law. The tribunal was of the view that the decision of the Court of Cassation would be respected if such court applied the Venezuela Law restrictively without ill will to foreigners. It held that :

> "If the Court of Caraccas in adopting a restrictive interpretation of the Martini Contract on the basis of Venezuela Law, reached the conclusion that the Feo monopoly was not contrary to the Martini Concession that conclusion cannot be characterized as erroneou's or unjust by an international tribunal".[103]

However the tribunal also held that according to the rules of responsibility of states, Venezuela was responsible for the decision of the Court of Caracas holding the Italian Company liable in manifest violation of the Ralston arbitral award and that the deficiencies of the decision of the Court of Cassation amounted to manifest injustice within the intention of the compromis thus amounted to a violation of the international obligations of the State.

Thus this case shows that a breach of contract perse is not a violation of international law but some other elements[104] must be established, for example denial of justice, exhaustion of local remedies rules, before diplomatic intervention by the State of the alien is resorted to for allegations or breach of contract. Even if the tribunal would have thought that the Feo contract was in breach of the Martini concession the tribunal seems to have had the view that the municipal law (in this case Venezuelan) was adequate, to handle that matter.

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Further if the tribunal were asked to decide whether the Feo contract breached the 1861 treaty it would have entertained the case on the international plane, not as an argument between a private person and an international person, but between two international persons for allegations of breach of treaty by the other states party, although Italy would then be asked to prove whether the Feo contract breached the Martini contract as a pre-requisite.

The International Fisheries Co. Case[105] concerns an American corporation, International Fisheries Company, which claimed that it suffered damages as a result of the cancellation by the Mexican Government of a contract or concession which it granted to a Mexican company on the ground of non-performance of the terms of the contract, wherein the claimant possessed a considerable number of shares. The said contract contained a Calvo clause.

The tribunal held that because the claimant could appeal against the cancellation of the contract or concession of the Mexican Corporation in the Mexican courts such cancellation did not amount to an arbitrary act which could be see as amounting to a breach of international law. Thus, again it is submitted, supporting the view, that a breach of state contract is not perse a violation of international law until such act in the words of the tribunal becomes an "arbitrary act".[106]

Another school of thought which it is submitted to be the better view and in conformity with the present state of law is that, as already seen in the arguments regarding the other school of thought therefore needs no further discussion, a breach of contract by a State party contract, whether it be an ordinary state contract or a concession agreement is not perse a violation of international law until some other elements are established.[107] This argument should be isolated from another argument that a breach of contract is a tortious act, therefore the breach itself amounts to a breach of international law.[108] These other elements would include a denial of justice "stricto sensu" and/or lack of remedies situation.[109]

It is therefore on the above grounds that I come to the conclusion that :

> ".... a breach of contract becomes a breach of international law not perse but when other conditions are also present. States become liable for violations of international law arising out of breaches of contract under the law of state responsibility for the treatment of aliens.

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It is submitted that international law specifies what requirements should be present in order to enable a state to discharge its duty of treating an alien according to international standards in relation to contractual rights, and responsibility is incurred when these requirements are not met. Thus, ordinarily, it is not as a breach of contract qua breach of contract that contractual claims will be actionable at international law but as a delict committed in the treatment of aliens".[110]

III. Breach of International Law under the law of State responsibility

a) Conditions under which such law is applicable

The Mavrommatis Jerusalem Concessions Case[111] which was decided by the Permanent Court of International Justice exemplifies the way in which breach of contract (in this case they were concession contracts) would give rise to state responsibility.[112] The case concerns one Mavrommatis who had entered into concession contracts, under which, inter alia, he was to construct an electric tramway, supply of electric lights and power and of drinking water in Jerusalem. It was alleged by the Government of Greek Republic that the Government of Palestine, then under the Mandate of Great Britain refused to recognize to their full extent the rights acquired by Mavrommatis, a Greek under contracts and agreements concluded by Mavrommatis with the Ottoman Authorities in regard to the above mentioned concessions. Under various treaties and by the terms of the Mandate itself Great Britain was obliged to respect certain Concessions granted by the Ottoman Authorities. Another concession was granted to one M. Rutenberg which it was alleged to breach the Mavrommatis Concessions, Clause 29 of the Rutenberg Concession infact provided that if any former concessions infringed the rights in the Rutenberg Concession, Rutenberg was given the right to ask the new government to annul Mavrommatis' rights and pay compensation, but Rutenberg never exercised this right and he in fact renounced the exercise of this right. Great Britain also during the course of proceedings undertook not to annul the concessions granted to Mavrommatis.

In the first phase of the case with regard to the question of the jurisdiction of the (PCIJ) court to entertain the claim, the Court held that although the dispute was at the beginning between a private person and a state, the dispute was pushed up to the international plane when the Government of Greek took up the case thereby making it a dispute between two international persons. It was then and there that international law principles became applicable.

The Permanent Court of International Justice held that :-

> "Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant".[113]

The court also said in that judgement that it was an elementary principle of international law that a State was entitled to protect its nationals if they became injured by acts repugnant to principles of international law done by States and legal redress was not made or such redress was obtained but was of improper standard.[114]

Why then did the Greek Government take up Mavrommatis' Case?. Firstly, it was certainly not the mere breach of Mavrommatis Concessions which occassioned them more, but that the way in which the British Government was handling Mavrommatis' concerns was such that it is submitted to have amounted to a denial of justice situation.

The question of the nationality of Mavrommatis was discussed in the early stages of the Merits Case. The British Government contended that the concessions granted to Mavrommatis were invalid because Mavrommatis was referred to in the concession as an Ottoman subject whereas his real nationality was Greek. British Government thereby, submitted that the concessions were granted in error, therefore were invalid. It should be noted that while Mavrommatis' Greek nationality was questioned in the early stages of the Merits Case, the British Government, during the course of the proceedings, did agree that Mavrommatis was a Greek subject.[115] The court said that the validity of the concessions was assumed throughout all negotiations and that Ottoman nationality was not a pre-condition to granting a concession contract. That the identity of the person was never in doubt and that the intentions of the parties were also clear.[116]

In the words of the PCIJ. it held that :

> "....the reference of M. Mavrommatis as an Ottoman subject in the agreements concerning the Jerusalem Concessions, is not intended to represent a condition on which the grant of the concession is dependant and that, therefore, the fact that M. Mavrommatis is not an Ottoman subject cannot involve the invalidity of the concession. The concessions must therefore be regarded as valid and definitely acquired".[117]

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This shows that the injured person must be a national of the Claimant State at the time of the happening of the injury and must continue to be a national until the case is disposed off.

The Court also decided that the existence for a certain period of a right on Rutenberg to request that the rights of Mavrommatis under the latters concessions be annulled was a violation of international obligations of the Mandatory of Palestine. This holding of the Court re-inforces the view that a mere breach of contract, does not amount to a breach of international law, but that the breach will amount to a breach of international obligations of (in this case) Mandatory of Palestine (UK) where the respondent state is obliged to conform with its international obligations. Hence, a dispute would only arise as a result of the breach of contract between two State parties and not between a private person. This dispute would only be concerned with a breach of international law and not on the breach of Contract.

