THE LAW APPLICABLE TO CONCESSIONS

THE ISSUE

A recent article by Lord McNair[1] drew attention to a lacuna in the system of legal regulation of international economic transactions and put forward proposals as to how the gap might be bridged. That lacuna was the inadequacy of some primitive municipal law systems to cope with the complexities of modern commercial life coupled with a reluctance to 'select' some existing and developed municipal law system as the 'proper law' of the transaction and was emphasised by submission of such relationships to arbitration applying, for example, 'legal principles familiar to civilised nations.' The proposals put forward to remedy this mischief were, if the abbreviation may be forgiven, that arbitrators to whom disputes arising out of such transactions were referred should determine them by reference to 'general principles of law recognised by civilised nations,' a body of law distinct from public international law (in the strict sense)[2] and municipal law, stemming from the same source as some principles of inter-state law, and presumably arrived at by means of comparative method. Lord McNair, understandably, did not take it upon himself to anticipate the work of generations of arbitrators, by presenting us with the mature system, but remained content to assist at its birth and suggest its early diet.

'The general principles of law recognised by civilised nations' was fortunate to have such an experienced *accoucheur.* May we not, however, before declaring the old stalwarts, whose place it is to take, redundant, allow a plea on their behalf. Let us make quite sure that we shall be deploying our labour force to the best advantage before we dispense with the services of old and experienced hands.

THE NEED FOR DETERMINATION OF THE ISSUE

The problem is posed in its most acute form in relation to the concession.[3] That economic necessity demands a solution to the problem of legal regulation of concessionary relationships no-one would deny. A

1. "The General Principles of Law Recognised by Civilised Nations" (1957) *British Yearbook of International Law* 1.
2. This term is used throughout to mean that body of rules governing matters in respect of which one state is entitled to complain *qua* state against another. It would not include an action brought by an alien individual against a state or *vice versa,* no matter what the tribunal. This, I take it, is the meaning Lord McNair would attribute to it and 'inter-state' law seems to be a useful term to distinguish it from international law 'loosely' so-called. The issue here joined is therefore more than a terminological one since a state may, in certain circumstances, complain of an injury done to one of its nationals and attributable to another state.
3. The term 'concession' is retained because the bilateral aspect of the arrangement (herein referred to as the 'contract of concession') is but part of the whole transaction and it is not even essential to it. State A may grant to individual B a concession to build a canal leaving B to look for his returns to various users, no obligation being imposed upon the state under municipal law. See also n. 28 below.

glance at the history of the treatment of foreign investment by the United Nations Organisation reveals that the cry for aid has been far from satisfied, [4] and that deeds have not matched words. There is a political aspect to the problem of economic aid to the underdeveloped countries which, if it were the only aspect, would to most people signify the futility if not the irrelevance of legal control. But it is not the only aspect, for economic interdependence between advanced and backward nations is a fact.[5] An increase in the flow of funds to the latter cannot but enure for the benefit of both. Even were there no great apparent demand for opportunities for investment, yet it could hardly be denied that, on the margin, the more attractive terms which clear regulation would make possible would be effective to divert funds from other, less necessary objects. The possibility of premature termination with inadequate guarantee of compensation to the individual[6] on the one hand and the shadow of economic aggrandisement at the expense of the state on the other must have some effect on yields demanded and safeguards required respectively. The parties could, in many cases, be brought closer together were there some effective assurance of limitation of freedom of action which improved legal control would supply.

Further, the clarification of the legal status of concessionary relationships would enable them to be conducted on terms approaching justice and certainty, in itself removing what many writers have considered to be one of the major causes of inter-state conflict in recent decades. Perhaps not all would put it as strongly as J. A. Hobson, whose opinion was that:—

> Still more disastrous to pacific relations has been the policy of intrigue and diplomatic pressure pursued on behalf of groups of concession-mongers and financiers by the Foreign Offices of commercial and investing nations. For though some of this business may be beneficial to the general trade and industry of a nation, there is not the slightest guarantee that this will be the case,[7]

4. Two facts seem to be established by reference to the history of proposals for economic aid to the underdeveloped countries in U.N.O. The first is that it seems to be generally agreed that such aid is desirable in principle; the second is that there is only limited agreement as to the channel which aid should take. Most advances have been on the front of public foreign investment. Private sources, however, have remained largely untapped. One of the most significant votes in the General Assembly occurred in the 7th Session. A resolution designed to encourage an increase in the flow of investment and to discourage aggrandisement was carried 36 for, 20 abstentions and 4 (U.S.A., United Kingdom, Union of South Africa and New Zealand) against. [Resolution No. 626; Off. Rec. 7th Sess. Supp. No. 20 (A/2361)]. See also Cmd. 7630, p. 16; Cmd. 7916; Cmd. 9057; Cmd. 9394; Report of 17th Session of The Economic and Social Council. What really seems to be needed is some sort of investment guarantee system.
5. "Folklore and Fact about Underdeveloped Areas" by Stacy May, *Foreign Affairs* 33 (1954-5) pp. 212 *et seq.*
6. The term 'individual' is used throughout so as to include all private legal persons.
7. *Towards International Government,* p. 183.

yet other, more sober men have reached similar conclusions. [8] Nor, of course, can the cavalier treatment of some of the awakening underdeveloped countries be entirely ignored. The concurrence of underdevelopment and political impotence has usually meant that might has been able to put right some of their extravagances (and to suppress some of their just claims). This is a treatment, however, which few can regard as calculated to effect a permanent cure, even disregarding the disaster-potential of some of the ugly situations of recent years. Yet, in the absence of a distinct possibility of legal settlement, can more be expected?

Lord McNair's thesis contains the assumption that legal control is desirable. This is admitted. According to the classical dichotomy, this control must flow from one of two sources, either from municipal law or from inter-state law.[9] This is also admitted. Lord McNair, however, challenges the classical dichotomy. It is assumed in discussing this question that the relevant municipal law system has not reached a sufficient stage of development to cope with the complexities of the type of commercial transaction with which we are concerned. There remains only inter-state law which, according to Lord McNair, cannot be the 'system of law which should govern them and within which they should operate' because the 'contracts are not interstate contracts and do not deal with interstate relations.'[10] Thus, although legal control is necessary, it cannot be derived from existing sources. In these circumstances, Lord McNair urges us to look elsewhere — to 'General Principles of Law recognised by Civilised Nations.'

The present writer is not inclined to do so and the main object of this paper is to state his reasons.

The thesis to be demonstrated is that concessionary relationships are peculiar, that inter-state law has direct application to certain aspects of them and indirect application to others, that municipal law has a direct application to these others and that where the relevant system of municipal law falls short in its direct application to these other aspects, Lord McNair's is not the best remedy.

