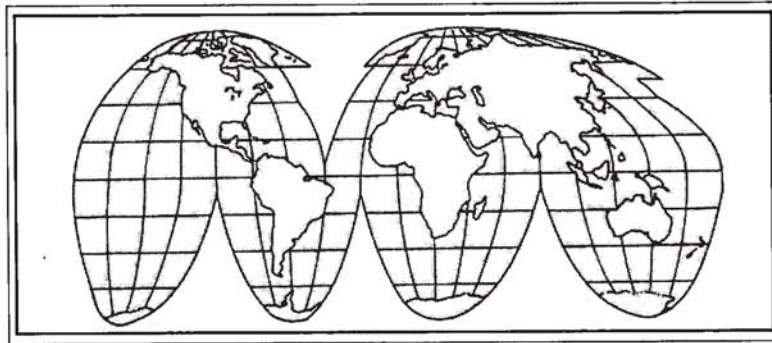


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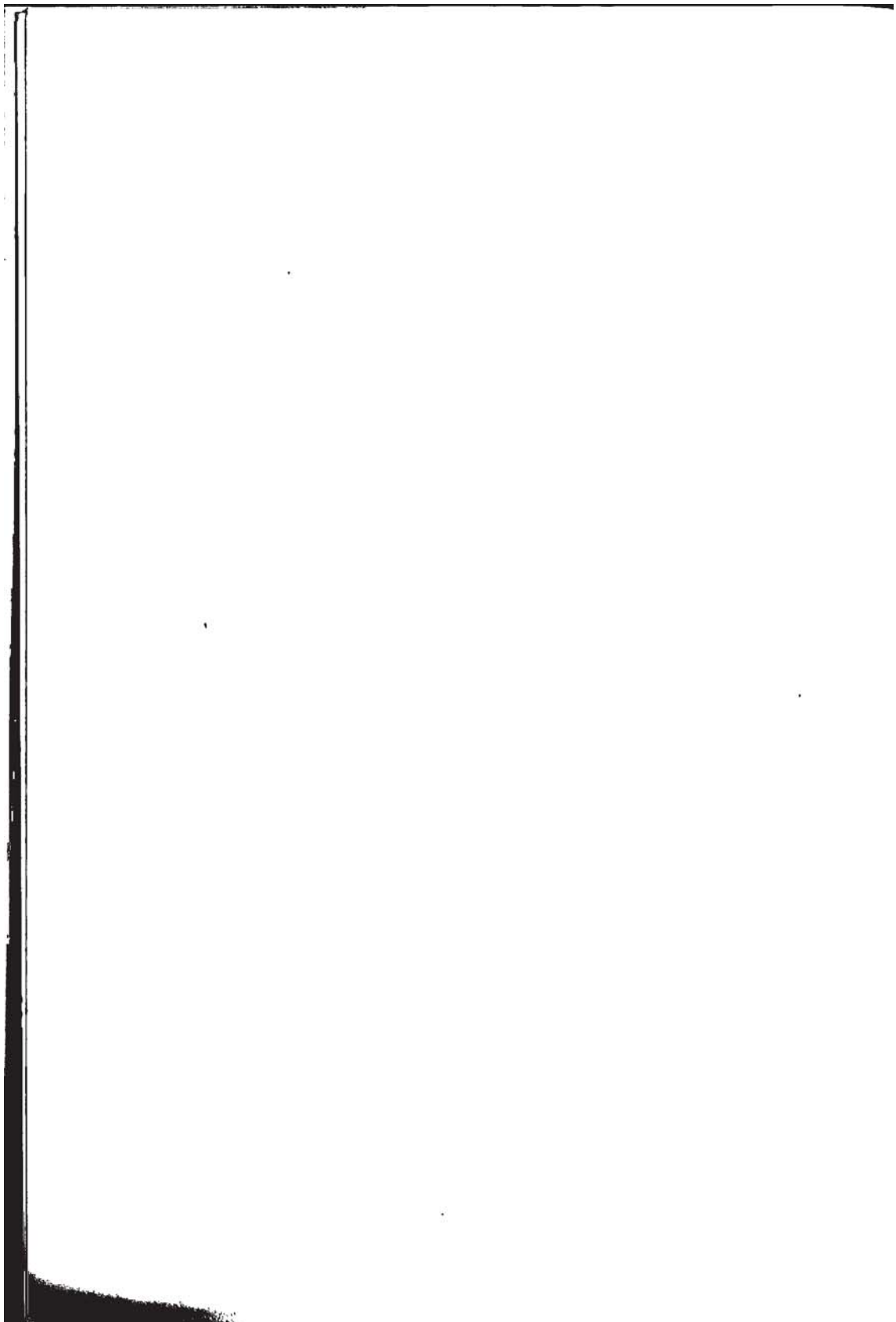


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BOOK REVIEW

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From the Editor:

In this issue...

Prof. A F M MANIRUZZAMAN examines the existing relationship between international law and economic development agreements (EDAs). He consequently explains that the corpus of international law lacks detailed and appropriate rules regarding complex commercial and contractual matters. Due to this considerable shortcoming, he propounds that international development law (IDL) is the more suitable alternative to resolve EDA breaches.

Prof. MARK A. SUMMERS analyzes the problems attendant in the treaty establishing a permanent International Criminal Court (ICC), focusing on the text that emerged from the Rome Conference negotiations and how the court it creates might function in hypothetical cases. Through this analytical framework, he argues that the future ICC's powers have been unacceptably diluted and that it may find itself in jurisdictional conflicts with the U.N. Security Council. Accordingly, he maintains that the current draft of the ICC treaty should not be ratified.

Prof. MARK B. BAKER discusses the ostensibly unbridled power of Multinational Enterprises (MNEs) and their corresponding global impact. In support of this premise, he explores the deleterious effects of rapid MNE growth, and he further surveys the numerous efforts, by which the power of MNEs has yet to be checked. In consideration of these fruitless efforts, he advocates that new methods be proposed and adopted in order to successfully overcome MNE dominance.

Mr. RAMA JOHN RUPPENTHAL describes the factors that duly motivate and legitimate the practice of high tech product piracy in Eastern Asia. By surveying the recent efforts used to impede the piracy problems in East Asia, he makes evident the limitations of Trade-Related Aspects of Intellectual Property Rights (TRIPS)- based enforcement solutions. In consideration of these limitations, he advances the development of a cooperative and regional approach to remedying this problem.

Ms. LORA A. GREEN outlines summarily the practice of child exploitation in a global context. She investigates extensively the pervasive practice of child exploitation in Pakistan, and she points to the Pakistani government's failure to comply with prescribed international standards. In closing, she reviews the actions taken by non-governmental organizations (NGOs) and international organizations to suppress child exploitation in Pakistan.

Mr. ALVIN H. CHU considers a recent U.S. lawsuit filed by five Tiananmen Square survivors against Li Peng, the former premier of China. He assesses the procedural dimensions and substantive merits of the Li Peng lawsuit against prior lawsuits filed under the auspices of the Alien Tort Claim Act (ATCA) and the Torture Victim Protection Act (TVPA). Lastly, he opines that the outcome of this case could have significant political and legal ramifications that extend beyond the human rights issues present in this lawsuit.

TINA CHANG

INTERNATIONAL DEVELOPMENT LAW AS APPLICABLE LAW TO ECONOMIC DEVELOPMENT AGREEMENTS: A PROGNOSTIC VIEW

A F M MANIRUZZAMAN*

I. INTRODUCTION

The main purpose of this article is to critically examine a cluster of important questions with regard to the application of international law to economic development agreements (EDAs) such as: What is the implication of international law when it is the designated applicable law in the choice-of-law provision? What exactly is the normative content of international law when general international law applies? What is the scope of international law in special situations? What may be the practical problems in applying international law to such kind of agreements? These questions have been with us for some time and they have given rise to great controversies among jurists. A fresh look at these questions is now ever so important in the context of recent moves towards the codification of a Multilateral Agreement on Investment under the auspices of the Organization for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO).