IV. Calvo Clause[118], Effect of :

The doctrine, it is submitted, is founded on two factors namely : that Sovereign States being free and independent should have the right to contract with aliens on a basis of equality free from any interference of whatever nature by other States especially the State of which the alien is a national; that aliens are not entitled to rights and privileges not accorded to nationals thus they should resort to local authorities to claim redress for allegations of any breach of contractual obligations.[119]

What then is the effect of the Calvo Clause?
In other words, can an agreement between an alien and a State which contains the Calvo Clause deprive the state of alien's nationality the right to take up its subject's case for allegations of breach of international law under the law of State responsibility? What is the validity of the Calvo Clause in international law?

It is usually said that the Calvo Clause is invalid on the grounds that an individual, be it a natural or legal person, cannot 'renounce the protection of his state and waive rights accruing to the State under international law'.[120]

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On the other hand it is said that the Calvo Clause is valid so far as it is limited only to its limited sphere, namely that the alien agrees that any claims arising out of the contract must be made to the local authorities without calling on its State of nationality to make these claims and that the applicable law is the law agreed to by the parties which is usually the law of the contracting State.[121] In the North American Dredging Co. Case it was held that :

> "...it is evident that its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws..... In other words, in executing the contract, in fulfilling the contract, or in putting forth any claim regarding the interests or business connected with this contract the claimant should be governed by those remedies which Mexico had provided for the protection of its own citizens. But this provision did not, and could not, deprive the claimant of his American citizenship and all that implies. It did not take from him this undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other Authorities available to him resulted in a denial of justice or delay of justice as that term is used in international law. In such a case the complaint's complaint would be not that his contract was violated, but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act".[122]

It should therefore be noted in so far as the Calvo Clause emphasises the duty of an alien to submit to the law of the contracting State in whose territory he happens to be or the necessity of exhausting local remedies before a claim may arise under international law under the law of state responsibility, the Calvo Clause merely repeats the existing principle of international law that local remedies must be exhausted before a request can be made to the State of nationality to take up the matter on the international level. Thus the conclusion drawn from the above discussion is that an alien cannot renounce the protection of his State and waive rights accruing to the State under international law.[123]

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B. STATE SUCCESSION

I. Acquired rights must be respected by the successor State

There is a view that, unless the successor State renews the concession contracts, obligations arising under such contracts are terminated and not binding on the successor State when there is a change of sovereignity. Thus, the successor state is not bound to honour obligations that arise from such contracts which were binding on the predecessor State.[124] However, I submit, that the proper view is that rights acquired under concession contracts must be respected by the successor State.[125] The duty to respect rights arising out of concession agreements has been recognized in cases of State succession.[126] D.P.O'Connell states in his exhaustive study that :

> "The generally consistent practice which has just been analysed is clearly based on the principle that the acquired rights of a concessionaire must be respected by a successor State".[127]

The same author also states that :

> "The change of sovereignity may affect a contract in one of two ways, depending upon whether the contracting sovereign survives it or not. If it does not survive, the contract lapses with one of the co-contractors. If it does survive, the contract only lapses if as a result of the change, it is frustrated. In either event, whether the contract fails for want of party or because of frustration, the successor State is not subrogated in its rights and duties. Therefore, it is not called upon for contractual performance. However that is not the end of the matter. Municipal law rarely leaves the loss where it falls in cases of frustration of contract or want of a party. It has equitable devices for restoring a balance between the parties, such as quantum meriut or unjust enrichment. They form part of the "general principles of law" available to international tribunals for solving problems of like juridical significance. When a private contractor has partially performed the contract before it lapsed he has an equitable interest to the extent of the performance. This constitutes an "acquired right" which is unaffected by the change of sovereignity. The formal contractual relationship may have expired but the equity has not".[128]

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This means that although the successor State may not be a party to contractual agreements entered into by the predecessor State, nevertheless, the former is totally subrogated in the contractual relationships of the latter, that is, the successor State has to respect the acquired rights.[129] Thus, where an alien's property is involved, a diplomatic claim may be made by the State to which the alien is a national, against the successor State if the latter does not respect the acquired rights. This claim is only available under the law of State responsibility,[130] for example, when an aliens property is nationalized without appropriate compensation, etc. Hence, where a claim is made against the successor State in this respect and the particular forum has jurisdiction, it may order the successor State, just as it would order another State, to effect restitution.

II. Lighthouses Arbitration[131]

The Lighthouse Arbitration concerns a dispute arising out of a concession agreement entered into between a French firm, Collas & Michel and the Government of Crete in 1860 in the matter of certain lighthouses which the former, was required under the concessions, to manage and maintain. Several claims and counter claims were made by the French firm as well as the Government of Greece respectively, but we are only concerned with Claim number 4. In 1908 the Government of Crete by virtue of a certain statute exempted a Greek ship Aghios Nicolaos from payment of the normal lighthouse dues. This was alleged to be a breach of concession agreement by the French firm. It should be noted that this case of the Lighthouse Administration was later taken up by France. In April 1913, the Balkan war broke out in which, inter alia, Greece and Turkey were involved. The war terminated by the Treaty of Athens of November 1913 as a result of which certain territories, including the autonomous State of Crete, were ceded to Greece. The arbitral tribunal was faced with the problem of deciding the responsibility of Greece as successor State of the State of Crete. Further, the validity of the concessions in dispute were never in dispute.

The only objection raised by Greece was that the claim made against her "pass(ed) all the bounds of logic",[132] because it was argued that it implied a demand that Greece should "assume the debts of the former Ottoman Empire on the ground that, five years after the voyage of the vessel to Crete, that island became Greek".[133]

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The tribunal however held that Greece was the successor State and as such the dues and concessional charges of Crete succeeded to her. She was therefore responsible for the breach of the concession contract involved in exempting the ship "Aghios Nicolaos" from paying light dues to Collas & Michel.

The tribunal stated that :

> "... it can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequencies of the breach of the concession contract, otherwise the avowed violation of a contract committed by one of the two States, linked by a common past and a common destiny, with the assent of the other, would, in the event of their merger, have the thoroughly unjust consequence of cancelling a definite financial responsibility and of sacrificing the undoubted rights of a private firm holding a concession to a so-called general principle of non-transmission of debts in cases of territorial succession, which in reality does not exist as a general and absolute principle. In this case the Greek Government with good reason commenced by recognizing its own responsibility".[134]

In arriving at its conclusion, the tribunal was also influenced by the fact that the Greek Government had in the past, before acquiring full sovereignity over Crete, had knowledge of the illegal nature of exemption and even after the acquisition of full sovereignity over Crete she had continued with that illegal arrangement. Thus, this case reaffirms the principle that acquired rights arising from concession or other State contracts must be respected, notwithstanding the fact that there has been a change in sovereignity.

C. THE PRINCIPLE OF 'PACTA SUNT SERVANDA'

I. Extent of Applicability

There is a view that where State contracts have been internationalized, international law will govern that agreement.[135] To substantiate their view reference is usually ha to the application of the well known principle "pacta sunt servanda".