THE NATURE OF CONCESSIONARY RELATIONSHIPS

The term 'concession' has been used with such diverse and even contrasting shades of meaning that one writer[11] goes so far as to state

8. *e.g.* Barclay, *Problems of International Practice and Diplomacy,* p. 154; Woolf, *International Government,* p. 9; G. Lowes Dickenson, *The Choice Before Us*, p. 134; Reid, *International Servitudes in Law and Practice,* p. 44 *et seq.*
9. This is not to prejudge the issue by claiming that either is adequate or has the potential to become so.
10. *loc. cit.,* p. 19.
11. Mosler, *Wirtschaftskoneessionen bei Anderungen der Staatshoheit* (1948), p. 66. Translation supplied.

that a concession is 'the grant to an individual of rights under municipal law which concern the public interest' and claims that beyond this, the term 'concession' has no definite, meaning in the law; whilst another[12] goes even further and claims that the concession is not a legal creature at all, but merely a non-technical term given to various fact situations, particularly economic ones. It has, it is true, been used to describe all types of relationships from private-law contracts to international agreements in the fullest sense.[13] In these circumstances, it is somewhat surprising that it has retained any legal significance at all. It is, however, recognised that if not its proper, at least its most common application is to certain relationships between a state on the one hand and an alien individual on the other. Thus, on this ground, it has been distinguished from a treaty [14] and from a private-law lease *simpliciter*.[15]

Among the relationships which can subsist between a state and an alien individual, the concession belongs to that smaller class which arise out of a special grant by the state, as opposed to the application of the general law. It may thus be distinguished from, for example, the situation where a resident acquires property rights in the same way as would a national. One of the reasons why recovery was denied in *Jablonsky* v. *German Reich* [16] was that the claimant's position was parallel to that of ordinary subjects, there having been no special grant to him.

Finally, among relationships which can subsist between a state and an alien individual as the result of a special grant, the concession may be regarded as distinctive in that it gives rise to acquired rights. Thus, a mining engineer could not complain under Article 4 of the Upper Silesian Convention of 1922 of the withdrawal of his licence, although it had been received by him as a result of a special grant. [17]

It may be that, as Gidel[18] suggests, one hall-mark of the concession is that the returns take the form, not of a sum of money paid directly on completion of the work, but of receipts levied for a more or less lengthy period of time on the individuals who profit from the work. This, however, although a usual feature of concessionary relationships, is believed not to be necessary. The essential acquired rights referred to

12. Huang, *"Some International and Legal Aspects of the Suez Canal Question"* (1957), 51 *American Journal of International Law,* 277 at pp. 289-96.
13. See the use of the term in the instruments listed in MacMurray, *Treaties and Agreements Concerning China.*
14. In the *Anglo-Iranian Oil Co. Case (Jurisdiction),* I.C.J. Reports, 1952, p. 93.
15. In *Shufeldt* v. *Republic of Guatemala, AmJ.J.L.* 24 (1930) 799, at p. 808.
16. ANNUAL DIGEST 1935-7. Case No. 42.
17. *Niederstrasser v. Polish State,* ANNUAL DIGEST, 1931-2, Case No. 33: see also Opinions of Attorneys-General of the U.S.A. (1842), p. 1394 *et seq.* (Flaujac's Claim); *Claim of Abraham Wendell,* Moore's Arbitrations, pp. 1649-50; *Case of the Canal Zone Squatters,* Stowell and Munro's International Cases — Peace, p. 174, *Jablonsky* v. *German Reich* cited n. 16 above.
18. Cited in Auroc, *Conference sur les Droits Administratifs*, vol. II, p. 269, No. 615.

above may take the form of the right to levy charges, but may also take other forms.[19]

Most of these distinctive features of the concession seem to have been appreciated by the Arbitrator in the *Interpretation of Article 260 of the Treaty of Versailles*.[20] The use of the term 'concession' in that provision necessitated the attribution of some fairly definite meaning to it for the purpose of Reparations. Two suggestions were put forward: Germany's, that the term comprised "rights conferred by a competent authority of founding, or exploiting certain enterprises in certain territories, to the exclusion of third persons, and notably, those cases where the exploitation has not yet been commenced and where, in consequence, an enterprise does not yet exist," and that of the Reparations Commission, that the correct interpretation of the word 'concession' was "in the sense of a right of agricultural, mining, industrial, commercial or other exploitation, having an economic character, conferred perhaps by a special legislative measure, perhaps by decree, granted in pursuance of an essentially discretionary power vested in the executive authority and consequently not arising by simple operation of the general law."[21] Compromise was eventually reached on the basis of this latter definition.

If an attempt is made to synthesise the various efforts at definition and to incorporate what appear, in principle, to be the distinctive features of the concession, one may define the concession as a vehicle of legal relationships between a sovereign state on the one hand and an alien individual on the other, arising out of a special grant by the state party and conferring property rights, in the wide sense, upon the individual party. To this, one might add that the grant is almost invariably implemented by contract (in the sense that in entering into commercial transactions, states do not usually have as their object giving things away) and will usually carry with it the right to levy returns over a considerable period, often from a source other than the funds of the state as such.

PROBLEMS POSED BY THE NATURE OF CONCESSIONARY RELATIONSHIPS

Certain features require particular notice for present purposes. One of these is that the parties to concessionary relationships are not on an

19. O'Connell makes this clear in his description of the concession in *B.Y.I.L.* (1950) p. 93 *et seq.:* "An economic concession is usually a licence granted by the state to a private individual or corporation to undertake works of a public character, extending over a considerable period of time, and involving the investment of more or less large sums of capital. It may also consist in the grant of mining or mineral and other rights over state property. To this type of concession there are usually annexed rights of marketing and export; as well as provision concerning royalties. Thirdly, a concession may be merely a grant of occupation of public land for the carrying on of some public purpose, such concession taking the form of a contract between the state and the concessionaire."
20. United Nations Reports of International Arbitral Awards, vol. I, 429, 469.
21. (My translation). See also *ibid.* p. 479.

equal legal footing. Another is that by special grant, the individual is placed in a unique position apropos the state as compared with other alien individuals.

The first of these points has given rise to considerable difficulty so far as determining the exact nature of concessionary relationships is concerned. Many statements, both in cases on the fringe of concessionary relationships and in texts, advert to the problem of the public/private character of the concession. In addition to the *dicta* of the Arbitrator in the *Case of the Electricity Company of Warsaw*[22] and Kaeckenbeeck's statement[23] one may refer in particular to *Czechoslovakia* v. *Radio Corporation of America*[24] and the *Lighthouses Case*.[25] The majority in the former case was commenting fairly when it stated that:—

> The question whether the agreements, which the Crown, as steward of public interests, enters into with private persons or institutions should be subject to public law or civil law, or whether, as some would have it, they contain a mixture of public and civil elements, is the subject, in theory as well as practice, of much disagreement.

The P.C.I.J., in the latter case, can be understood for opining that:—

> It is true that a contract granting a public utility concession does not fall within the category of ordinary instruments of private law, but it is not impossible to grant such concessions by way of contract, and some States have adopted the system of doing so.