In the context of such an attempt at a universal, multilateral, and conventional international law regime concerning foreign investment, an inquiry into the present state of general international law merits attention. If the answers to these questions, however, are not satisfactory as far as general international law in the field is concerned, there remains to explore other avenues to seek out satisfactory answers for such *sui generis* agreements as EDAs.¹ It is proposed that this alternative avenue is the emerging international development law (IDL). After a balanced treatment of the questions posed, an effort will be made to highlight the recent trends towards

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¹ See *I Amco Asia Corporation v. Indonesia*, 24 I.L.M. 1022 (1985); HENRY CATTAN, *THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA* 27-30 (1967).

the developing new principles that can weave the fabrics of IDL to be suitably applicable to EDAs.

II. INTERNATIONAL LAW AS APPLICABLE SUBSTANTIVE LAW

There has been a great controversy with regard to the application of public international law to a contract between a State and a foreign private individual. Some contend such contracts are not governed by public international law *stricto sensu*, for this system is an inter-state system *jus inter gentes*.² However, there could not be any reason why the parties cannot choose public international law as the applicable law of the contract by virtue of their autonomy of will which is a universal rule found in almost all legal systems of the world.³ Thus, today the question is not whether international law applies; but if it applies at all, and then to what extent does it apply? The whole theme relates to the nature of applicable international law rules to such contractual relationships.

At this point it is necessary to distinguish two schools of thought which favour the application of public international law to such contracts. One school of thought supports the application of international law by elevating the contract between a State and a foreign private individual to the level of an inter-State treaty. The other school supports the application of

² Lord A. McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1, 10 (1957).

³ See F.A. Mann, *The Theoretical Approach Towards the Law Governing Contracts between States and Private Persons*, 11 REVUE B.D.E. DR. INT'L 562, 564-65 (1975).

(B)y exercising their right to choose the applicable legal system the parties may make public international law the object of their choice. Certainly French law is designed normally to apply to French people or French transactions. Certainly public international law is designed to apply as a rule to States and the transactions between them. But nothing prevents a contract between the German State and a Dutch firm to be submitted to French law. Similarly, the fact that one party is not a State should not prevent the contract from being submitted to public international law. It would thus become subject to the mandatory rules of public international law. No mandatory law of any national system as such could touch it. If the parties desire this, why should we put any obstacle in their way? Just as by their will they can choose a given State order as their proper law, so it is their will, their choice, founded upon and permitted by the private international law of the forum, that may submit a contract to the law of States, to public international law.

Id.

international law, but in a cautious and limited sense. With regard to the mode, nature, and degree of the application of international law in the context, the former school may be characterised as the Strict Internationalist School and the latter as the Moderate Internationalist School.

A. THE STRICT INTERNATIONALIST SCHOOL

Some contend concession agreements are international agreements entitled to protection on the international level.⁴ In the past, international law societies made several proposals to apply international law or general principles of law to development agreements and to provide international remedies in case of breach.⁵ Multilateral investment treaties containing these proposals were drafted, and international bodies were urged to affirm accordingly the international character of such agreements.⁶ Professor Fatouros, about four decades ago, succinctly summarised the position of the strict internationalist school of thought in the following words:

The basic assertion of the proposed modern theory is that the violation by a State, in whatever manner and for whatever purpose, of its contractual commitments to aliens constitutes in and by itself an internationally unlawful act. The legal effects of State contracts with individuals of a foreign nationality are thus identified with those of agreements between States, since, according to traditional international law, only the violation of the latter constitutes an internationally unlawful act. It is thus held that even State measures which are dictated by reasons of public interest and are not

⁴ This claim was made by the British Government before the International Court of Justice in 1951, in the case arising out of the expropriation of the Anglo-Iranian Oil Company by Iran (U.K. v. Iran), 1952 I.C.J. Pleadings 124 and Oral arguments and Documents 84 (July 2). For excerpts of the British argument, see also LOUIS HENKIN et al, *INTERNATIONAL LAW: CASES AND MATERIALS* 771-72 (1980). See also the Greek Government's position in the *Ambatielos Case* (Greece v. U.K.), 1953 I.C.J. Pleadings 71 (May 1953) (where it maintained that the contract between His Majesty's Government in the United Kingdom and Mr. M.N.E. Ambatielos "was one between a State and a foreign national, with the result that, according to the admitted principles of international law, the government of the State incurs a direct responsibility on breach of the contract, for which the government of the foreign national thereby injured is entitled to seek redress"); *Losinger & Co. Case*, 1936 P.C.I.J. (ser. C) No. 78, at 32 (1936). For similar arguments, see *id.* (argument advanced by Switzerland); *Norwegian Loans Case* (Fr. v. Nor.), 1957 I.C.J. Pleadings 61 (July 1957) (oral arguments and documents) (argument advanced by France). It should be noted that none of the cases, in which these arguments were made, ended up in judgment on the issue. See *ILC Fourth Report on International Responsibility*, [1959] 2 Y.B. Int'l L. Comm'n 30 ff., U.N. Doc. A/CN.4/119. See also Add. to Sixth Report (A/CN.4/134/Add.1 of 11 December 1961), art. 10(3) & cmt. 23.

⁵ See, e.g., *AMERICAN BRANCH INTERNATIONAL LAW ASSOCIATION PROCEEDINGS* 71 (1957-58).

⁶ G. SCHWARZENBERGER, *FOREIGN INVESTMENTS IN INTERNATIONAL LAW* 153-69 (1969).

discriminatory in character should be considered unlawful when they serve to defeat the normal expectations of the private contracting party.⁷

This view has given rise to a number of doctrinal issues: (a) an agreement between a State and a foreign private individual is considered equivalent to an inter-State treaty, (b) the foreign private individual who is not a subject of international law is endowed with that status or quality while entering into an agreement with a State, (c) and, by the same token, if the State violates any contractual commitments or interferes with any contractual rights it would amount to an international wrong and the State incurs international responsibility *vis-à-vis* the foreign private individual. We shall critically examine these issues next.

1. Economic Development Agreements (EDAs) Not Equivalent to Treaties

Some writers consider that the choice of public international law by the parties elevates the contract to the international plane and makes it equivalent to an inter-State treaty.⁸ One writer explains the position as follows:

In principle it appears that the proposition that contracts between a State and a foreign national should be regarded in the same manner as treaties between two States, and hence governed by international law, is both logical and desirable. In both cases, promises with an international scope, or of an international flavour, are made; in both cases reliance is placed on those promises; in both cases the obligation to perform those promises should be the same.⁹

⁷ A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 262 (1962) (footnotes omitted). See also Garcia-Amador, *the 4th Report on State Responsibility*, [1959] 2 Y.B. Int'l L. Comm'n 32 para. 127, U.N. Doc. A/CN.4/119; J-F. LALIVE, 181 HAGUE RECUEIL DES COURS 9, 110 (1983-III); H. Wehberg, 53 AM. J. INT'L L. 775, 786 (1959); P. WEIL, 128 HAGUE RECUEIL DES COURS 94, 113-14 (1969-III); G. Cohen-Jonathan, AFDI 452, 474 (1977).

⁸ Kissam & Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 FORDHAM L. REV. 207 (1959). For further references in this contest, see also Fatouros, *supra* note 7, at 262.

⁹ Kissam & Leach, *supra* note 8, at 209. See also PHILIP JESSUP, A MODERN LAW OF NATIONS 139 (1946) (where the author uses the term "'international agreement' to embrace not only agreements between States but also agreements between States and individuals").