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How far can this principle be applied in State Contracts or the so-called internationalized contracts? The majority of juristic writers seem to favour the proposition that the principle of pacta sunt servanda is a fundamental principle of law found in all nations.[136] Professor Wehberg in his authoritative study states :

> "We have described the rule of pacta sunt servanda as a general principle of law that is found in all nations. It follows, therefore, that the principle is valid exactly in the same manner, whether it is in respect of contracts between states or in respect of contracts between states or in respect of contracts between states and private companies. Whether, one regards ... the contract of a state with a foreign company for the purpose of granting a concession as being quasi-international law agreements, or whether one ascribes to them another character, the principle of the sanctity of contracts must always be applied.
>
> .... the principle of sanctity of contracts is an essential condition on the life of any social community. The life of the international community is based not only in relations between States, but also, to an ever-increasing degree, on relations between States and foreign corporations or foreign individuals. No economic relations between States and foreign corporations can exist without the principle pacta sunt servanda. This has never been disputed in practice".[137]

State practice also shows how the principle of pacta sunt servanda has been invoked to protect aliens.[138] Thus, any unilateral modification or termination of a state contract by the State contractor is regarded as an act violative of the principle pacta sunt servanda, and contrary to international law. In the Losinger Case[139] and Certain Norwegian Loans Case,[140] both Switzerland and France respectively argued to the effect that the principle pacta sunt servanda not only applies to agreements between States, but also to those concluded between States and nationals of other States. Therefore a breach of such contracts was a breach of the principle pacta sunt servanda, which then amounted to a violation of international law. However, this argument by Switzerland and France has gained little or no support at all[141] because it assumes that a mere breach of State Contract amounts to a breach of international law which is not in conformity with the present State of international law.[142]

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It is with the above reasons that it is submitted that although the principle pacta sunt servanda underlies all contractual relationships either it be State-State relationship or State-Alien relationship, nevertheless it cannot be correct to postulate that a termination, etc. of a State Contract per se is a breach of international law.

II. Is a State Contract a mere Contract or a Treaty?

In order to answer this question, the writer is of the opinion that the best starting point would be to refer to the Vienna Convention on the Law of Treaties (hereinafter the Convention)[143] and examine the relevant provisions contained therein. Article 2 (1) of the Convention, inter alia, reads :

> (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation..."[144]

Article 2 (a) of the Convention is self explanatory in that it states that the basic requirement is that there must be an international agreement between States. There is no qualification added to the word "States". Thus, it is submitted that an international agreement that is not made between States cannot be described as a treaty.[145] This was exactly what the United Kingdom of Great Britain attempted to do in the Anglo Iranian Oil Co. Case.[146] The United Kingdom of Great Britain argued that due to the role she played in the negotiation of a concession agreement between the Government of Iran and the Anglo Iranian Oil Company that concession agreement had a double character, the character of being at once a concessionary agreement between the Iranian Government and the Company and a treaty between the two Governments.[147] The contention of the United Kingdom was framed as follows :

> "... when there has been an international dispute between two Governments which is settled on certain terms, there arises under international law an obligation binding the two Governments to observe the terms of settlement and this obligation arises, even though the settlement takes the form of a concessionary contract between a State and a private company....".[148]

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The International Court of Justice rejected this argument. The Court stated.

> "The Court cannot accept the view that the Contract signed between the Iranian Government and Anglo (Iranian) Company has a double character. It is nothing more than a Concessionary Contract between a government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom. Under the Contract the Iranian Government cannot claim from the United Kingdom Government any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom any obligations which it is bound to perform towards the Company. The document bearing the signatures of the representatives of the Iranian Government and the Company has a single purpose : the purpose of regulating the relations between that Government and the Company in regard to the Concession. It does not regulate in any way the relations between the two Governments".[149]

Further in reference to the situation which gave rise to the United Kingdom Government raising the above argument the Court stated :

> "The juridical situation is not altered by the fact that the concessionary contracted was negotiated and entered into through the good offices of the Council of the League of nations, acting through its Rapporteur. The United Kingdom, in submitting its dispute with the Iranian Government to the League Council, was only exercising its right of diplomatic protection in favour of one of its nationals. It was seeking redress for what it believed to be wrong which Iran had committed against a juristic person of British nationality. The final report by the Rapporteur to the Council on the successful conclusion of a new concessionary contract between the Iranian Government and the Company gave satisfaction to the United Kingdom Government. The efforts of the United Kingdom Government to give diplomatic protection to a British national had thus borne fruit, and the matter came to an end with its removal from the agenda".[150]

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Had the Court accepted the British argument on the double character of the concession agreement it would have consequently and undoubtedly held that the failure by the Iranian Government to honour the Concession agreement amounted to a breach of international law under the principle of pacta sunt servanda.[151]

A reference is also made to the Island of Palmas Case[152] to add weight to the above discussion that a private corporation does not possess treaty-making capacity. In the Island of Palmas Case the arbitral tribunal said :

> "As regards contracts between a State ..... and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or Conventions capable of creating rights and obligations such as may, in international law, arise out of treaties".[153]

It is therefore in my opinion that in accordance with the authorities referred above especially with regard to the holding of the International Court of Justice in the Anglo Iranian Oil Co. Case[154] and by analogy to the fact that an individual does not have treaty-making capacity,[155] State Contracts entered into between States and private corporations are merely contracts and cannot be treated as treaties. To hold that State Contracts are treaties, therefore, the rules governing treaties are thereby applicable, would only mean the following :

i) that a private corporation would be assumed as having treaty-making capacity as States do.[156]

ii) that it would be assumed that a breach of a State Contract *per se* would be a breach of international law.[157]

However the present state of international law is clearly contrary to the above assumptions.

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PART 3. THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (1965)

A. THE PLACE OF INTERNATIONAL LAW

The Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereinafter I.C.S.I.D.)[158] establishes a permanent Centre for the Settlement of Investment Disputes (hereinafter the Centre),[159] and offers services of conciliation and arbitration of investment disputes.[160] The jurisdiction of the Centre is dealt with in Chapter II of the I.C.S.I.D.[161] Consent of the parties is the cornerstone of the jurisdiction of the Centre and such consent must be in writing and once given cannot be withdrawn unilaterally.[162] It has been said that consent must be expressed, explicit, unequivocal and not open to doubt.[163] However, consent alone will not suffice to bring a dispute within the Centre's jurisdiction. There are further requirements provided in Article 25 (1) of the I.C.S.I.D. namely that the dispute must be a "legal dispute arising directly out of an investment"[164] and such dispute must be between a Contracting State[165] (or a constituent subdivision or agency of a Contracting State) and a national of another Contracting State.[166] Article 25 (1) reads :

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any Constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to the Centre. When the parties have given their consent no party may withdraw its consent unilaterally".

It is therefore submitted that the jurisdiction of the Centre is limited to States and nationals of States which are parties to the I.C.S.I.D. Thus, non-Contracting States as well as nationals of non-Contracting States cannot be parties to disputes before the Centre.[167]

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1. Reference to International Law

a) Choice of Law

According to the I.C.S.I.D. the parties have full freedom to select, by agreement the rules of law to be applied in the settlement of disputes.[168] Article 42 (1) of the I.C.S.I.D. reads :

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the Law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