The confusion appears nowhere more clearly than in the preliminary documents of the Conference for the Codification of International Law in 1930 where it is observed apropos legislative interference that the prevalent view favoured international responsibility but that:—

> Certain replies consider that a concession or contract, as also the violation of a concession or contract, sets up relations which are merely matters of municipal law; others feel that distinctions must be made; while others, on the contrary, deprecate entering into too much detail.[26]

It is almost tautologous to point out that one source, at any rate, of uncertainty on this point, is the status of the parties to concessionary arrangements. On the one hand is the state whose relations are usually governed by public law, whether municipal or international. On the

22. United Nations Reports of International Arbitral Awards, vol. III, p. 1687.
23. "The Protection of Vested Rights in International Law," *B.Y.I.L.*, (1936) pp. 10-11.
24. Award of 1st April, 1932, in *Am. J.I.L.* 30 (1936) 523, 530.
25. P.C.I.J. Reports, Ser. A/B, No. 62, p. 20.
26. *Am. J.I.L.* 24 (1930) Supp. pp. 49-50. See also *Rosenstein* v. *German State,* ANNUAL DIGEST, 1929-30, p. 482, where it is stated that "one was bound to consider the special character of the concession. Concessions relating to public works, though they assumed the form of a private law contract, always remained fundamentally administrative acts, governed primarily by public law. The individual rights derived from them were not private rights pure and simple, but, to use the terminology of German Administrative law, 'subjective public rights.' They were rights *sui generis,* the extinction of which could not be judged according to the ordinary rules of civil law." And see Bentwich, *War and Private Property,* p. 72.

other hand is the private individual embarking upon a commercial venture. If, then, the question be asked 'does the concession belong to public law or to private?', the answer is believed to be that it exists on both planes at once.[26a] That, of course, is simple to assert. It is more difficult to demonstrate, and it would be foolish to attempt to enumerate all those aspects of the concession which appertain to inter-state law, public municipal law and private municipal law. Nevertheless, some indication of the 'dual' operation of the concession can be given.

THE APPLICATION OF INTER-STATE LAW TO THE CONCESSION

Inter-state law has a two-fold application to concessionary relationships. On the one hand are those aspects where its application is direct. On the other hand are those aspects where its application is indirect.

1. *Direct Application*

It is to be noted that because one party to a concession is invariably a state, and because a state is a subject of inter-state law, the rules of inter-state law, whose raison d'etre is the regulation of state conduct apropos other states, govern the sovereign act of a state entering into a concessionary relationship (hereinafter referred to as the 'act of concession'), insofar as such entry affects inter-state relations.

THE ACT AND CONTRACT OF CONCESSION DISTINGUISHED

It is fallacious to assume that because the immediate relation effected by a concession is not an 'international contract' it therefore has no international effect. The freedom which a state might conceivably enjoy in entering into relations with an individual is limited in many ways by existing rules of inter-state law. Any sovereign act which might transcend these rules is subject to the direct scrutiny of inter-state law and entry into a concession is a sovereign act. The act of concession must be carefully distinguished from the contract of concession which governs the relations of the parties *inter se* and is not directly subject to inter-state law. As MM. Lyon-Caen and Renault stated, in their joint opinion in the *Delagoa Bay Railway Arbitration*:—[27]

> The concession for the construction of the railway was not in the nature of an act of sovereignty, but of a contract, just as it was denominated in all the documents produced by the Portuguese Government. *The only act of sovereignty in the matter was the royal decree by which the contract was approved,* ...The arbitration related solely to the provisions of the contract to which the decree gave validity.[28] Though the Portuguese Government had in granting the concession exercised acts of sovereignty, it had at the same time entered into an actual contract by the provisions of which it was bound.

26a. see Schwarzenberger, *Die Kreuger Anleihen*, (1931), pp. 9-15.

27. Moore's Arbitrations, at p. 1891.

28. A difference between the terminology adopted in this article and that used by MM. Lyon-Caen and Renault in this case should be noted. What is there referred to as the 'matter' is here described as the 'concession.' What is there referred to as the 'concession' is here described as the 'contract of concession.' This change in terminology seems justifiable on the grounds that, as previously stated (in n. 2 above) the term 'concession' is used in its common meaning when

THE SIGNIFICANCE OF THE DISTINCTION

There may not even be a decree or other legislative measure, but there must be a special grant, and that grant is a sovereign act. It may thus well be that although there is no direct bar or obstacle to the conclusion of a contract of concession within the municipal law system, the state may nevertheless be rendered incompetent so to do by virtue of some over-riding obligation already existing towards some other state, or the community of states in general. Such matters are obviously relevant to the regulation of concessionary relationships and may be (and have been) pertinent in many disputes. Yet they are matters of international law *stricto sensu.* Some of them are referred to by way of illustration:—

a) It is clear, first of all, that if a state lacks capacity to perform an act of concession, any purported arrangement is a legal nullity.[29] So far as international agencies and other creatures of convention are concerned, the initial problem is easily resolved by reference to the instruments which are the beginning and end of their existence.[30] The fully-sovereign state likewise gives rise to no initial difficulty for there the presumption of capacity exists. So far as less than sovereign states, provinces, municipalities, state organisations, uncivilised despots, etc., are concerned the one's point of departure is that of incapacity. But in all these cases, whether fully-sovereign-state or province, treaties may have played havoc with the initial norms of capacity. Whatever other powers they may have lacked apropos other states, the Mosquito Indians could certainly grant concessions to British subjects [31] and the abortive Treaty of Sevres would have demanded recognition of 'concessions' granted by "states, provinces, municipalities or other similar juridical persons." [32] The complications introduced by the establishment of spheres of influence and the use of the most-favoured-nation clause have been considerable.

it is used to describe the whole transaction which contains the element of 'granting,' whereas if it is used solely to describe a bilateral consensual arrangement, it is used in an uncommon manner; and also that since the act of concession is an essential prerequisite of the contract of concession and since, therefore, the latter cannot have a separate existence, it seems useful to employ a single term to describe the whole creature.

29. From the point of view of international law, since the state would be arrogating to itself a competence which it did not have.

30. Thus, for example, Art. I of the Agreement for U.N.R.R.A. provides: "The Administration shall have power to acquire, hold and convey property, to enter into contracts and undertake obligations...and in general to perform any legal act appropriate to its objects and purposes" — Hudson, *International Legislation,* vol. IX, p. 85.

31. British and Foreign State Papers, vol. 49, p. 13; *ibid.*, vol. 50, p. 96.

32. Art. 299, Annex 2 (*e*); See also the following instruments: G.B./Kelantan, Hertslet's Commercial Treaties (hereinafter cited as Hertslet), XXVI, 753-4; G.B./Trengganu, Hertslet, XXVI, 955-6: G.B./Russia, Hertslet, XXV, 1043-8; G.B./Tibet, Hertslet, XXIV, 1044-6. The problem has arisen in the following cases: *Peru* v. *Dreyfus Bros.* (1888) 38 Ch.D. 348; Cook v. *Sprigg* [1899] A.C. 572; and the *Tinoco Concessions Case,* United Nations Reports of International Arbitral Awards, vol. I, p. 374.

Many disputes have occurred in which it simply has not been possible to ignore this aspect of concessionary relationships. The case of *George Rodney* Burt in the *Fiji Land Claims* [33] turned upon the competence of the local chiefs to grant which was based solely upon British recognition of their general competence by entering into a treaty of cession.

b) It is also clear that he who has not got cannot give. There are many old incidents which illustrate this point. In one American municipal decision,[34] Spain had ceded Louisiana to France in 1800 but had remained in occupation and granted a concession to one Davis in 1801. Davis sought to enforce this concession against the U.S.A. authorities after the Louisiana Purchase but was held unable to do so. The problem nowadays is likely to become much more acute, particularly in respect of the continental shelf and those parts of the world, some rich in oil-bearing deposits, where boundaries are still not defined.[35] The uncertainty surrounding the requirements for establishing title in Antarctica can hardly be regarded as other than raising questions of international law.[36] Yet they too may rise to the fore in determining the validity of a contract of concession.

c) Illegality according to international law may prevent the establishment of any basis upon which to rest the contract of concession. The most common example is the granting of a concession in violation of prior treaty rights, though the same rule will apparently apply in the case of infringement of prior concessionary rights.[37]

d) In principle, and perhaps as a result of the wide general provisions in the Charter of the United Nations Organisation, fraud and duress may[38] also be regarded as vitiating the act of concession and preventing the formation of a valid contract.