Similarly, in the *Ambatielos case* before the International Court of Justice (ICJ), the Greek Government argued that the contract between the Government of the United Kingdom and Mr. Ambatielos

was one between a State and a foreign national, with the result that, according to the admitted principles of international law, the Government of the State incurs a direct responsibility on breach of the contract, for which the Government of the foreign national thereby injured is entitled to seek redress.¹⁰

The ICJ did not entertain the above view, nor did it a similar British argument that the concession contract between the Anglo-Iranian Oil Co. and Iran amounted to a treaty in the *Anglo-Iranian Case*.¹¹ The ICJ most categorically pronounced on the issue in the following terms:

The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character [of a contract and an international agreement]. It is nothing more than a concessionary contract between a government and a foreign corporation.¹²

There is no denying the fact that there is an initial difficulty with regard to the question of equating EDAs with treaties, the former being between two unequal parties, a sovereign State and a private entity, whereas the latter is between two or more equal parties, *i.e.* at the least parties are sovereign States. It will be shown that it is not only the quality of the parties distinguishing EDAs from treaties but also other factors which make the distinction between them even more prominent.

It is necessary to grasp the essential aim of the assimilation to a treaty of an investment agreement between a State and a foreign entity. The principal aim is to prevent the State from interfering with their mutually agreed contractual rights and obligations by its legislative or executive measures, thus upholding the doctrine of *pacta sunt servanda*, the fundamental rule of treaty law. Under that rule, the State party cannot rely on its executive act or municipal legislation to avoid international obligations arising out of variation, termination or any other interference with the contract as if it is a treaty. The fact of the matter is that an investment agreement is neither a treaty, nor even analogous to a treaty. Hence such analogous

¹⁰ The *Ambatielos Case* (Greece v. U.K.) 1953 I.C.J. Pleadings 71 (May 1993).

¹¹ (U.K. v. Iran), 1952 I.C.J. 111 *et seq* (July 1952).

¹² *Id.* at 112. See also ICC Award in Case 3327 of 1981, 1 COLLECTION OF ICC AWARDS 433 (1990).

application of treaty rules to investment agreements cannot be accepted. There is now overwhelming juristic¹³ as well as judicial support¹⁴ for this view. As Professor Somarajah observes:

The assimilation of foreign investment agreements to treaties is a non-starter as the law on treaties was never developed in contemplation of its application to foreign investment agreements. The argument that the Vienna Convention on the Law of Treaties could be applied to foreign investment agreements is too fanciful to have any merit as the Convention was not made by the parties to apply to anything other than agreements between States. It is unnecessary to clutch at such straws if the argument that is made has any inherent strength.¹⁵

Furthermore, one has to appreciate that investment agreements and treaties significantly differ not only on the quality of the parties concerned, as mentioned earlier, but on other important grounds, including the respective interests of such parties. It cannot be denied that the State, on the one hand, represents the interests and welfare of its people as a whole, while the contracting foreign private entity, on the other hand, mainly represents its profit-motivated interests from the time it enters into such a contract until its

¹³ I. BROWNIE, *PRINCIPLE OF PUBLIC INTERNATIONAL LAW* 550 (4th ed. 1990); O. SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 309 (1991); Bowett, *infra* note 98, at 933; G. Jaenicke, *supra* note 13, at 177; HORACIO A. GRIGERA NAÓN, *CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION* 133 (Tübingen 1992); Bernard Audit, *Transnational Arbitration and State Contracts: Findings and Prospects*, in *TRANSNATIONAL ARBITRATION AND STATE CONTRACTS* 77, 104-06 (Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law, 1987); Michael E. Dickstein, *Revitalizing the International Law Governing Concession Agreements*, 6 *INT'L TAX & BUS. LAW.* 54, 71-74 (1988); John A. Westberg & Bertrand P. Marchais, *Pacta Sunt Servanda and State Contracts - A Commentary*, 7 *ICSID REV - FILJ* 476-96 (1992); AFM Maniruzzaman, *State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law*, 9 *J. INT'L ARB.* 141-71 (Dec. 1992); Georges Abi-Saab, *The International Law of Multinational Corporations: A Critique of American Legal Doctrines*, in *THIRD WORLD ATTITUDES TOWARDS INTERNATIONAL LAW: AN INTRODUCTION* 549, 552-54 (E. Snyder & S. Sathirathai eds., 1987); Ronald Brown, *Choice of Law Provisions in Concession and Related Contracts*, 39 *MOD. L. REV.* 625, 636-67 (1976) (with regard to past arbitration practice, the author observes that "Certainly no international tribunals can be said, in unequivocal terms, to have applied the principle *pacta sunt servanda* in the context of a government contract.").

¹⁴ See, e.g., *The Anglo-Iranian Oil Co. Case* (U.K. v. Iran), 1952 *I.C.J.* 112 (July 2); *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran*, 15 *Iran-U.S.C.T.R.* 189, 242-43 (July 1987).

¹⁵ M. Somarajah, *Power and Justice in Foreign Investment Arbitration*, 14 *J. INT'L ARB.* 103, 119 (1997).

completion.¹⁶ In entering into investment agreements, the State does not surrender its sovereignty. And there cannot be any question of mutual surrender of sovereignty¹⁷ because one of the parties, *i.e.* the foreign entity, lacks such quality, while the State party's sovereignty remains predominant¹⁸ during the whole course of the agreement.

In the case of a treaty between two sovereign States, there is naturally a mutual surrender of sovereignty, and it is this limitation on their sovereignty that is protected by the doctrine *pacta sunt servanda*.¹⁹ The Iran-United States Claims Tribunal's important decision in the *Amoco International Finance* case²⁰ is thus instructive in this context. While the Tribunal was weighing a rule of public international law that "a State has the duty to respect contracts freely entered into with a foreign party," it emphasised that this rule

must not be equated with the principle *pacta sunt servanda*, often invoked by claimants in international arbitrations. To do so would suggest that sovereign States are bound by contracts with private parties exactly as they are bound by treaties with other sovereign States. This would be completely devoid of any foundation in law or equity and would go much further than any State has ever permitted in its own domestic law.²¹

As Schachter noted, "... treaty rules are designed for agreements between States and they need not, and generally should not, be 'transported lock, stock and barrel' to the contracts that are not between States."²² He also warned that "the determination of typical questions of contract law by seeking analogous principles in treaty law, or in general principles of law common to domestic systems of all kinds, can be a daunting and frustrating exercise."²³

¹⁶ See generally A F M Maniruzzaman, *supra* note 13, at 141.

¹⁷ G. Schwarzenberger, *The Protection of British Property Abroad*, 5 CURRENT LEGAL PROBS 315 (1952).

¹⁸ See *Kuwait v. American Independent Oil Co.*, 21 I.L.M. 976, para. 99 (1982) [hereinafter *aminoil*].

¹⁹ D.W. GREIG, INTERNATIONAL LAW 458 (2d ed. 1976). See also Sapozhnikov, *Neocolonialistic Doctrines of International Protection of Foreign Concessions*, 1966-7 SOVIET Y.B. INT'L L. 90, 98-99 (1968) (where the author criticizes the doctrine of *pacta sunt servanda*, believing that it severely encroaches upon the State's sovereign authority, even if that means the exercise of that authority in the State's developmental activities).

²⁰ *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran*, 15 Iran-U.S.C.T.R. 189 (July 1987).

²¹ *Id.* at 242-43. See also Michael E. Dickstein, *supra* note 13, at 74 ("In short, *Pacta Sunt Servanda* is not a doctrine flexible enough to be useful in resolving concession disputes.").

²² Schachter, *supra* note 13, at 309.