The literal interpretation of Article 42 (1) of the I.C.S.I.D. would seem to be, it is submitted, that rules of international law[169] would be applicable by virtue of the "choice of law" provision in an agreement or where no such provision is available, in accordance with the second sentence of Article 42 (1).[170] The question whether international law should directly be applied as the governing law of State-Contracts or contracts of the type under the I.C.S.I.D. has been a subject of controversy among international lawyers,[171] however the I.C.S.I.D. has clearly stated in the affirmative that international law can be applied by virtue of the "Choice of Law" provision.[172] However, international law may be selected as the applicable law 'provided that full force and effect is given to all the terms and conditions of the investment agreement and to the intent of the parties as expressed therein'.[173] What then is the meaning of the term "rules of law" as contained in Article 42 (1) of the I.C.S.I.D.? Firstly, by stipulating "rules of law" as opposed to "system of law" the I.C.S.I.D. apparently intends to allow the parties as much arbitral flexibility as they care to choose.[174] However, the absence of a definition of "rules of law" given by the I.C.S.I.D. leaves the confusion wide open.[175] It has been said that "rules of law" refers to specific legal systems such as the law of a particular state, even the law of the host State, international law or perhaps one formulated entirely ad hoc.[176] It may be argued that in using the 'Choice of Law" provision the investor may be reluctant to agree to the application of the host States law as it is assumed that the investor would not submit its investment to a system of law which would be unstable, having in mind the fact that the host State's legislative powers may be exercised in future that would affect its interests.[177]

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There is another view that investment agreements between States and private investors of the nature stipulated by the I.C.S.I.D. are quasi-public international contracts that are governed by the "lex contractus" agreed to by the parties.[178] Supporters of this view argue that neither a particular national legal system nor public international law can govern such agreements because the investor is not a subject of international law, but the law that governs such agreements is the one formulated by the parties to the contract.[179] Another possibility is the reference to general principles of law recognized by civilized nations.[180] The main objection to this type of legal system, as it were, is that public international law is not capable of dealing with the complexities of an investment agreement.[181] Further, it is argued that public international law is designated to govern relations between States and other subjects of international law and not relations with private investors.[182] The majority of juristic writers on this subject so far have adopted the view that the term "rules of law" refers to a definite legal system.[183]

It is therefore submitted that the term "rules of law" should mean that 'the parties should submit the investment to a definite, legal system or combination of particular legal systems. However, in the event that the system chosen by the parties as the applicable law governing the investment is inadequate and therefore produces a juridical void, the automatic provisions of Article 42 (1) will apply'.[184]

b) Automatic choice of law

The I.C.S.I.D. specifically provides in Article 42 (1) that if the parties fail to agree on the "rules of law" to govern particular investment agreement "the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable". As already stated the question whether rules or principles of international law can be directly applied to a dispute between a State and a non-State party is clearly answered by the I.C.S.I.D.. Even state practice shows that arbitrators have had recourse to the general principles of law recognized by civilized nations, but usually their reasons for applying the general principles vary.[185]

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Thys, the writer is of the opinion that in a way the I.C.S.I.D. restates and reaffirms state practice that general principles of law recognized by civilized nations can be invoked where the law applicable to a particular contract is inadequate or the parties have intended such result.

What then is the meaning of the term "and such rules of international law as may be applicable" as contained in the second sentence of Article 42 (1) of the I.C.S.I.D. The separate mention of international law from "the law of the Contracting State" suffices to mean that the two legal systems should be applied. This is supported by the Report of the Executive Directors of the World Bank[186] which reads as follows :

> "Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term "international law" as used in this context should be understood in the sense given to it by Article 38 (1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.[187]

Apart from the above Report of the Executive Directors there is no further elaboration as to what are appropriate rules of international law that will be applied. However, going back to the Report of the Executive Directors it is quite clear that the term "and such rules of international law as may be applicable" was meant as 'the rules of international law relevant to the case and that international law is the law whose sources are indicated in Article 38 of the Statute of [International] Court of Justice with the well understood reservation of necessary adaptations since that Statute only refers to inter-State disputes.[188]

Thus, it would mean, it is submitted, that international law as applied in accordance with Article 42 (1) of the I.C.S.I.D. would be applied where there is a conflict between the two legal systems or where there is a lacuna in the Contracting States law including its rules on Conflict laws.[189]

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Then comes the question whether the Contracting States law is superior over international law or vise-versa? Literal interpretation of the second sentence of Article 42 (1) of the I.C.S.I.D. would be construed as meaning that the two legal systems would be applied simultaneously. One writer[190] who supports this construction states :

> "The text in its present formulation would indicate if taken literally, simultaneous application of the two laws, but the reference to the law of the State should counsel prudence to arbitrators and guide them to call on the more general rules of international law only where the State law is well adapted to settlement of the dispute or in case of flagrant violation of the law of nations".

Another writer[191] supports the above view, but approaches it in a slightly different way. He states that :

> "The Tribunal will first look at the law of the host State and that law will in the first place be applied to the Merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law violates international law. In that sense, as I suggested earlier, international law is hierarchically superior to national law under Article 42 (1)".

Both writers in one way or another agree that international law is superior over the law of the Contracting State.

In contrast to the foregoing views, another writer,[192] basing his argument on the traditional notion that a sovereign State cannot be subjected to the jurisdiction of the laws of foreign States other than its own, is of the opinion that an investment agreement to which a sovereign State is a party with a foreign national and which is the subject matter of a dispute cannot be submitted to the jurisdiction of the laws of foreign States other than those of the host States'. Thus, the view that the law of the Contracting State is superior over international law.

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However, the writer is of the opinion that such is not the right interpretation of Article 42 (1) of the I.C.S.I.D. It is submitted on the contrary that the hierarchical order would be that international law is superior over the law of the Contracting State party on the grounds that :

I. it is argued that the spirit and letter of Article 42 (1) calls for the parties to a dispute before the Centre to be treated on an equal footing without one having the upperhand, in this situation, presumably the Contracting State party. This argument is supported for example by the fact that under Article 42 (1) the parties are free to choose any particular legal system(s) as they may agree to govern their investment agreement. Hence, the formulation of the second sentence of Article 42 (1) is designed to maintain or enhance that equality between the parties.

II. the standard in which the law of the Contracting State party should be applied is the (minimum) standard set by international law. Thus, the law of the Contracting State party is subordinate to international law.[193]

III. it is submitted that the bulk of juristic writers on this subject support the contention that international law is hierarchically superior over the Contracting State party's law.[194]

There then remains the question : What appropriate rules or principles of international law should be applied? As stated earlier Article 42 (1) of the I.C.S.I.D. is silent on the definition of rules or principles of international law that must be applied, but the Report of the Executive Directors of the World Bank[195] again mentioned earlier is quite clear in stating that the rules of international law that must be applied are those stipulated in Article 38 of the Statute of the International Court of Justice, having in mind of course, that Article 38 of the above Statute was meant to apply to inter-State disputes. For arguments sake the following are suggested :

I. Investment Treaties : There is evidence which shows that a large number of bilateral agreements have been entered into, the aim of which is to establish a system for investments by nationals of the two States parties, however it can be argued that such practice has not taken the form of a custom as required by Article 38 of the Statute of the International Court of Justice.[196]

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Apart from the I.C.S.I.D. there are no other multilateral treaties that establish a system for foreign investment.