33. *Am. J.I.L.* 18 (1924) 814, 819-821; the awards were accepted by Germany, see British and Foreign State Papers, vol. 76, pp. 887-8.

34. *Davis* v. *The Police Jury of Concordia*, 9 How. 280.

35. A recent instance was the case of *Gasperoni et al*, briefly noted in *Am. J.I.L.* 49 (1955), p. 584 where it was decided that since there was no right to grant a concession to salvage at a distance of 22 miles off-shore, no title could accrue and a prosecution for theft would not, therefore, lie. A similar point was, of course, under consideration in the *Abu Dhabi Arbitration, International and Comparative Law Quarterly* (1952), p. 247.

36. see W. W. H. Christie, *The Antarctic Praulem*.

37. This is implicit in the *Oscar Chinn Case,* P.C.I.J. Reports, Ser. A/B, No. 63, p. 65, at p. 88, it being held, however, that business prospects did not warrant protection. In *American Electric and Manufacturing Co.* v. *Venezuela,* a promise to annul a previous concession was held illegal and unenforceable. See also Hershey, in *Am. J.I.L. 5* (1911) 285, 296; Report of the Transvaal Concessions Commission, Cd. 623, para. 13.

38. Also on the basis of general principles of law, *stricto sensu*, see Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* pp. 105-160, particularly pp. 110-111, and authorities there cited. As to duress, see *The Unitas* [1950] 2 All. E.R. 219 and cf. *Bernstein* v. *N.V. Nederlandshe-Amerikaanshe Stoomvaartmaatschappij* noted in *Am. J.I.L.* 48 (1954) 499.

Capacity, *nemo dat quod non habet,* illegality and other considerations all bear upon the initial validity of an act of concession. They delimit the sphere within which a state may manoeuvre in entering into economic relationships with an alien individual. Yet they are matters of international law and, as experience has shown, they cannot be considered *in vacuo.* It is asking too much of the entrepreneur and the underdeveloped country to expect them to observe niceties of classification in these matters. A complaint as to performance or interpretation of the contract by one party is quite likely to be met by a challenge as to initial validity by the other.

Whether we like it or not, concessionary relationships in their very inception give rise to questions of public international law strictly so-called.

THE SOVEREIGN ACT OF EXPROPRIATION

The act of concession however is not the only part of concessionary relationships where the state party may act in exercise of the competence which it is recognised to possess by international law. Of even greater practical importance than any of the matters thus far discussed is the effect upon the concession of the faculty of expropriation.[39]

In the light of this competence, the dual role of the state party which gives rise to the difficulties of classification which surround the concession, can be clearly seen. On the one hand, the state is party to a commercial transaction the frame-work of which is probably a municipal law contract, express or implied. On the other hand, the state is the steward of public interest and the arbiter of that very system of municipal law to which the aforementioned relationship is subjected. It is true that the Tribunal in *Czechoslovakia* v. *Radio Corporation of America* [40] maintained that there was really no difference between the contract there in question (between a state agency and a private company) and a contract between two private companies. Kelsen's view that:—

> The essence of the legal state consists in the fact that the state, as the possessor of authority is always subject to her own legal systems, and that when state officials enter upon a concrete legal responsibility, they are of no greater importance than any other legal subject in the same position and, in such case, they stand, from a legal point of view on exactly the same footing as the latter,

was approved. From a strictly legal point of view, Kelsen is quite right. But how far resort to him on this point was justified is doubtful. Legislative policy is, for Kelsen, an extra-legal fact, and outside his purview. But no entrepreneur can afford to equate the effect upon the formulation of legislative policy of the state itself with that

39. What follows touches only those aspects of expropriation which are immediately relevant and is, of course, abbreviated. At the same time, it is this aspect of concessionary relationships which is likely to give rise to most serious disputes. No attempt to reach conclusions on the various issues need be made. That the issues can be joined is all that requires proof for present purposes.

40. *Am. J.I.L.* 30 (1936) 523 at p. 530-531.

of the private subject. This is the crux of the problem. It is this very element, as Lord McNair rightly points out,[41] which sets apart the contract of concession from other municipal law arrangements and which makes of it a special case requiring special treatment.

The prevalent opinion today would seem to be that a state has a sovereign right to expropriate property within its jurisdiction.[42] There are limits upon this right. Clearly, foreign public property cannot be expropriated, nor can expropriation be effected in contravention of the terms of a treaty in force. On two points, however, there is considerable doubt. The first of these, as to the extent of the obligation to compensate, is not of immediate concern here. The second, however, as to whether the effectiveness of an expropriation is dependent upon payment of the required compensation, or whether the obligation to compensate arises only out of an effective expropriation, involves some consideration of this first point and is obviously of concern to the entrepreneur, for upon it turns the question of title to products, and rights to dues and profits during the period between the initial purported expropriation and the satisfaction of the obligation to compensate. It is not the purpose of this article to answer these questions, but rather to show that they may legitimately be asked and are matters of public international law in the strict sense.

a) The extent of the obligation to compensate

At the risk of accusation of gross over-simplification, it is asserted that there are certain circumstances where expropriation can be carried out without any obligation to compensate. The guiding principle in this sphere would seem to be that such a course may only be taken where the concession operates in a manner injurious to the public interest, due to causes outside the contemplation of the state at the time the transaction

41. *loc. cit.* p. 6.

42. See, for example, the London Declaration of 2nd August, 1956, made by the U.S.A., the United Kingdom, and France; which recognised "the right of Egypt to enjoy and exercise all the powers of a fully sovereign and independent nation, including the generally recognised rights, under appropriate conditions, to nationalize assets..."; see also the letter of 7th September, 1948, from the U.K. Minister in Roumania to the Koumanian Minister for Foreign Affairs, regarding the Roumanian expropriations; the famous 'Middleton' letter in the Anglo-Iranian Oil Co. dispute was in similar vein. It is frequently asserted that contractual rights cannot be the subject of expropriations. The more correct view is believed to be that the concession must give rise to property (acquired) rights and that these may be expropriated. It seems that in principle from the point of view of international law the concession gives rise to no rights other than these. See *The Salem Case,* United Nations Reports of International Arbitral Awards, vol. II, p. 1161, 1235.

was entered into.[43] It may be, of course, that the instrument granting the concession makes express provision for such a contingency.[44] This may quite properly be regarded as being a matter of termination according to the terms of contract and thus not a matter of international law at all.[45] Even where the matter has been one for determination according to the general law, it has been recognised that the determination of what is 'harmful to the public interest' is primarily the province of the state.[46] But in neither of these two cases has international law been content to vest an absolute discretion in the state party. Thus, Fauchille[47] considered that a state could be "considered juridically responsible...when it abused its sovereignty in departing, without necessity, from the engagements which it had contracted." So also, in the *Shufeldt Case,* the Arbitrator, Sir Herbert Sisnett, whilst admitting that the question as to whether a concession was 'harmful to the national interest' was for the Government alone to decide, declined to admit this as conclusive in international law and held that if injustice resulted from such decision of the Government, the aid of international law could be invoked. [48] In yet other cases, tribunals have not even paid lip-service to the primary

43. The proviso would seem to flow from a dictum in *Czechoslovakia* v. *Radio Corporation of America* that "when a public institution enters into an agreement with a private person or a private company, it must be assumed that the institution has intended by this agreement to benefit its citizens. But that this expectation sometimes proves to fail in not giving the country as large a profit as was expected, cannot be considered sufficient reasons for releasing that public institution from its obligations as signatory of said agreement." *Am. J.I.L.* 30 (1936) pp. 523, 534.