²³ *Id.* Cf. Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 317, 344-45 (1988).

In order to surmount the theoretical obstacles, Bockstiegel has cleverly coined the phrase "public international law contract."²⁴ And, in order to have the effect of a "public international law contract" on the State-alien contractual relationship and to apply public international law thereto, he suggests several necessary criteria as follows:

- 1) On the side of the State partner the contract has to be concluded or authorized by the highest authorities of that State,
- 2) the contract must not be of a strictly private law character, but has to contain certain obligations of the State partner either for *ad hoc* changes of the law or for the execution or non-execution of a specific act of public authority,
- 3) the form of conclusion of the contract must be equal or close to that used in that specific State for the conclusion of international treaties,
- 4) the contract must contain a clause excluding national court jurisdiction such as submitting to international arbitration,
- 5) it must be evident from the contract either expressly or by implied interpretation that the contract is not supposed to be subject to a national law.²⁵

The approach seems to be rather a formalistic one that tends to attach to an investment agreement between two unequals, *i.e.* the State and a foreign entity, the formalities of a treaty thus elevating the former to the same level.

²⁴ Karl-Heinz Bockstiegel, *infra* note 25, at 33.

²⁵ *Infra* at 33-34. But see Bockstiegel's view in another place:

The question is whether the breach of a quasi-international contract has the same consequences as the breach of a treaty. The private party does not, by entering into the contract, become a State. Certain rules of international law (such as those of the Vienna Convention) are therefore not applicable. If however we accept that under certain exceptional circumstances quasi-international contracts, the logical consequences is that for the purpose of that contract the private party becomes a subject of international law. This is analogous with the possibility for international organizations to become subjects of international law. International law has only developed rules in connection with treaties. Only after further evolution will it be possible to see whether international law will develop rules for contracts.

It ignores the predominant element, *i.e.* "the moral and economic welfare"²⁶ of the contracting State's people which defies such an assimilation. Such an element lies at the foundation of the relationship between a State and a foreign entity. However, there are some writers who have taken a mid-way stance in the debate suggesting that investment agreements are "quasi-international agreements"²⁷ or "partly international agreements"²⁸, and that such agreements share many of the features of international agreements. Hence, according to Verdross and others, these agreements are akin to international treaties.²⁹ Such an approach also suffers from the same foregoing criticism.

Some writers have, however, considered foreign investment agreements to be of a higher status³⁰ than other State contracts and for that reason some even assimilate these agreements to treaties.³¹ These writers rely for authority mainly on paragraph 8 of the UN General Assembly (UNGA) Resolution 1803 on Permanent Sovereignty over Natural Resources³² which provides that "[f]oreign investment agreements freely entered into *by, or between*, sovereign States shall be observed in good faith..." (emphasis added). One may wonder why this wording would make foreign investment agreements any different from other State contracts. Good faith is the foundation of all contractual relations. To attribute a higher status to foreign investment agreements because they are to be observed in good faith would indicate that other State contracts are likely to be based on bad faith and may not be binding. Professor Brownlie noted, "... investment agreements by States include concession contracts and paragraph 8 thus constitutes evidence for the view that contemporary law confers a higher status on such agreements than did the older customary law."³³

With respect it is submitted that paragraph 8 of the UNGA Resolution has asserted one of the cardinal principles of contract law that commonly applies to all contracts and has not pronounced anything unique

²⁶ D.P. O'Connell, *A Critique of the Iranian Oil Litigation*, 4 INTL & COMP. L. Q. 267, 270 (1955); J. Verhoeven, *Droit international des contrats et droit des gens*, 105 CLUNET 209, 220 (1978); F. Rigaux, *Des dieux et des Héros : réflexions sur une sentence arbitrale*, 67 REVUE DE DR. INT'L. PRIVÉ 435 (1978).

²⁷ See, e.g., A. Verdross, *Quasi-International Agreements and International Economic Transactions*, 18 Y.B. WORLD AFF. 230 (1964); S. Schwebel, *International Protection of Contractual Arrangements*, AM. SOC'Y L. INT'L L. PROCDS. 226, 269 (1959).

²⁸ Peter Fisher believes that the only 'partly international agreements' are concession agreements as mentioned by I. Seidl-Hohenveldern, *infra* note 51, at 570 (1975).

²⁹ A. Verdross, *supra* note 27, at 230 (1964).

³⁰ I. Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, 162 HAGUE RECUEIL DES COURS 245, 308-09 (1979).

³¹ I. SEIDL-HOHENVELDERN, *INTERNATIONAL ECONOMIC LAW* 154 (2d ed. 1992).

³² G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

³³ I. Brownlie, *supra* note 30, at 308-09.

about foreign investment agreements as a special *genre*. As Professor Jaenicke observed, "... no cogent reasons can be found why the dimension of the investment should be sufficient justification for treating such agreements differently from other transnational contracts, and there are no precedents for such a privileged treatment"³⁴ Hence too much reading into the wording of the paragraph could be confusing. Similarly, an artificial classification of investment agreements as "economic development agreements" will not provide them with a special status, *i.e.* internationalized status, as this consideration is now being increasingly discarded, or at least ignored, in international decisions³⁵ and by scholars.³⁶

2. *The Question of Conferring International Personality on a Private Party to an EDA*

Traditional international law still jealously guards the dichotomy between the subject³⁷ and the object³⁸ theories of international law though there have been juristic objections to these theories³⁹ or suggestions for other

³⁴ Jaenicke, *supra* note 13, at 180.

³⁵ See, e.g., Jan Paulsson, *The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements*, 1 J. INT'L. ARB. 145, 157 (1984); *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran*, 15 Iran-U.S.C.T.R. 189, 234, 236 (July 1987); *Liberian Eastern Timber Corporation [LETCO] v. Government of the Republic of Liberia*, June 17, 1986, 26 I.L.M. 647, 658, 661-62; *Amco v. Indonesia*, Nov. 20, 1984, 24 I.L.M. 1022, 1027-28 (1985).

³⁶ See F.A. MANN, *STUDIES IN INTERNATIONAL LAW* 266 (1973); SCHACHTER, *supra* note 13, at 311. The author notes, "... the fact that a contract has international importance because of its nature and magnitude does not result in an exception to the general principle that contracts are subject to domestic law." Stephen I. Pogany, *Economic Development Agreements*, 7 ICSID REV. - FILJ 1 (1992).

In the proceedings of the Institute of International Law most of the members of the Institute refuted the proposition that "economic development agreements" or "investment agreements" should be dealt with as a separate category in regard to applicable law. Proceedings of the Institute of International Law, 57 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 207, *et seq* (1977) (Part I).

³⁷ R. HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 49 (1994). Professor Higgins, as she then was, notes that Verzijl has suggested that the first scholar to use the technical term "subject of international law" (in fact to describe the status of a State) was Liebnitz in the preface to his *Codex juris gentium diplomaticus*, of 1693.

³⁸ Heilborn, a German jurist, is said to have formulated the object theory of international law in 1896. See G. Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 438, 443 (1952).