II. General Principles of law : The fact that international law has been developed or designed to govern relations between States and other subjects of international law, it has been argued that public international is inadequate to deal with complex investment agreements concluded between States and private investors.[197] However, the subjects of the treatment of foreign nationals and their properties[198] and the fundamental principle of "pacta sunt servanda"[199] cannot be left in isolation. It is now the general consensus that States have the right to nationalize properties of foreign nationals provided that it is for public purpose, is without discrimination, prompt, adequate and effective compensation is paid.[200] The usage of the principle of "pacta sunt servanda", although an established principle of law, is controversial in that, for example, it has been invoked to mean that a breach of State Contract per se is a breach of international law, but on those occassions the tribunal has rejected that argument for one reason or another.[201] It is therefore submitted that 'the scope of these principles is controversial and their interpretation and application raise great difficulties. The principles are also insufficient because they are narrowly and particularly concerned with the protection of the private investor, and do not establish a true long-term relations for the purpose of economic development'.[202]

III. State Practice : It is submitted that 'repeated entry into similar contracts can create obligatory norms'.[203] This can best be exemplified by the Sapphire Arbitration Case.[204] Since the agreement between Sapphire and N.I.O.C. contained no express choice of law the arbitrator had to look at the provisions of two other similar agreements which N.I.O.C. had entered into to decide what was the applicable law governing the Sapphire agreement. One of the agreements referred to contained an express choice of law.

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In his conclusion the arbitrator said :

"It is true that there is no such provision in the present Agreement, nor in the one made in 1958 with the Pan-American Petroleum Corporation. But the essential character of all these contracts is the same; they all have the same object and the same character, as is evidenced by the complete similarity of several of their clauses, particularly those dealing with performance and arbitration. By virtue of the principle of good faith, N.I.O.C. cannot claim that the absence of an express provision regarding the law applicable should be interpreted as a denial of a principle contained in previous agreements which had the same object. The requirements of a guarantee by the foreign company are the same; therefore according to reason and good faith, the same solution should be adopted, as N.I.O.C. formally agreed to with more powerful partners. If then, in the present contract, N.I.O.C. had intended to cast aside a principle which is recognized in the previous agreements and to refuse Sapphire a guarantee which they had previously conceded as legitimate, it must be presumed that the draftsman of the Contract would have expressly shown his intention. It is quite clear from the above that parties intended to exclude the application of Iranian law. But they have not chosen another positive legal system and this omission is on all the evidence deliberate. All the connecting factors cited above point to the fact that the parties therefore intended to submit the interpretation and performance of their contract to principles of law generally recognized by civilized nations, to which Article 37 of the Agreement refers, being the only clause which contains an express reference to an applicable law. The Arbitrator will therefore apply these principles, in taking account, when necessary of the decisions taken by international tribunals."[205]

In this case it can be seen that the source used by the Arbitrator to draw the conclusion that the parties intended that the principles of law generally recognized by civilized nations should apply was the practice the National Iranian Oil Company had in entering into similar contractual agreements with other companies. However it is hard to determine that such practice of a State can become a source of international law as stipulated under Article 38 (1) of the Statute of the International Court of Justice.

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PART IV CONCLUSION

A. LAW AT PRESENT

I. International law comes into play when the Law of State Responsibility is invoked.

States become internationally liable for breaches of State Contracts under the law of State Responsibility for the treatment of aliens.[206]

II. International Commercial Law

There is now a move towards adopting an international commercial law which has arisen because of the fact that commercial transactions in the international sphere between international persons, international financial institutions, for example, The World Bank and private corporations have reached a stage where it is said that public international should have some direct bearing on transactions by the above-mentioned entities.[207]

International Commercial Law is often referred to as International Law of Contracts,[208] however both phrases carry the same meaning. Several juristic writers[209] have suggested that public international law could be applied to transactions between States and private corporations and even several decisions of arbitral tribunals[210] have indicated that public international law may be applicable to State Contracts in certain circumstances. However, several objections have been raised to rebutt the above argument. Firstly, that public international law has not fully developed definite principles that may apply to international commercial transactions such as State Contracts of the type concerned in this research paper. Secondly, public international law in its traditional setting applies to relations between states and/or other international personalities.[211]

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What then is the meaning of "International Commercial Law"? It's a new branch of public international law which has arisen as a result of the above objections so that international commercial transactions such as State Contracts may be governed directly by this new branch of public international law. Thus, the so-called public international commercial law is based on general comparative principles of commercial contracts.[212]

III. The Changing Structure of international law

As discussed above in Part 4 (A) (II) recent developments in international commercial transactions have made it inevitable that somehow room should be made to allow the application of public international law to such commercial transactions, for example, State Contracts.[213] This situation is best summarised by Friedmann[214] where he states that:

> "But if we regard international law as a system that has, from its very beginning, responded to the social needs of international life, and that must continue to respond to the changing structure of international relations, its limitation to the forms of yesteryear is not only injurious but quite unnecessary. The 'general principles of law recognized by civilised nations" constitute an important source of law as recognised in the statute of the International Court of Justice, but not a separate system of law. They can and must nourish the still embryonic system of international law, as it expands and widens from the traditional and limited sphere of interstate relations to a far fuller and more diversified system of public international legal relations".

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FOOTNOTES

1. D. W. GREIG, INTERNATIONAL LAW (1976) 93.

2. Ibid.

3. The term "nationals" includes natural and legal persons.

4. J.F. Lalive, Contracts between States or a State Agency and a Foreign Company, 13, I.C.L.Q. 987 (1964)

5. McNair, The General Principles of Law Recognized by Civilized Nations, 33 B.Y.I.L. 1 (1957).

6. Supra, n.2.

7. See discussion on Concession Contracts, infra., 9 - 11.

8. Delaume, What is an International Contract? : An American and a Gallic Dilemma, 28 I.C.L.Q. 258, 259 and 279. (1979)

9. Ibid, 262 - 271.

10. The French view is that although the nationality of the parties is relevant, it is not necessarily the determining factor for characterising a contract as an "international" one. They support the view that once a transaction involves international trade, that transaction becomes an "international" contract. See id. 264 - 266.

11. Delaume, Supra, n.8, 266 - 268.

12. Delaume, Supra, n.8, 267.

13. Delaume, Supra, n.8, 267.

14. Delaume, Supra, n.8, 268.

15. Delaume, Supra, n.8, 268 - 271. However the latest position is that economic considerations may be superseded by legal considerations.

16. Delaume, Supra, n.8, 269

17. Delaume, Supra, n.8, 261.

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18. Delaume, Supra, n.8, 271. It should be noted that the above definition of an "international" contract is only reflective of the current judicial pronouncements and therefore may change to meet new judicial thinking on the subject.

19. Internationalization of the agreement resolves nothing by itself. It provides no generally accepted answers to the quest for the legal rules applicable. It is an obvious attempt to withdraw the relationship from the reach of the host State's law.

20. Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Lybian Arab Republic (1978) 17.I.L.M. 1

21. Ibid, para. 41. It was stated that general principles of law contribute with other elements (international custom and practice) to constitute what is called the "principles of international law". The P.C.I.J. held in the Lotus Case (1927) P.C.I.J., No. 10 Ser. A, 16 that the meaning of the phrase "principles of international law" could only mean international law as applied between all nations belonging to the community of States.

22. Mann, The Proper Law of Contracts Concluded by International Persons 35 B.Y.I.L. 34, 43 (1959).

23. It should be noted that internationalization of concession agreements is never complete. There always matters, such as those regarding the movements of expatriate staff, the employment of local labour, social legislation and customs and exchange regulations, to name but a few, that continue to be governed by the law of the host State.

24. It is argued that this cannot be correct since a State Contract is not a treaty and cannot involve state responsibility as an international obligation. See Article 22 (f) of the Concession Agreement in the Anglo-Iranian Oil Company Case (1952) I.C.J. 93, according to which any award was to be based "on the juridical principles contained in Article 38 of the Statute of the Permanent Court of International Justice".