44. As, for example, in the Charter of Schantung Bergbau Gesellschaft — "Should they (the company) fail to comply with this obligation and should the omission of or interruption to such work be contrary to revailing reasons of public interest, the Imperial Government may withdraw the grant of mining rights for such fields. No claim for compensation of any kind shall be admitted in such case." (MacMurray, *Treaties and Agreements Concerning China,* p. 252). Similarly, Art. 22 of the Portuguese Law Regulating the Concession of Lands in the Portuguese Colonies provides that "...the state may always avail itself of the provisions of the following clauses, if not otherwise expressly stated: —

    (i) The right to expropriate, without any compensation, portions of land required for the construction of works of admitted public utility, roads, viaducts, etc."

    Articles 29, 32-40 and 84 contain similar provisions. (British and Foreign State Papers, vol. CVII, p. 1098 *et seq.).*

45. This is made clear in the dictum in the *Delagoa Bay Railway Arbitration* that " From the moment when they (the company) could not justify themselves by the very terms of the concession and when it could no longer be said that the concessionaire was himself responsible, there remained only one principle of law which could be applied to the determination of the compensation to be allowed by this tribunal." (de Martens, *Nouveau Receuil, etc.,* 2me. Ser., vol. XXX (1904) 329) (translation supplied).

46. *Shufeldt* v. *Republic of Guatemala, Am. J.I.L.* 24 (1930) pp. 799, 814.

47. *Traite de Droit International Public,* vol. I, pp. 528-33. Translation supplied.

48. *Am. J.I.L.* 24 (1930), pp. 799, 814, 818.

right of the state to determine 'public interest' but have been content to examine the substantive question themselves.[49]

What conditions have been regarded by international tribunals as 'harmful to the public interest' is another and more pertinent matter. The mere fact that a concession is 'opposed to the commerce of a country,'[50] that the main object of the expropriation is the seeking of a 'source of pecuniary gain'[51] or that the transaction has not turned out as well as expected[52] will not suffice. At the other extreme are certain well-defined grounds acceptable even to Western states, where confiscation is permissible. Execution of the concession in manner illegal by the municipal law,[53] or in a manner involving breach of treaty[54] or in breach of neutrality[55] are all recognised as providing grounds for confiscation, as

49. Thus, in *Anglo-Iranian Oil Co.* v. *Societa S.U.P.O.R.* the Tribunal of Venice is reported as saying "...that they...must deny effect in Italy to a foreign law providing for expropriation not for motives of public interest, but for motives of a political character, persecution, discrimination," etc., *Am. J.IJj.* 49 (1955) pp. 259-61, though the Italian court was not, of course, sitting as an international tribunal applying international law. The Tribunal in the *Walter Fletcher Smith Claim,* however, was, and found that "the expropriation proceedings were not in good faith for the purpose of public utility," United Nations Report of International Arbitral Awards, vol. II, p. 913, 917. In *Czechoslovakia* v. *Radio Corporation of America Am. J.I.L.* 30 (1936), p. 523, the tribunal refused to allow cancellation 'in the public interest and examined the substance of this plea.'
50. Letter from Sir H. Drummond Wolff to the Marquis of Salisbury in connection with the Persian Tobacco Monopoly, 16th September, 1890, in British and Foreign State Papers, vol. 85, p. 607 *et seq.*
51. *Case of the Expropriated Religious Properties in Portugal,* United Nations Reports of International Arbitral Awards, vol. I, p. 7 *et seq.* The expropriations were upheld on the grounds that this was not the object. See also the *Walter Fletcher Smith Claim,* cited n. 49, *supra.*
52. As in *Czechoslovakia* v. *Radio Corporation of America,* cited n. 43, *supra.*
53. *Shufeldt* v. *Republic of Guatemala,* cited n. 46, *supra; The Matadero Canal Case,* Magoon's Reports, 602-3.
54. The Report of the Transvaal Concessions Commission included this as one of the grounds of non-payment of compensation, in Cmd. 623, Art. 13, pp. 6-8. This claim was also made in the Persian Tobacco Concession Affaire: see correspondence referred to above, n. 50; see also the *Martini Case, Am. J.I.L.* 25 (1931) 554, 562-3, where it was argued, though never settled (p. 564) that "The Feo contract also constituted a violation of the treaty of commerce between Italy and Venezuela of June 19, 1861, by which each of the contracting parties agreed not to grant any monopoly;" Article 228 of the Treaty of Trianon, 1920.
55. See, for example, Article 23 of the Regulations for the Working of Mines in Szechuan, MacMurray, *op. cit.*, p. 183; The contrary treaty practice is to be found in some of the Peace Treaties after the First World War; See also The Channel Tunnel Concession, British and Foreign State Papers, vol. 66, p. 484; Jessup, in *Am. J.I.L.* 49 (1955) 57, at pp. 58-9. This is the true principle underlying the refusal to allow compensation to some shareholders in the *Netherlands South African Railway Co. Case* (see Barclay *Problems of International Practice and Diplomacy,* pp. 47 *et seq.*); Other examples are to be found in *Rosenstein* v. *German State,* Hackworth's Digest, vol. 6, p. 198 and ANNUAL DIGEST, 1929-30, p. 482, where the cancellation was held to be

also is the obtaining of a grant by fraud.[56] It is in between these two extremes, however, that most difficulty is to be found. It is clear that fundamental breach of the contract of concession by the individual justifies confiscation. [57] At the same time, it is clear that a minor breach, such as, for example, the use of machetes in the *Shufeldt Case*,[58] will not. Somewhere between the two extremes, the line has to be drawn, a difficulty which is not peculiar to international law. Among the acts which have at various times been held to amount to sufficient breach to warrant confiscation are failure to commence work within a reasonable time, gross mishandling of affairs, great lapse of time during operations,[59] and failure to comply with an absolute prohibition on assignment.[60]

Where the breach is non-fundamental, expropriation apparently gives rise to an obligation to compensate taking into consideration a set-off for the breach.[61] It is also the case that where the breach is occasioned

justified by the "loss of an essential quality in the person of the contractor." *The Raburg Claim* de la Pradelle et Politis, Receuil, vol. II, p. 281; *Jarvis's Case,* Ralston, *Report* (1904), p. 150; *Fitch* v. *Mexico,* Moore's Arbitrations, p. 3476 *et seq*.; and *Cucullu's Case*, Moore's Arbitrations, 3477.