³⁹ See, e.g., R. Higgins, *supra* note 37, at 48-55 (1994); I. DETTER, *THE CONCEPT OF INTERNATIONAL LAW* 4-24 (2d. ed. 1993); D.P. O'CONNELL, *INTERNATIONAL LAW* 116 (1965); G. Manner, *supra* note 38, at 438-49.

alternative classifications of non-state actors in international law.⁴⁰ The issue of the status of an individual in international law is inextricably linked to the doctrinal differences as to the relationship between municipal law and international law.⁴¹ Traditional positive international law is basically State centric⁴² and non-state actors, including private entities like multinational corporations, are not considered subjects of international law but objects of it. As Professor Bin Cheng reminded us, the traditional international law orthodoxy holds that "the international legal system is still basically a legal system established and maintained by States to regulate their mutual relationships."⁴³

It has to be acknowledged, however, that the doctrinal hypothesis on which the said dichotomy rests is itself a matter of great controversy amongst various jurists.⁴⁴ Thus, there are writers who hold that only States are subjects of international law as they are not only the bearers of rights but also have procedural capacity or duties and responsibility under that law.⁴⁵ To others whether an individual has procedural capacity or not, the mere fact that his capacity to become a subject of rights or duties under international law will

⁴⁰ Thus Professor Higgins, as she then was, is in favor of erasing the subject and object dichotomy and characterizes individuals as *participants* amongst others in international law. In her words, "Individuals are participants, along with states, international organizations (such as the United Nations, or the International Monetary Fund (IMF) or the ILO), multinational corporations, and indeed private non-governmental groups." HIGGINS, *supra* note 37, at 50. There is no surprise in Higgins's views, as she drifts away from the positivist notion of international law while proposing her own idea of international law as "process" rather than rules. *Id.* at 2-12.

G. Sperduti finds the status of the individual in international law as an intermediary ("intermédiaire"), rather than as a subject or an object of international law. However, he seems to lean toward the view that the individual may be a subject of international law when he considers individuals as material subjects ("sujet matériel") in many cases where the individual is the designated subject of rights and/or subject of duties. For example, individuals were vested with the capacity to sue or be sued before an international court, viz., the Mixed Arbitral Tribunals and the Nuremberg Tribunal. See G. Sperduti, *L'individuo nel diritto internazionale and l'Individu et le Droit International*, REC.T.90 727-85 (1950).

Manner notes, "... individuals often derive personal benefits from this (international) law in consequence of the rights and duties acquired by States concerning them, led the moderate German subjective positivist, Gareis, the Frenchman, Merignhac, and the American, Borchard, to assert in 1901, 1907, and 1915, respectively, that the individual is not only an object, but also a usufructuary or a beneficiary, of international law." Manner, *supra* note 38, at 432 (footnote omitted).

⁴¹ See generally A F M Maniruzzaman, *State Contracts in Contemporary International Law: Monist versus Dualist Controversies*, 12 EUR. J. INT'L L. 309-28 (2001).

⁴² See CHARLES. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 7-8 (P.E. Corbett trans. 1968).

⁴³ INTERNATIONAL LAW, TEACHING AND PRACTICE 516 (Bin Cheng ed., 1982).

⁴⁴ See C.A. NØRGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* 34-77(1962).

⁴⁵ G. SCHWARZENBERGER, 1 *MANUAL; INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 140 (3d. ed. 1957). On the concept of subject of international law and other allied concepts, see Nørgaard, *supra* note 44, at 26-33.

be enough to count him as a subject of international law.⁴⁶ Some writers have even gone afield to suggest that only individuals, and never States, are the subjects of international law.⁴⁷ Such is the diversity of doctrinal views on the subject.

Further, in the international scene, the non-state actors are increasingly playing important roles that lately pose a great challenge to the notion of sovereignty of States.⁴⁸ However, it is not the place here to examine that phenomenon. Be that as it may, the traditional positivist notion that the States are the main subjects of international law is still in operation in institutional mechanisms and procedural prescriptions of international law as we know today. In the positivists' eyes an individual is subservient to a State in capacity and status in the existing inter-State legal system. It is the States that protect the interests and rights of individuals directly and design the *modus operandi* by their common will in which to allow individuals to operate on the international plane in respect to certain matters, highlighted shortly below. Nothing has changed yet in the structure of international law to automatically accommodate individuals as subjects of this law.

Turning to the context of State contracts, one confronts the foregoing doctrinal debate. Some claim that parties to a State contract, by agreeing to submit it to public international law, have ranked themselves on the equal status in that law.⁴⁹ Such a claim is indeed a large one which is neither supported in theory nor in practice. However, a lesser claim for "limited international legal personality" of individuals in such a contract situation

⁴⁶ H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 27, 38 (1950).

⁴⁷ For a review of these views, see Nørgaard, *supra* note 44, at 72-75.

⁴⁸ For an interesting discussion on the topic, see *Implication for International Law of New Challenges to State Sovereignty, Round-table Discussion, no. XI*, in *THE PROCEEDINGS OF THE UNITED NATIONS CONGRESS ON PUBLIC INTERNATIONAL LAW* (New York, 13-17 March 1995) 575-91 (1996). Symposium, *International Law - From the Traditional Interstate Order Towards the Law of the Global Community: New Non-State Actors as Subjects of International Law*, J. INT'L L. ASS'N 23 (1998) (held at the University of Kiel, Germany on March 25-28, 1998). Professor Delbrück is reported to have noted in his closing remarks, "there was general consensus among participants (experts in the field) that the emergence of non-state actors has reduced the scope of action of states, even though in a formal sense this is less apparent as states still take the final decisions." *Id.* See also Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, Inaugural Public Lecture as Professor Of Public International Law, University of London, in 33 N.Y.U. J. INT'L L. & POL., 527, 543-48 (2001).

⁴⁹ P. VELLAS, *DROIT INTERNATIONAL ECONOMIQUE ET SOCIAL* 30 (1965) ("The rules of economic international law concern not only States but directly the individuals; because economic and social progress has as its objective to assure its direct application to those concerned. The result is that individuals are directly the subjects of economic or social international law.").

seems to be an attractive option to many jurists.⁵⁰ In Professor Seidl-Hohenveldern's words:

If it is possible to recognize international organizations, insurgents, etc., as subjects of international law and if some authors at least consider that even individual human beings under certain circumstances may be subjects of international law, why should a State be prevented from recognizing its partner to such a contract as a subject of international law? Of course, such recognition does not mean that the State recognizes its partner to such a contract as a subject enjoying all rights and duties due to a State. The private partner is recognized as a subject of only those rights and duties as are embodied in the contracts concerned.⁵¹

⁵⁰ Such a proposition was made in the *Texaco/Calasiatic v. Libya* Award, 53 I.L.R. 389, 457-60, 458 (1978):

... stating that a contract between a State and a private person falls within the international legal order means that for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specific international capacities. But, unlike a State, the private person has only a limited capacity and his quality as a subject of international law does enable him only to invoke, in the field of international law, the rights which he derives from the contract.

See also S.M. Schwebel, *The Law Applicable in International Arbitration: Application of Public International Law*, in ICCA CONGRESS SERIES NO.6 562, 568 (1996); R.B. Lillich, *The Law Governing Disputes Under Economic Development Agreements: Reexamining the Concept of "Internationalization"*, in INTERNATIONAL ARBITRATION IN THE TWENTY-FIRST CENTURY TOWARDS 'JUDICIALIZATION' AND UNIFORMITY 61, 67-69 (R. Lillich & C. Brower eds., (1993); G. SCHWARZENBERGER, *supra* note 6, at 6; K.-H. Bockstiegel, *The Legal Rules Applicable in International Commercial Arbitration Involving States or State-controlled Enterprises*, in INTERNATIONAL CHAMBER OF COMMERCE, COURT OF ARBITRATION, DOCUMENTS OF THE 60TH ANNIVERSARY CONFERENCE 60, 72-73 (1983); Mezghani, *Souveraineté de l'état et participation à l'arbitrage*, REV. ARB. 543, 579 (1985); F.V. Garcia-Amador, *The Proposed New International Economic Order: A New Approach, the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1, 55-56 (1980); F.V. Garcia-Amador, *International Responsibility*, [1959] 2 Y.B. Int'l Comm'n 32, U.N.Doc. A/CN.4/119.