25. McNair, Supra n.5, 1 - 19.

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26. Mann, Supra n.22, 43; See also Mann, The Law Governing State Contracts, 21 B.Y.I.L., 11 et seq (1944); JESSUP, A MODERN LAW OF NATIONS (1948) 139 et seq; This view has its difficulties and is opposed by some prominent writers in this area, for example, WOLFF, PRIVATE INTERNATIONAL LAW (1950) 417; Fawcett, Legal Aspects of State Trading, 25 B.Y.I.L. 44 (1948); FRIEDMANN, LAW IN A CHANGING SOCIETY (1959) 472 and 50 A.J.I.L. 438, 484 (1956).

27. Abu Dhabi Arbitration (1952) I.C.L.Q. 1, 247.

28. Ibid.

29. ' ..... any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country'. See Serbian Loans Case (1929) P.C.I.J., Ser. A, No. 20/21, 41.; '... as the Agreement of 1933 has not been concluded between two States, but between a State and a private American corporation, it is not governed by public international'. See Aramco Case (1963) 27 I.L.R. 117.

30. Texaco/Calasiatic Case, Supra n.20, para. 41.

31. See Lena Goldfields v U.S.S.R. (1930) 5 ANN'DIG 426; Abu Dhabi Arbitration, Supra n.27; Sapphire Award (1967) 35 I.L.R. 136. In all these cases in which the arbitrators noted a reference to the general principles of law, they reached conclusions as to the internationalization of the contract.

32. It has been said that "general principles of law" is a separate system of law called the general principles of law recognized by civilized nations. See McNair, Supra n.5, 10; See also JENKS, THE PROPER LAW OF INTERNATIONAL ORGANISATIONS, (1962) 152 et seq; Abu Dhabi Arbitration, Supra n.27, 251.

33. Texaco/Calasiatic Case, Supra n.20.

34. Texaco/Calasiatic Case, Supra n.20, para. 44.

35. Delaume, State Contracts and Transnational Arbitration, 75 A.J.I.L. 784, 798 (1981).

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36. Texaco/Calasiatic Case, Supra n.20, paras. 16 and 44.

37. Aramco Case, Supra n.29, 117.

38. Aramco Case, Supra n.29, 155 - 156.

39. Texaco/Calasiatic Case, Supra n.20, para. 44.

40. Sapphire Award, Supra n.31.

41. Sapphire Award, Supra n.31. 172.

42. Texaco/Calasiatic Case, Supra n.20, para. 45.

43. See FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS (1962); Hyde, Economic Development Agreements, 105 Hague Recueil 267 (1962); McNair, Supra n.5, 1 et seq; Hyde, Permanent Sovereignty Over Natural Wealth and Resources, 50 A.J.I.L. 854 (1956).

44. The classic legal description of a concession agreement was given by McNair, Supra n.5, 3 - 4; See also Geiger, The Unilateral Change of Economic Development Agreements, 23 I.C.L.Q. 73, 77 - 78 (1974).

45. Texaco/Calasiatic Case, Supra n.20, 17.

46. It is argued by some writers that a sovereign State cannot submit to the jurisdiction of the Courts of another country, either the courts of the nationality of the private investor or a third state. See Mann, Supra n.22, 46.

47. Sapphire Award, Supra n.31, 175 - 176.

48. See for example, FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964) 221 - 231; 127 Hague Recueil 121-124 (1969,II), with reference to private corporations.

49. See Waldock, Y.B.I.L.C. (1962, II) 32; Anglo Iranian Oil Company Case, Supra n.24, 112.

50. See, FRIEDMANN, id, 176.

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51. See, the I.C.J. Advisory Opinion on Reparations of 11 April, 1949 where it stated that "the subject of law, in any legal system, are not necessarily identical in their nature or in the extent of their rights and their nature depends on the needs of the community" (1949) I.C.J. 174, 178

52. G. Amador, International Responsibility, 2 Y.B.I.L.C. I, 32 (1959)

53. Mann, State Contracts and State Responsibility, 54 A.J.I.L. 572 (1960); JESSUP, A MODERN LAW OF NATIONS (1948) 104; AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1967) 66 - 120; FOIGHEL, NATIONALIZATION AND COMPENSATION, (1964); EAGLETON, RESPONSIBILITY OF STATE IN INTERNATIONAL LAW (1928) 157 - 168; FATOUROS, Supra n.43 232 - 301.

54. See Article 9 of the Draft Convention prepared by Harvard Law School Research Bureau and by Fitzmaurice in his article entitled, The Meaning of The Term Denial of Justice, 13 B.Y.I.L. 93 - 114 (1932)

55. See AMADOR, SOHN and BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITIES FOR INJURIES TO ALIENS, (1974) 23 - 25; Jennings, State Contracts in International Law, 37 B.Y.I.L. 156, 166 (1961); See also Ambatielos Claim (1956) 26 I.L.R. 306, 336.

56. AMERASINGHE, Supra n.53, 98.

57. AMERASINGHE, Supra n.53, 99.

58. AMERASINGHE, Supra n.53, 99.

59. United States of America - Mexico Claims Commission (1930-31) 4 R.I.A.A. 691.

60. GREIG, Supra n.1, 554.

61. Ambatielos Claim, Supra n.55, 324 - 325.

62. Ambatielos Claim, Supra n.55, 325.

63. McNAIR, INTERNATIONAL LAW OPINIONS (1956, II) 311; Amerasinghe, State Breaches of Contracts with Aliens and International Law, 58 A.J.I.L. 881, 907 (1964).

64. See Chattin Case (1951) 4 R.I.A.A., 282

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82. See Clause 12, Harvard Draft Convention on International Responsibility of States for Injuries to Aliens, 1961.

83. See Martini Case (1930) 25 A.J.I.L. 554.

84. See Ibid, 557 for the rest of the facts.

85. Martini Case, id, 565.

86. Martini Case, Supra n.83, 563.

87. Martini Case, Supra n.83, 563.

88. Schwebel, International Protection of Contractual Arrangements, 53 Proc. A.S.I.L. 266 - 73 (1959); Carlston, Concession Agreements and Nationalization, 52 A.J.I.L. 260 - 279 (1958). Professor Jennings also argues that there are no basic objections to the existence of an international law of contract. See Jennings, Supra n.55, 156 - 182; See also Clarke, Intervention for Breach of Contract or Tort Committed by a Sovereignty, Proc. A.S.I.L. 149, 155 (1910).

89. Hyde, 105 Hague Recueil (1962, I) 315 - 18; McNair, Supra n.5, 16 - 18; It was said in the Aramco Case that acquired rights should be taken as a "fundamental principle". See Supra n.29.

90. For example, Shufeldt Claim, Supra n.80; Aramco Case, Supra n.29; Landreau Claim (1921) R.I.A.A. 347; Sapphire Award, Supra n.31; Texaco/Calasiatic Case, Supra n.20; International Fisheries Company Case, infra, n.92; See also Lalive, Supra n.4.

91. Carlston, supra n. 88, 261.

92. International Fisheries Company Case (1951) 4 R.I.A.A. 691, 700. Carlston argues that in this case, local remedies are to be exhausted and denial of justice rule applies. See Carlston, Supra n.88, 267.

93. Carlston, Supra n.88, 260.

94. P.C.I.J. Rep. Ser C, No. 78, 32.

95. 2 I.C.J. Pleadings, Oral Arguments and Documents, 61.