56. Compensation was refused to some shareholders in the *Netherlands South Africa Railway Co. Case* on this ground. (see n. 55, *supra).* A similar point was decisive in *Jarvis's Case* (see n. 55, *supra).*

57. *The International Fisheries Co. Case,* United Nations Reports of International Arbitral Awards, vol. IV, p. 691, Award of Commissioner MacGregor: see also Nicaraguan Law of 4th March, 1882, Art. 31, which provides for cancellation for non-observance of basic provisions; this ground was relied upon in the Transvaal Concessions Commission Reports — see the *Dynamite Concession Case* in Cd. 623, p. 61.

58. See n. 46, *supra.* Several examples of what will *not* suffice occur in this case.

59. "Repeated breaches of contract, the great lapse of time, the character of the companies, which it was justified in declaring, by its minister, to be merely 'imaginery;' the refusal of the reasonable guarantees required by the Bolivian law...and the want of means to prosecute the enterprise successfully; these things appear to have fully warranted this withdrawal of the concession," *per* Lord O'Hagan in *National Bolivian Navigation Co.* v. *The Republic of Bolivia* (1880) 5 App. Cas. 176, 200-201; see also *per* Lord Hatherley at p. 189.

60. As in the Blanchet Concession — Article 2 of the Nicaraguan Law of 4th March, 1882, British and Foreign State Papers, vol. 73, p. 916; see also Columbian Law No. 33 of 26th May, 1876, in British and Foreign State Papers, vol. 68, p. 433. Not so, however, a provision for assignment on conditions, even where the conditions are not fulfilled: see Exchange of Notes Concerning the Persian Tobacco Monopoly, para. 9, British and Foreign State Papers, vol. 85, p. 607 *et seq.; aliter* failure to comply with notice requirements, as in the *Orinoco Shipping Co. Case,* Award of Umpire Barge reprinted in Scott, Hague Court Reports, I, p. 255, 267.

61. There is but sparse authority for this proposition. In the Persian Tobacco Monopoly Affaire, settlement short of full compensation seems to have been reached as a result of the Shah's pleas of 'force majeure' in the form of the hostility of the local populace and unspecified 'extraordinary events,' British and Foreign State Papers, vol. 85, p. 607 *et seq.;* a similar approach seems to have been adopted in the *Case of the Ashmore Fishery,* Moore's Arbitrations, pp. 1857-9.

by the fault of the state-party, that party cannot be heard to complain of it.[62]

These instances apart, the obligation arising out of an expropriation is to compensate in full, though there is considerable diversity in state practice and otherwise as to the exact measure of this obligation.[63] It is sufficient for present purposes that an obligation to compensate may arise out of the expropriation of concessionary interests.

Now, as has been said, expropriation is "the exercise of a jurisdiction, which the State is recognised to possess by international law."[64] Yet expropriation is a not infrequent method of interference with concessionary rights. A dispute arising out of concessionary relationships is therefore not unlikely to give rise to the questions (1) is the expropriation effective? (2) what obligations are regarded by international law as arising out of it? and (3) have these obligations been discharged? If for any reason, the expropriation is ineffective, then there is a straightforward question of breach of contract which is not directly the concern of international law. If, however, the expropriation is effective, there remains the inter-state obligation of compensation for failure to respect acquired rights, a question of international law in the strict sense.

b) The character of obligations ensuing upon expropriation.

Let us assume, now, a purported expropriation, and assume also a failure to make any provision as to compensation. In these circumstances, there comes to the fore immediately the question of title to products, dues, profits, etc., which turns upon whether the faculty of expropriation is an absolute one in the sense that the state can always expropriate, although by failure to make proper provision for compensation it may entail delictual responsibility. We are concerned here with the nature and effect of the exercise of its jurisdiction under inter-state law by a sovereign state, surely a matter of inter-state law?[65]

It can be seen therefore, that there are likely to arise in a dispute between the individual and the state parties to a concession, issues as to the initial validity of the act of concession, the validity of an exercise of the faculty of expropriation and the effect of failure on the part of the state to discharge such international obligations as arise out of a purported expropriation. These are not merely matters which might have been settled in municipal tribunals, but which have received the

62. *The Lazare Case,* Moore's Arbitrations, 1749.
63. The question is simply rephrased, not answered, by positing such tests as "adequate, effective and prompt" compensation.
64. Friedmann, *Expropriation in International Law,* p. 204. Any doubt as to the validity of this, of course, raises in itself a matter of inter-state law.
65. Determination of this question here is irrelevant. The point is that it is an issue which may legitimately be joined in international law but with regard to which municipal legislation might well be conclusive in the municipal courts.

attention of international law. They are matters which, in principle, appertain exclusively to the latter. One need only consider the grant of a concession by the sovereign observing the municipal forms, or his expropriation of it by properly enacted municipal legislation. In either case, no question can arise in the municipal law [66] for the effect of the sovereign acts is to re-shape the municipal law to suit the act.

2. *Indirect Application*

We have so far considered certain situations all of which have one thing in common, namely, that they arise from the performance of a sovereign act. This, however, is not the only source from which interference with the individual's rights under a concession can flow. There remain differences as to the interpretation or construction of the instruments governing the relationship, non-performance or partial non-performance by the state without more, unauthorised interference, allegations of minor breach by the individual, and the pursuit of an administrative policy which obliquely affects the venture. There may arise, in other words, differences as to which the state is not concerned to go to the lengths of justifying itself in the municipal law by re-shaping that law. Here, of course, the municipal law is directly concerned and notionally, a solution can be reached by its application. But in this debate, we are assuming the inadequacy of the municipal law in its present stage of development to cope.

THE ALTERNATIVE TO THE CREATION OF A THIRD SYSTEM

At this juncture, it is pertinent to observe that the deficiency about which we are arguing is not an inherent vice in systems of municipal law. As Lord McNair himself points out, the problem does not arise where both parties to the arrangement are endowed with mature systems. One solution therefore immediately poses itself in the 'education' as it were, of the legal systems of the backward countries concerned. Formation of a third system of law, though a solution, is therefore not the only solution, and whether it is to be adopted must turn on whether it is a more desirable one. There are several factors which, when considered in the light of the immediacy of the problem of regulation of international economic relations, persuade one that the desired end could be reached more quickly in a manner other than the one suggested by Lord McNair.

The first of these factors can easily be over-emphasised. It is simply that law is always a little behind life, and grows usually by adapting itself to situations after they have arisen. At the same time, it must discharge the function of inter-relating the various aspects of the national life and incorporating new situations as they arise into the bulk of old ones which are already catered for. Capitulatory systems have

66. I intend the term 'sovereign' so as to cover all situations, including those where the existence of a fundamental constitutional law or division of powers in a federation might otherwise have been claimed to pose grounds for invalidation of the acts in municipal law.

perhaps been justifiable as a stop-gap measure, but they have been proved to be inadequate and indeed, intolerable, as long-term measures. All other things being equal, then, the better course to take would be to mature the relevant municipal law systems, if, indeed, such a course were possible.