⁵¹ I. Seidl-Hohenveldern, *Contrats Entre Etats et Personnes Privées Etrangères*, in 11 REVUE BELGE DE DROIT INTERNATIONAL 570 (1975); I. SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 48 (2d. ed. 1992). See also Schwarzenberger, *The Protection of British Property Abroad*, 5 CURRENT LEGAL PROBS. 315, 315 (1952); GARCIA-AMADOR, THE CHANGING LAWS OF INTERNATIONAL CLAIMS 382 (1984); C.N. OKEK, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW 214 (1974). But see generally H.A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS chs. 5, 6 (1988). "It would be more accurate to say that there are some consistencies in international practice concerning recognition of liberation movements, but this practice is not necessarily a matter of international law. Recognition of an entity representing a people is still a very primitive and tenuous development for which definite rules do not appear to exist." *Id.* at 138.

And, elsewhere in the same context: "... what recognition there is, is granted to the investor only as far as the execution of the agreement is concerned. The investor thus becomes merely a partial subject of international law."⁵²

The supporters of this view have put forward different justifications from different angles which are mainly representative of *de lege ferenda*. The arguments for the limited international legal personality vary from the human rights standpoints⁵³ to the recognition of transnational corporations' very important role as non-State actors on the international plane.⁵⁴ In the view of some jurists the emerging international economic law adds a new dimension in evolving "a method of protecting the economic rights of individuals and corporations against State behaviour that infringes upon such of those rights that are guaranteed by the EDA, or otherwise protected by international law."⁵⁵ Such protection is attributed to the assumed international legal capacity of the individual in the context of an EDA, which is considered an offshoot of international economic law. As Lillich puts it, "[t]o a limited extent, as in the human rights area, one may say that it [the EDA] thereby accords the private investor some international status on an *ad hoc* basis."⁵⁶ The claim for limited international legal personality of individuals is mainly attributed to an internationalized contract.⁵⁷ Unless automatically characterised, an EDA cannot always be internationalized as international law may not be the applicable law by virtue of the parties' choice⁵⁸ or the arbitrator's determination.⁵⁹ The State's ability to confer international legal

⁵² I. SEIDL-HOHENVELDERN, *supra* note 31, at 48.

⁵³ R.B. Lillich, *supra* note 50 at 68. See also *Duties of States Regarding Civil Rights of Aliens*, 161 HAGUE RECUEIL 329, 399-408 (1978); THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 17 (1984); E. LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 72 (1991).

⁵⁴ J.I. Charney, *Transnational Corporations and Developing Public International Law*, DUKE L.J. 748 (1983).

⁵⁵ R.B. Lillich, *supra* note 50, at 68.

⁵⁶ *Id.*

⁵⁷ *Texaco/Calasiatic v. Libya Award* 53 I.L.R. 389, 459 (1978) ("the internationalization of certain contracts entered into between a State and a private person does not tend to confer upon a private person competences comparable to those of a State but only certain capacities which enable him to act internationally in order to invoke the rights which result to him from an internationalized contract").

⁵⁸ See generally G.R. Delaume, *The Proper Law of State Contracts Revisited*, ICSID REV-FILJ 1 (1997); A F M Maniruzzaman, *Choice of Law in International Contracts - Some Fundamental Conflict of Laws Issues*, 16 J. INT'L. ARB. 141-72 (Dec. 1999).

⁵⁹ See A F M Maniruzzaman, *International Commercial Arbitration: The Conflict of Laws Issues in Determining the Applicable Substantive Law in the Context of Investment Agreements*, XL NETH. INT'L L.R., 210 (1993).

capacity or personality, however limited, to its contracting partner by virtue of a contract is questioned by many jurists.

The most important of the arguments against such a view seems to be that if conferring international legal capacity or personality is allowed in international law, then a State may be at liberty to unilaterally confer international personality on certain individuals or organisations for certain purposes which may not be acceptable to the international community at large, nor even to the national State of the individual.⁶⁰ Furthermore, it seems difficult to conceive the position and role of the home State of the foreign entity with regard to diplomatic protection, as long as that entity itself is formally elevated to the rank of a subject of public international law. As Greenwood has rightly pointed out:

... the company may not waive or surrender a right which belongs to another subject of international law any more than a State may surrender a right belonging to another State. The right of diplomatic protection at which the Calvo clause is aimed belongs not to the company but to its State of incorporation and only that State is competent to waive it.⁶¹

More than six decades ago in the *Panevezys-Saldutiskis Railways Case*, the Permanent Court of International Justice clarified the law on this matter. The court's words still stand true today, that

in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of special agreement, it is the bond of nationality between the State and the individual which alone confers upon it the right of diplomatic protection, and it is as part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.⁶²

⁶⁰ See generally ANN-SOFIE NILSSON, *POLITICAL USES OF INTERNATIONAL LAW* (1989); F.A. BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* (1985).

⁶¹ C.J. Greenwood, *State Contracts in International Law - The Libyan Oil Arbitration*, 53 BRIT. Y.B. INT'L L. 27, 49-50 (1982).

⁶² *Panevezys-Saldutiskis Railway Case*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (1939).

Similarly, the Permanent Court of International Justice pronounced in its 1924 judgement of the *Mavrommatis Palestine Concession case*:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subject, respect for the rules of international law.⁶³

Further, it has to be noted that where a foreign company is incorporated in the law of the host State it becomes its national, and, in the absence of any special legal arrangement, it is difficult to presume the international personality of that company.⁶⁴ However, there is no denying the fact that developments in modern international law since World War II have extended limited international legal personality to such non-State actors as international organizations⁶⁵ and individuals for specific purposes.⁶⁶ But it has

⁶³ The *Mavrommatis Palestine Concession Case* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) at 12 (1924).

⁶⁴ See Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), reprinted in 60 AM. J. INT'L L. 892 (1966), and in 4 I.L.M. 532 (1965) (entered into force October 14, 1966).

⁶⁵ The *Reparations for Injuries*, 1949 I.C.J. 174 (1949) (advisory opinion). SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 177 (1996). Sir Hersch Lauterpacht observed:

It is the Opinion in the *Injuries* case which, because of the doctrinal boldness and the clarity of its unanimous pronouncement on a fundamental issue of international law, must be regarded as the most important decision of the Court in that sphere and as one of the most significant examples of judicial legislation on its part. In that Opinion the Court held, unanimously, that the United Nations as an Organisation has the capacity to bring an international claim against a State – whether a Member of the United Nations or not – with a view to obtaining reparation in respect of damage caused to the United Nations as the result of an injury suffered by an agent of the United Nations in the performance of his duties.

It is noteworthy that even in this Opinion, the Court recognized the United Nations only a limited international personality.

⁶⁶ See R. JENNINGS & A. WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW 16-22 (9th ed. 1992); STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION 85 *et seq* (1990).

to be borne in mind that the international community, in the main, has collectively by virtue of multilateral treaties recognized such non-State actors as having limited international personality.⁶⁷ States have also done the same through bilateral arrangements.⁶⁸ Judge Schwebel notes that "(i)ndividuals and corporations have been invested with such rights by treaties in such diverse fields as commerce, navigation, investment, tax, transit, labour, extradition, the conduct of hostilities, human rights, social security payments, copyrights, etc."⁶⁹

With respect to disputes arising out of foreign investment and commerce between States and foreign entities or corporations, the latter have been granted specific capacity to pursue claims directly against States by several treaties negotiated between States.⁷⁰ This development in

⁶⁷ On the matter of Human Rights, see The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov., 1950, 213 U.N.T.S. 222 (esp. art. 25); the American Convention on Human Rights, 36 O.A.S.T.S. 1, O.A.S. Off.Rec. OEA/Ser. I/V/II 23, doc. 21, rev.6 (English), esp., Art. 44 (Nov. 1969). The United Nations International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368 (1967); The Optional Protocol to the Covenant, G.A. Res. 2200, 21 U.N. GAOR, Supp. No. 16, at 59, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 383 (1967). E. Lauterpacht notes:

The Law of the Sea has also given natural or juridical persons access to the Law of the Sea Tribunal in those situations where such persons might come into direct contact with the rules or organs established by the Convention. The jurisdiction of the Sea-Bed Disputes Chamber extends not only to States and the Authority or the Enterprise, but also covers disputes between parties to a contract relating to the exploitation of the Area, including natural or juridical persons.