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96. The reason for this argument was that if the State was not bound by obligations to an alien at the time the contract was made, this would allow the State to easily annul or modify its obligations by using its sovereign and legislative powers.

97. Certain Norwegian Loans Case, Supra n.95, 84.

98. 4 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 285, 705, 723; 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1942) 611; 2 WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES OF AMERICA (1886) 654; J. G. Wetter, Diplomatic Assistance to Private Investment, 29 Uni of Chicago L.R., 275 (1962).

99. 2 McNAIR, INTERNATIONAL LAW OPINIONS (1956) 201 - 206; HALL, A TREATISE ON INTERNATIONAL LAW (1924) 334 - 336.

100. See Illinois Central Railroad Co. Case (1926 - 27) 4 R.I.A.A. 17.

101. See Supra p.p. 18 - 19 and discussion therewith.

102. Earlier the Venezuelan Government argued that the tribunal was not competent because Martini had not exhausted local remedies in which case it would appeal against the decree in the Venezuelan Courts. Venezuela had the policy that diplomatic intervention or resort to international arbitrations could not be accepted until local remedies had been exhausted.

103. Martini Case, Supra n.83, 554.

104. See also May Case 15 R.I.A.A. 47.

105. Supra n.92.

106. See Article 12, Harvard Draft Convention on International Responsibility for Injuries to Aliens (1961), Sohn and Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 A.J.I.L. 545-584 (1961); See also, May Case, id.

107. See Supra pp. 19 - 22.

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108. See Shufeldt Claim, Supra n.80 where it was said that the effect of the breach of contract was the confiscation of property rights acquired under the contract. It should be noted that the latter argument is based on the principle of "acquired rights".

109. See the discussion on exhaustion of local remedies and the denial of justice by Professor Jennings, Supra n.55, 166.

110. Amerasinghe, Supra n.63, 889.

111. Jurisdiction (1924) P.C.I.J. Ser. A, No. 2; Merits (1925) P.C.I.J. Ser. A, No.5.

112. See also Oscar Chinn Case (1934) P.C.I.J. Ser A/B No. 63 where the United Kingdom of Great Britain took up its nationals claim for allegations of breach of international obligations under certain treaties and also the general principles of international law by Belgium.

113. Mavrommatis Concessions (Jurisdiction) Supra n.111, 12.

114. Mavrommatis Concessions (Jurisdiction) Supra n.111, 12. It should be noted that a State is not duty bound to take up a case in the international forums everytime one of its subject suffers injury inflicted on by another State. It is only a matter of discretion.

115. Mavrommatis Concessions (Merits) Supra n.111, 15. et seq.

116. Mavrommatis Concessions (Merits) Supra n.111, 29.

117. Mavrommatis Concessions (Merits) Supra n.111, 30 - 31.

118. See, Lipstein, The Place of Calvo Clause in International Law, 22 B.Y.I.L. 130 (1945) for the discussion on elements of the Calvo Clause.

119. HACKWORTH, Supra n.98, 635; See also SHEA, THE CALVO CLAUSE (1955) 16 - 21.

120. Lipstein, Supra n.118, 139; STARKE, INTRODUCTION TO INTERNATIONAL LAW (1977) 328.

121. North American Dredging Company Case (1951) 4 R.I.A.A. 26. The Calvo Clause is thus restricted to its contractual setting. See also International Fisheries Company Case, Supra n. 92.

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122. See North American Dredging Company Case, ibid, 30 - 31.

123. Lipstein, Supra n.118, 139.

124. See Bedjaoui, Y.B.I.L.C. 115 (1968, II).

125. The doctrine of acquired rights itself is subject to exceptions in that it is not every right that is protected. See Jennings, Supra n.55, 176.

126. The same principle applies to other State Contracts which are not concession contracts. See O'CONNELL, INTERNATIONAL LAW (1970) 383; Bedjaoui, ibid, 115 - 117.

127. O'CONNELL, THE LAW OF STATE SUCCESSION (1956) 129; See also Kaeckenbeeck, The Protection of Vested Rights in International Law, 17 B.Y.I.L.1 (1936).

128. O'CONNELL, Supra n.126, 381.

129. See Supra n.89.

130. See Supra p.p. 19 - 23.

131. (1956) 23 I.L.R. 79.

132. Lighthouses Arbitration, ibid, 83.

133. Lighthouses Arbitration, id, 83.

134. Lighthouses Arbitration, Supra n.131, 92.

135. See Supra p.14 et seq.

136. Wehberg, Pacta Sunt Servanda, 53 A.J.I.L. 775 (1959) See also CHENG, GENERAL PRINCIPLES OF LAW (1953) 112 - 114; Jennings, Supra n.55, 175 - 179; Mann, Supra n.53, 577 - 578; Hyde, 105 Hague Recueil 267 (1962, I); Sohn and Baxter, Supra n.106, 569; Vienna Convention on the Law of Treaties, 63 A.J.I.L. 875 (1969).

137. Wehberg, ibid, 786.

138. See Losinger Case, Supra n.94 ; Anglo Iranian Oil Company Case (1952) I.C.J., Pleadings, Oral Arguments and Documents, 84; Certain Norwegian Loans Case, Supra n.74.

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139. Losinger Case, Supra n.94, 32.

140. Certain Norwegian Loans Case, Supra n.74, 9.

141. Mann, Supra n.53, 576.

142. See Supra p.p. 12 - 33.

143. Vienna Convention on the Law of Treaties, Supra n.136.

144. Compare Article 6 of the Convention: "Every State possesses capacity to conclude treaties".

145. McNAIR, LAW OF TREATIES (1961) 5.

146. Anglo Iranian Oil Company Case, Supra n.24, 111 et seq.

147. Anglo Iranian Oil Company Case, Supra n.24, 111 - 112.

148. Anglo Iranian Oil Company Case, Supra n.138, 75.

149. Anglo Iranian Oil Company Case, Supra n.24, 112.

150. Anglo Iranian Oil Company Case, Supra n.24, 112.

151. Article 26 of the Convention reads :

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

Further, internal law cannot be pleaded to justify failure of performance. See Article 27 of the Convention. See also McNAIR Supra n.145, 493; North Atlantic Coast Fisheries Case 1910 (1916) H.C.R. 141, 167 where the tribunal said that "every State has to execute the obligations incurred by treaty bonafide, and is urged there to by the ordinary sanctions of international law in regard to observance of treaty obligations".

152. Island of Palmas Case 2 R.I.A.A. 831.

153. Island of Palmas Case, Ibid, 858.

154. Anglo Iranian Oil Company Case, Supra n.24, 58.

155. See Island of Palmas Case, Supra n.152; Private corporation also do not have treaty making capacities by virtue of Articles 2 and 6 of the Convention.

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156. McNAIR Supra n.145, 35 - 57.

157. See Chorzow Factory Case (1927) P.C.I.J. Ser A. No.9, 21 where the Court stated that it was "a principle of international law that the breach of an engagement involves an obligation to make reparations [and that reparation was therefore] the indispensable complement of a failure to apply a convention".

158. (1965) 4 I.L.M. 532, (1966) 60 A.J.I.L. 892. Entered into force 14 October 1966.