Whichever course it is decided to take, however, it must be appreciated that both are barred by a gate to which there is only one key. That key is held by the backward states in question. Apart from the influence of commercial expediency (which may be considerable), the choice before them is a free one between internal and external change. Either steps must be taken to bring the municipal law system 'up to scratch' and thus at the same time, to retain control over national affairs, or this particular legal function must be abdicated either directly (as seems unlikely, by treaties), or indirectly (as seems likely, by reference to arbitration coupled with acquiescence in the growth of a system which is to bind them) thus, to that extent, abandoning control over national affairs. At the present stage of development of many of these countries, it may matter little to them whether they retain control or not, but let us not forget, as we so frequently have in the past, that these are the pupae from which emerge the larvae of intensely nationalistic new states which are not likely to take kindly to subjection to such external regulation whilst other, developed, nations claim and enjoy freedom from it. It is, further, not uncommon for the type of dispute which we are considering to create a climate suitable for such a metamorphosis, in which circumstances the significance of the existence of a legal obligation to submit to external arbitration may be grossly over-emphasised. At all events, in legal theory at any rate, we cannot impose any new system upon them. Any remedial action, in other words, requires their consent, and that consent is likely, if given freely and with awareness of the issues involved, to express itself internally rather than externally; in the long-term, a preferable course all round. The development it is true, seems likely to take the form of an emerging *jurisprudence* which requires the attention of capable men. There is, however, no reason in principle why such men should not operate within the frame-work of the relevant municipal law system. There is consequently no reason to assume that development from within could not take place.

THE MINIMUM STANDARDS OF INTERNATIONAL LAW

There is a third and more pertinent factor to be considered in determining which of the two courses open to the backward states might more profitably be taken. There is in existence as a part of international law a system of norms, albeit as yet imperfectly devised, to which states as members of the international community are required to conform in the regulation of their internal affairs. There is, in other words, a skeleton framework already in existence upon which the backward states can build and which could, given the requisite conditions, be used in a supervisory capacity. It is here that international law may have an indirect

application to concessionary relationships, by calling states to order when they fail to provide proper legal regulation of such relationships.

Reference is made to the so-called minimum standards of international law which states are required to observe in their dealings with aliens. Several states have, it is true, at times denied the existence of any such minimum standards.[67] The fact, however, remains that in its present stage of development, international law recognises that responsibility can be incurred by one state towards another in respect of injuries caused to one of the latter's nationals. If this fact is to be given its true significance, then the criterion of 'national treatment' as a justification for injuries caused must be abandoned (a) because such a criterion refers the responsibility of the state to its own municipal law and removes it from the sphere of international law; (b) because if this were so, the only injury which could be caused by one state to another could be such as must arise outside its own jurisdiction, in which case either interference with the territorial integrity of the other state or infringement of the principle of freedom of the high seas would be involved. In either of these events, it would become superfluous to cause responsibility to attach by virtue of injury in respect of nationals, a *nexus* already existing.[68]

Present concern is with those standards which appertain to concessionary relationships. It is not intended to attempt to determine

67. Particularly the South American countries. This was demonstrated clearly at the Hague Codification Conference in 1930 in the Third Committee dealing with the Responsibility of States for Damage to Foreigners. A Chinese resolution purporting to limit the duty of states to according 'national treatment' was defeated by 23 votes to 17, the latter being Brazil, Chile, Columbia, Mexico, Nicaragua, Salvador, Uruguay, China, Czechoslovakia, Danzig, Egypt, Persia, Poland, Portugal, Roumania, Turkey, Yugoslavia. (Minutes of 3rd Comm. 1930 vol. 17, p. 185 *et seq.*). It was strenuously denied by Mexico in the Correspondence over the Agrarian Expropriations, See Kunz, *The Mexican Expropriations.* The International Court has, however, suggested the existence of such a standard in the *Case of Certain German Interests in Polish Upper Silesia,* P.C.I.J. Reports, Ser.A. No. 7, pp. 22-23, 32-33; and affirmed this view in *Peter Pazmany University* v. *Czechoslovakia* P.C.I.J. Reports, Ser. A/B, No. 61, p. 243.

68. The literature on the existence of these 'minimum standards' is voluminous and extensively repetitive. A short and clear statement of principle is contained in a paper by Borchard "The 'Minimum Standards' of the Treatment of Aliens" in *Proceedings of the American Society of International Law,* (1939), pp. 51-63, and the ensuing discussion, *ibid*., pp. 67-74. The authorities down to 1938 seem to be exhaustively compiled and discussed in Freeman, *The International Responsibility of States for Denial of Justice*, pp. 497 *et seq*. See also Verdross, "Les regies Internationales concernant le traitement des etrangers," 27 *Recueil des Cours de l'Acaddmie de Droit Internationale de la Haye* (1931), p. 330 *et seq.* In principle, there must be a standard. Opposition has arisen from dissatisfaction with the standard asserted but has taken the form of denial of the standard's existence whereas it should have taken the form of a denial that *the* standard was that asserted.

exactly what these standards are, nor yet to define their extent, but rather to illustrate the sphere of the control which has been exercised in the past over state interference with concessionary relationships and to demonstrate that consistency can only be maintained by regarding such exercise of control as being the assertion of the obligation imposed by international law upon states to provide a legal order acceptable to the community of states in general. It is not claimed that all that is necessary is to apply these standards; that would be to claim for them a present perfection which is far from having been achieved. It is, however, suggested that more useful and lasting benefits would be obtained by expending the same effort on this project than would result from the course suggested by Lord McNair.

EXHAUSTION OF LOCAL REMEDIES

One's point of departure in considering treatment of aliens must be that the alien's primary responsibility is that of exhaustion of local remedies. Such an obligation is perfectly compatible with this thesis, for only by such a procedure is one of the types of municipal law defect which are here postulated determinable. It may, however, be that in certain circumstances the rule of exhaustion of local remedies is not applicable.

One writer,[69] at any rate, has seen fit to draw distinctions between the application of it to 1) acts in breach of international law but not of municipal law; 2) acts in breach of both; 3) acts in breach of municipal law but not of international law. The rule is claimed to apply in its full extent only in the third instance. As regards acts in breach of both, the function of an international tribunal is confined to the award of a declaratory judgment whilst in those cases where the act complained of is in breach of international law but not of municipal law, the rule is claimed to have no application at all. Most cases of legislative interference and certain cases of administrative interference will fall under this latter head. The municipal law will have been altered to render the interference legal according to it.

In at least one international decision, authority is to be found for this view. In *l'Affaire des Forêts du Rhodope Centrale*[70] the Arbitrator rejected a plea that the action was not maintainable before the exhaustion of local remedies in these words:—

> The rule...cannot be pleaded...against the Greek Government, (inter *alia)* because recourse to national courts offers the claimants no possibility of obtaining

69. J. E. S. Fawcett in B.Y.I.L. (1954) 452-8; see also *Am. J.J.L.* 23 (1929) Supp. pp. 167 *et seq.*

70. *Greece* v. *Bulgaria,* United Nations Reports of International Arbitral Awards, vol. III, p. 1418. Quotations are taken from the translation in *Am. J.I.L.* 28 (1934), 760, 788-9. A recent judicial pronouncement would favour a more comprehensive application of the 'local remedies' rule — see the dissenting opinion of Judge Lauterpacht in the *Case of Certain Norwegian Loans, France* v, *Norway,* I.C.J. Reports, 1957, p. 9, pp. 43 *et seq.*

justice, these tribunals being bound on the matter by Bulgarian national legislation... The rule of exhaustion of local remedies does not apply generally when the act charged consists of measures taken by the government or a member of the government performing his official duties. There rarely exist local remedies against the acts of the authorised organs of the state.