E. LAUTERPACHT, *supra* note 53, at 71. See also UNCITRAL, Arbitration Rules, reprinted in 2 Y.B. COM. ARB. 161 (1977); ICRC, Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts, 06 IR RED CROSS 248 (1978).

⁶⁸ See, e.g., the Treaty of Versailles, Art. 304 (1919); the Treaty of St. Germain with Austria, Art. 256 (1919); the Treaty of Trianon with Hungary, Art. 239, the TREATY of Neuilly with Bulgaria, Art. 188, and the Treaty of Lausanne with Turkey, Art. 92. These various treaties, concluded at the end of World War I, established a series of Mixed Claims Commissions in which individuals and corporations had *locus standi* in respect of the classes of action (relating to contracts, debts and property affected by the war) specifically provided for in the Treaties. For a similar instance, see also the German-Polish Convention of 15 May 1927, relating to Upper Silesian Arbitral Tribunal. See KAECKENBEECK, THE INTERNATIONAL EXPERIMENT OF UPPER SILESIA (1942).

⁶⁹ S.M. Schwebel, *The Law Applicable in International Arbitration: Application of Public International Law*, ICCA CONGRESS SERIES NO.7 562, 568 (1994).

⁷⁰ The World Bank Convention (ICSID Convention) on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159. See Vuylsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 GA J. INT'L COMP. L. 343, 348, 349 (1974); George-R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784 (1983); DELAUME, 2 TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES 70 (1985); A. BROCHES, 136 HAGUE RECUEIL DES COURS 331, 352 (1972). *The Claims Settlement Declaration negotiated between Iran and the United States*, 7 Y.B.COM. ARB. 255, 257 (Jan. 1981).

The Energy Charter Treaty (1994), reprinted in 10 ICSID REVIEW-FILJ 258 (Fall 1995) (Art. 26); North American Free Trade Agreement (NAFTA), Dec. 17, 1992, reprinted in 32 I.L.M. 289, ch. 11 (1993).

contemporary international law is, however, an exception established by treaties, and it would be wrong to generalise this position as an encompassing one in international law.⁷¹ As one scholar rightly observes: "It is true that certain rules of international law seem to create direct rights or obligations for the individual. But these remain until now the very limited exception rather than the rule."⁷² However, from these isolated and exceptional instances it cannot be concluded that general international law recognises multinational corporations as its subjects nor can a State make it an international person by its unilateral act.⁷³

As mentioned earlier, some jurists have taken a different tag to authorise the *locus standi* of individuals against a State. As Professor Elihu Lauterpacht states:

As these [human rights] standards expand and become more widely accepted, the prospect that the kinds of State behaviour that now most directly affect aliens - denial of justice, the maltreatment of the person and the taking of property - will fall within the scope of human rights protection. In that way, the goal of individual access to international tribunals will gradually be achieved.⁷⁴

With respect, this statement proves to be just wishful thinking in the present state of international law. Since the protection of human rights⁷⁵ sets the

See Yair Barnes, *Investor-State Dispute Settlement under NAFTA, Chapter 11: The Shape of Things to Come?*, CAN. Y.B. INT'L L. 263 *et seq.* (1997).

⁷¹ Cf. R.B. Lillich, *supra* note 50, at 68-69; S.M. Schwebel, *supra* note 69, at 568.

⁷² Georges Abi-Saab, *The International Law of Multinational Corporations: A Critique of American Legal Doctrines*, in *THIRD WORLD ATTITUDES TOWARDS INTERNATIONAL LAW: AN INTRODUCTION* 549, 553 (E. Snyder & S. Sathirathai eds., 1987).

⁷³ See TOOPE, *supra* note 66, at 85-90; C. Greenwood, *supra* note 61, at 49-50.

⁷⁴ Lauterpacht, *supra* note 53, at 72. See also Elihu Lauterpacht, *International Law and Private Foreign Investment* 10 (The Inaugural Earl Snyder Lecture in International Law), available at <http://www.law.indiana.edu/glsj/vol14/no2/laupgp.html>.

⁷⁵ For a review of recent developments, see G.H. Aldrich, *Individuals as Subjects of International Humanitarian Law*, in J. MAKARCZYK, *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 851-58 (1996); DETTER, *supra* note 39 at 9:

The Nuremberg Court ruled emphatically that individuals may have direct international duties and that, conversely, individuals in many cases enjoy specific rights under international law. Subsequently, the whole development of the rules of Human Rights and of humanitarian law shows that individuals are endowed with important rights and duties, not only under treaties, but under general international law.

ground for an individual's procedural capacity against a State, there seems to be a tendency amongst some jurists to rationalise various matters to be part of human rights in order to allow a person, natural or juridical, to attain that exceptional procedural capacity. A caveat must be made here that an individual's property right for which protection is available mainly on the basis of humanitarian considerations should not be equated with a multinational corporation's business concerns to which various policy considerations of the host State may be attached.

Finally, even if it is recognised that foreign entities or multinational corporations do possess some strictly limited international personality, then their rights and duties are restricted to the contract itself.⁷⁶ And they cannot assert international law rights and benefit from obligations that may be owed to States under international law. We shall discuss this point further in the next section.

3. State Responsibility for Breach of EDAs

There is no doubt that the majority view supports the position that a simple or mere breach of an economic development agreement governed by international law is not *per se* a violation of international law.⁷⁷ The main reason may be ascribed to the fact that a choice of law clause providing for international law, either instead of or in addition to the national law of the

(emphasis added). But see Georges Abi-Saab, *supra* note 13, at 553 ("... most of the instances where the individual has been found [to have international personality] ..., primarily in the field of human rights, are based on treaty provisions - applying within certain regional confines - and not on general international law") (emphasis added).

⁷⁶ See Verhoeven, *Arbitrage entre états et entreprises étrangères: des règles spécifiques?*, REV. ARB. 637-38 (1985); TOOPE, *supra* note 66, at 87; M. SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 106-08 (1986).

⁷⁷ For references, see I. BROWNIE, *supra* note 13, n.36; M. Sornarajah, *supra* note 76. In the *fifth Report on State Responsibility*, [1976] Y.B. INT'L L. COMM'n 3, the International Law Commission stated that the violation by the State of an obligation entered into by contract and not by treaty is not, as such, an internationally wrongful act giving rise to international responsibility. The 1961 L.B. Sohn and R.R. Baxter report on the Responsibility of States for Injuries to the Economic Interests of Aliens made it clear that, in the absence of a violated treaty, the mere non-performance of the contract does not in itself entail international responsibility. State responsibility is incurred only in "those cases in which there has been a 'denial of justice' in litigation in the courts of the respondent State respecting an alleged breach of the contract and ... cases in which the breach of the contract or concession has been characterised as 'arbitrary' or 'tortious.'" L.B. Sohn & R.R. Baxter, *Report on the Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 570 (1961); D.W. GREIG, *supra* note 19 at 566. For the minority view, see OPPENHEIM, INTERNATIONAL LAW 344 (8th ed. 1955); S.M. Schwebel, *Whether the Breach by the State of Contract with an Alien is a Breach of International Law*, in III INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION, ESSAYS IN HONOUR OF ROBERTO AGO 401 (1987); SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 108-115 (1987); Schwebel, *supra* note 27, at 266.

host State, cannot transform an agreement between a State and a foreign private party into an international agreement equivalent to a treaty between States. Similarly, it cannot elevate the private party to the plane of public international law *stricto sensu* by conferring international personality on it. It is now established that a State contract itself does not create an international law right or obligation for the parties concerned, or likewise give rise to any international responsibility if a violation occurs. If a foreign private party breaches such an agreement, how can it be said that it is a breach of international law and that such party is internationally responsible when it is not a subject of international law? This can be said otherwise concerning the State and as such there remains a lack of mutuality between the two positions of the parties to the same contract.