159. See Article 1 (1).

160. See Article 2 (2).

161. See Articles 25 - 27.

162. See Article 25 (1).

163. See J.F. Lalive, The First 'World Bank' Arbitration (Holiday Inns v Morocco) - Some Legal Problems, 51 B.Y.I.L. 123, 141 (1980)

164. The term "investment" is not defined in the I.C.S.I.D. However, Article 25 (4) allows Contracting States "at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre ....".
It is submitted that because the purpose of the I.C.S.I.D. is broad, the term "investment" should be afforded an expansive meaning.
See STARKE, Infra n. 170, 13.

165. The term "Contracting State" is not defined in the I.C.S.I.D. However Article 68 provides that the Convention enters into force for each State 30 days after the deposit of its instrument of ratification, acceptance or approval of the Convention. Thus, a State becomes a Contracting State 30 days after it has deposited either of the above instrument.

166. The term "national of another Contracting State: is defined in Article 25 (2).

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167. See C. F. Amerasinghe, Jurisdiction Rationae Personae Under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 47 B.Y.I.L. 227, 230 (1974/75); R. Luzzatto, International Commercial Arbitration and Law of States, 157 Hague Recueil 9, 95 - 96.

168. Article 42 (1); See also Luzzatto, ibid.

169. The term "rules of international law as may be applicable" as used in Article 42 (1) has the same meaning as the term "relevant rules of international law". See Broches, infra n.170, 391.

170. Amerasinghe, Submissions to the Jurisdiction of the International Centre for the Settlement of Investment Disputes, J of Maritime and Commerce, 211, 238 et seq; Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Hague Recueil 332, 390 - 395 (1972); Szasz, A Practical Guide to the Convention on Settlement of Investment Disputes, Cornel J. Int. Law 1 (1968); See also STARKE, THE PROTECTION AND ENCOURAGEMENT OF PRIVATE FOREIGN INVESTMENT (1966) 17.

171. Kahn. The Law Applicable to Foreign Investments. The Contribution of the World Bank Convention on the Settlement of Investment Disputes, 44 Indiana L.J. 1, 6 (1968).

172. Broches, id; 391; McDANIELS, INTERNATIONAL FINANCE AND INVESTMENT (1964) 554.

173. Amerasinghe, Supra n.170, 238 - 239.

174. Rodley, Some Aspects of the World Bank Convention on the Settlement of Investment Disputes, 4 Can Y.B.I.L. 43, 59 (1966); See also Amerasinghe, Supra n.170, 238.

175. Khan, Supra n.171. It should be noted that the 'applicable law' question to contracts between States and private investors has divided international lawyers over the years.

176. Amerasinghe, Supra n.170, 238; Szasz, Supra n.170, Luzzatto, Supra n.167, 97 - 98; Khan, Supra n.171, 14.

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177. Szasz, Supra n.170, 131.

178. Sutherland, The World Bank Convention on the Settlement of Investment Disputes, 28 I.C.L.Q. 367, 393 (1979). Article 42 seems to exclude such a system because "rules of law" connotes submission to a particular legal order.

179. Khan, Supra n.171, 14.

180. See Eg. Sapphire Award, Supra n.31.; Abu Dhabi Arbitration, Supra n.27; Aramco Case, Supra n.29.

181. Khan, Supra n.171, 16 - 17. There is still controversy on the meaning of "general principles of law". Some afford it the meaning in Article 38 (1) of the Statute of the International Court of Justice : Others say it is a separate legal order altogether. See McNair, Supra n.5.

182. Rodley, Supra n.174, 60.

183. See Eg. Sutherland, Supra n.178, 394; Khan, Supra n.171, 11; Luzzatto, Supra n.167, 97 - 98; Amerasinghe, Supra n.170, 238 - 239.

184. Sutherland, Supra n.178, 394.

185. See Eg. Abu Dhabi Arbitration, Supra n.27; Lena Gold Fields v U.S.S.R. Supra n.31, 428; Aramco Case, Supra n.29. See also CHENG, Supra n.136, 22 - 25.

186. Report, (1965) 4 I.L.M. 524.

187. Article 38 (1) of the Statute of the International Court of Justice reads as follows :

"1) The Court whose function it is to decide in accordance with international law such disputes as are submitted to it shall apply :

a. international conventions, whether general or particular, establishing rules expressly recognized by the Contesting States;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

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d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

188. Khan, Supra n.171, 28.

189. Luzzatto, Supra n.167, 98; Rodley, Supra n.174, 61; Broches, Supra n.170, 393 - 393; Khan Supra n.171, 27; See also SCHWARZENBERGER, FOREIGN INVESTMENTS AND INTERNATIONAL LAW (1969) 143 - 144. Where the question was part as to whether the reference to the law of the Contracting State party to the dispute was limited to the substantive law of that State or included its law on the conflict of laws. It was said that no dogmatic answer to this question appears possible. The interpretation of Article 42 would have to be left with each individual arbitration tribunal.

190. Khan, Supra n.171, 28.

191. Broches, Supra n.170, 392.

192. SCHWARZENBERGER, Supra n.189, 143.

193. Broches, Supra n.170, 393. He states that 'international law operates as a corrective to national law'.

194. For example, Broches, Supra n.170, 392; Khan, Supra n.171, 28; Amerasinghe, Supra n.170, 239; Rodley, Supra n.174, 61; Luzzatto, Supra n.167, 98; Sasoon, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1 Israel L. Rev. 27, 37 - 38 (1966); Broches, Arbitration in Investment Disputes, in INTERNATIONAL COMMERCIAL ARBITRATION (1981, III), 1, 56.

195. Report, Supra n.186.

196. Kahn, Supra n.171, 28 - 29.

197. See Supra p.36.

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198. See Supra p.p. 12 - 26.

199. See Supra p.p. 29 - 21.

200. WHITE, NATIONALIZATION OF FOREIGN PROPERTY (1961) 35 - 37; Fawcett, Some Foreign Effects of Nationalization of Property, 27 B.Y.I.L. 355 - 356 (1950). It should be noted too that the United Nations General Assembly Resolution, G.A. Resolution 1803 (XVII), on permanent sovereignty over natural wealth and resources hasn't yet become part of the customary international law. See Texaco/ Calasiatic Case, Supra n.20; Gess, Permanent Sovereignty Over Natural Resources 13 I.C.L.Q. 398 (1964).

201. See Supra p.p. 30 - 31.

202. Kahn, Supra n.171, 29.

203. Kahn, Supra n.171, 31.

204. Sapphire Award, Supra n.31.

205. Sapphire Award, Supra n.31.

206. See Part 2, Supra p.p. 12 - 26; See also, Lillich, The Current Status of the Law of State Responsibility for Injuries to Aliens, 73 Proc. A.S.I.L. 244 - 249 (1979).

207. FRIEDMANN, Supra n. 48, 170 et seq.

208. See Texaco/Calasiatic Case, Supra n. 20, para 32

209. JESSUP, Supra n. 53, 138 et seq; Mann, Supra n. 26, 11 et seq; See also

210. AbuDhabi Arbitration, supra n. 27, 427; Texaco/Calasiatic Case, supra n. 20. para 32 et seq.

211. McNair, Supra n. 5, 10.

212. Friedmann, Supra n. 48 105; See also FRIEDMANN, Supra n. 48, 173 - 176

213. See The Convention on the Settlement of Investment Disputes between States and Nationals of other States, Supra n. 158.

214. FRIEDMANN, Supra n. 48, 176.

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