Where local remedies are required to be exhausted, recourse must be had to the courts. Failure on the part of the courts to exercise the judicial process in accordance with minimum standards gives rise to a right in the state of the individual to complain of denial of justice or manifest injustice.[71] Here then, is the first catalyst of municipal law reform.

THE ESPOUSAL OF CONTRACT CLAIMS

Where, however, there is no obligation to exhaust local remedies, the question arises whether a state can validly espouse the claim of one of its nationals who is complaining of a mere breach of contract. If not, then no possibility of enforcement of any standards, minimum or otherwise, will arise with respect to the contract of concession. That very assertion has, in fact, been frequently made, most recently by Friedman,[72] whose tautology cannot, however, justify itself:—

...Contracts cannot be the subject of international disputes since international law contains no rules respecting their form and legal effect.

One may contrast with this and like statements the fact that on numerous occasions, international tribunals have entertained claims which appear to be based upon breach of contract.[73] In order to reconcile this apparent difference four distinctions must be appreciated. The first of these is the distinction between contracts between private individuals (albeit of different states) and contracts to which a state is a party. That there can be no international reclamation arising directly (as opposed to by way of denial of justice) out of the former is admitted.

The second distinction which must be drawn, even where the contract is between the state and an alien individual, is that between contracts arising out of a special grant and those arising out of a general legislative measure. The concession is the classical example of the former, the public bond of the latter. Borchard makes this point thus:—

When they state, as many of them do, that on principle there can be no intervention in claims arising out of contract, they really mean to confine their assertion to the case of claims arising out of unpaid bonds and *not* contracts in general. This

71. The *locus classicus* is Freeman's work, referred to above, n. 68. For a demonstration of the spheres of these claims, see the *Martini Case,* referred to above, n. 54.

72. *Expropriation in International Law,* p. 156.

73. In some cases, the *compromis* has specifically authorised the hearing of contract claims. Even here, however, the law has not always been included in the *compromis* and must therefore exist apart from it. In other cases, a jurisdiction to entertain 'claims' has been conferred and used to hear certain types of contract claims. See below, n. 79 and n. 80. Other instances are to be found in Moore's Digest, vol, 6, pp. 722-738; Moore's Arbitrations, 3425-3590,

distinction...is important, inasmuch as there is far less reason for governmental intervention to secure the payment of defaulted bonds of a foreign government than there is in the cases of breach of concessions and similar contracts. [74]

Fischer Williams[75] found it difficult to ignore the fact that bonds could be bought on the open market by foreigners and concluded, therefore, that in issuing them the state could not be considered to have tacitly limited its sovereignty. The position may well be different, however, where there is but one transaction, which, presumably, the state has scrutinised, resulting in the special grant of a concession to a foreigner.

A third distinction which must be drawn is that between interference with the contract by the state and interference by unauthorised nationals. The remedy in the latter case, as above admitted, is primarily in the local courts and only mediately (via denial of justice) in an international tribunal.[76]

A fourth distinction which must be drawn (and a vital one) even where the contract is between foreign individual and state, where it arises out of a special grant, and where the state itself interferes, is that between interference before implementation of the contract, and interference after such implementation by the individual. Such a distinction appears strange to one nurtured on common law sanctity of agreement and weaned on to *pacta sunt servanda,* but it arises from the necessity to reconcile international law minimum standards with the principle of territorial sovereignty. As is pointed out by Lord McNair,[77] this union is consummated in the doctrine of respect for acquired rights, and no rights are acquired by virtue only of agreement.[78] Immediately, however, the individual invests capital, time, labour or skill in the enterprise, there comes into being that interest which has been variously described, but respect for which is sanctioned by international law.

74. *Diplomatic Protection of Citizens Abroad,* p. 282.

75. B.Y.I.L. (1928) 1, 15-30.

76. See the *Claims of Dominique & Co.,* French-Venezuelan Mixed Claims Commission of 1902, Ralston's Report, 81-127.

77. *loc. cit.,* p. 16.

78. This fact, carried through, offers a reconciliation of the difficulties surrounding the question of state succession to concessionary obligations. If the obligations of the conceding state are so limited, the obligation of the succeeding state appears identical, *i.e.* a straightforward application of the doctrine of respect for acquired rights. Huber's maxim (cited in Westlake's *International Law,* vol. I, Peace, at p. 82) that 'rights which are a mixture of public and private rights perish so far as they are public' is applicable. This can be easily illustrated by the hypothetical case of state A, bound by treaty with state B, not to expropriate concessions of nationals of state B, succeeding to state C which has granted concessions to nationals of state B. There is no succession to the public act of state C, (the grant of the concession). There is, however, succession to the obligation to respect the rights acquired by nationals of state B from the concessions of state C. The rights can be expropriated, but not *qua* concessions.

Thus it is that international tribunals have on many occasions entertained actions which the common lawyer would classify as breaches of contract. One main device has been used in order to discharge this function. This is the adoption of the view, in certain cases, that what is nominally a breach of contract is, in real terms, a confiscation. The proposed reference to arbitration of the *North and South American Construction Co.'s Claim* by the U.S.A. authorities was met by a Chilean objection that it was, in reality, a contract claim and as such could not be entertained. The retort was, however, that the claim was "not, properly speaking, based upon the contract, but upon conduct of the Chilean Government, amounting to a practical confiscation of its property."[79] The same objection in the *Case of the Venezuelan Bonds* drew the reply that "a claim is none the less a claim because it originates in contract instead of tort. The refusal to pay an honest claim is none the less a wrong because it happens to arise from an obligation to pay money instead of originating in violence offered to person or property."[80]

One is here approaching very near to the recent trend towards an expansive definition of 'expropriation.' Most cases of expropriation recently have been the result of legislative measures destroying the whole of the individual's right of property by positive acts. There may, nevertheless, be expropriation where there is no legislative measure and where the individual's right of property is not wholly destroyed, but where it is seriously interfered with so as to reduce greatly his returns. At the other side of the picture, failure by the state to perform (an omission) which results in loss, involves the state in responsibility for failure to comply with minimum standards.

The great shortcomings of such this supervisory function of international law are twofold :—

Firstly, that what are prescribed are *minimum* standards only. Without attempting to define the precise standard, it can nevertheless be stated that no-one has ever seriously argued that there was not considerable latitude left to the state to determine the distribution and incidence of private property, by taxation and other means.

Secondly, the standards are as yet imperfectly devised, in the sense that there seems to be no general agreement as to their application in particular cases.

These two shortcomings are, however, present in the system of "General Principles" advocated by Lord McNair; for that system is as yet totally undeveloped. Even minimum and imperfectly devised standards are preferable to no standards.

79. Moore's Digest, VI, p. 728-9..
80, Moore's Arbitrations, p. 3616,

In developing this branch of international law, the main source which is going to be drawn upon is that from which Lord McNair would derive his system. The essence of Lord McNair's proposal is, however, that conceptual difficulties necessitate the abandonment of the old dichotomy. The purpose of this article has been to suggest that the conceptual difficulties are more apparent than real, and that for this reason we should hesitate before abandoning a classification which has the merits of existing machinery, partial development, scope for further development and which has served us well enough in the past.

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