One may ask how international law can be the proper law of the contract and what purpose it would serve to the contract. As mentioned earlier, by virtue of the autonomy of will, the parties can choose public international law as the proper law of the contract. The scope of the applicable international law in the relevant context is discussed later in this article. It is claimed, however, that a simple breach by a State of an internationalized contract such as an EDA, normally including a stabilization clause, arbitration clause and international law as applicable law, is *per se* a breach of international law incurring direct international responsibility of the State towards aliens.⁷⁸ Such a position is not tenable; it has been endorsed only in a few cases⁷⁹ and has not attracted sufficient support in legal literature,⁸⁰ in State practice,⁸¹ or in the majority of cases in order to be conclusive.⁸²

⁷⁸ See F.V. GARCIA-AMADOR, *supra* note 51, at 381-95 (1984); Garcia-Amador, *State Responsibility in Case of "Stabilization" Clauses*, 2 J. TRANSNAT'L L. POL'Y 23 (1993). See also *The Texaco Award*, 53 I.L.R. 456, para. 41 (1977); the *Aramco Award*, 27 I.L.R. 171 (1958). The consequence would probably be the same even in the case of a breach of certain terms of a contract as such, falling short of a taking of the property rights represented by the contract. See R.Y. Jennings, 37 BRIT. Y.B. INT'L L. 156 (1961).

⁷⁹ *Id.*

⁸⁰ See C.F. Amerasinghe, *infra* note 103, at 906.

It still remains a complex of relations belonging to a municipal level, although it may be necessary to import international legal principles to interpret the contract and give it effect. In other words, such a reference would introduce specific rules without altering the position of the contract in the municipal sphere. Lord Asquith's approval in the case cited above [*Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*] did not go further than this, it is submitted. The learned arbitrator was right in seeing the reference as an invocation of specific principles, while he did not commit himself to the view that the contract had its existence in the international legal system as such.

Contrary to this broad lack of support, Judge Schwebel concluded:

... while mere breach by a State of a contract with an alien (whose proper law is not international law) is not a violation of international law, a "non-commercial" act of a State contrary to such a contract *may be*. That is to say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law.⁸³

With respect, this view does not represent the existing law nor the practice of States. It is clear that even the existing investment protection treaties⁸⁴ do not restrain a host State from exercising its sovereign authority, legislative or otherwise, in a way that may affect an alien's contractual rights. As Jaenicke rightly notes:

... investment protection treaties do not normally render interference by non-discriminatory legislation internationally unlawful even if such interference diminishes or even destroys the value of contractual rights of the investor. But the investor will nevertheless be protected in those cases where the effect of the legislation of the host State on his contractual rights, if sufficiently serious, amounts to a total or partial expropriation of the investment and entitles the investor to a claim for compensation under the provision of the investment protection treaty dealing with the expropriation of an investment for public purposes.⁸⁵

See also G.R. Delaume, *The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal*, FILJ 79, 105 (1988) ("State contracts, including most investment agreements, remain rooted in municipal law, which is usually, though not always, that of the Contracting State.").

⁸¹ C.F. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 71-72 (1967); F.A. MANN, *supra* note 36, at 308-311.

⁸² See I. BROWNLEE, *supra* note 13, at 547 (footnotes omitted):

The practice of the capital-exporting States, such as the United States and the United Kingdom, clearly requires some element, beyond the mere breach of contract, which would constitute a confiscatory taking or denial of justice *stricto sensu*. On analysis most of the arbitral decisions cited in support of the view that breach of contract by the contracting State is an international wrong are found not to be in point, either because the tribunal was not applying international law or because the decision rested on some element apart from the breach of contract.

⁸³ STEPHEN M. SCHWEBEL, *JUSTICE IN INTERNATIONAL LAW* 431-32 (1994); S.M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* 111 (1987)(emphasis added).

⁸⁴ See the Collection of investment protection treaties by the International Centre for the Settlement of Investment Disputes (ICSID).

⁸⁵ Günther Jaenicke, *supra* note 13, at 189.

Judge Schwebel's above statement is purportedly based on certain international arbitral awards.⁸⁶ Unfortunately, this decisional basis for the support of the claim is very weak indeed on various grounds. First, many of the arbitral decisions were found, upon analysis, not in point.⁸⁷ Secondly, some of the very controversial awards made *ex parte*⁸⁸ prove to be weak sources of international law. Even Section 712 of the *Restatement of the Foreign Relations Law of the United States* (Revised 1986), which has been put forward as an authority for the above mentioned position, does not consider governmental acts or "non-commercial" use of sovereign authority to alter or abrogate the terms of a State contract with an alien to constitute a violation of international law on their own.⁸⁹ Some additional requirements are to be fulfilled in order to treat such governmental actions as a violation of international law. As the *commentary* on Section 712 clearly provides,

(u)nder Subsection (2) a State is responsible under international law for such a repudiation or breach only if it is discriminatory ... or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons and the State is not prepared to pay damages.⁹⁰

⁸⁶ Schwebel, *supra* note 83, 432-433; *Id.* at 111-13.

⁸⁷ See, e.g., *International Fisheries Company (USA) v. United Mexican States*, IV U.N.R.I.A.A. 691, 699 (1931) (the question was whether the Calvo clause precluded the investigation of a claim arising from the cancellation of a contract); *The North American Dredging Company of Texas case (U.S. v. Mex.)* IV U.N.R.I.A.A. 26 (1926) (the question arose whether the Calvo clause deprived the Commission of jurisdiction); *Saudi Arabia v. Aramco*, 27 I.L.R. 117, 168, 172, 227 (1958) (the award in the case had a declaratory character as the principle of acquired rights had been recognized by both parties). See F.A. Mann, *supra* note 36, at 312-13; I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 551, 552 (5th ed. 1998) ("On analysis most of the arbitral decisions cited in support of the view that breach of contract by the contracting state is an international wrong are found not to be in point, either because the tribunal was not applying international law or because the decision rested on some element apart from the breach of contract.").

For a detailed analysis of many often cited cases, see C.F. AMERASINGHE, *supra* note 81, at 77-84. The author reached the conclusion that "(f)rom this survey it is clear that none of the existing decisions convincingly supports the thesis that a breach of contract is *per se* a breach of international law." *Id.* at 84.

⁸⁸ See, e.g., *BP Exploration Company (Libya) Limited v. Government of The Libyan Arab Republic*, 53 I.L.R. 297, 329 (1972); *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic*, 53 I.L.R. 389, 470-71, 473-77 (1977).

⁸⁹ SCHWEBEL, *supra* note 83, at 114.

⁹⁰ *Id.* 114-15.

considerations and the State is prepared to pay damages."⁹¹ Judge Schwebel's assertion seems to suggest that a "non-commercial" act of a State contrary to a State contract on its own is sufficient to constitute a violation of international law. With respect, this is difficult to accept. Above all, Schwebel's view defies a well recognised fundamental principle of contemporary international law, *i.e.* the principle of permanent sovereignty of States over natural resources.⁹² By virtue of this principle, a State can regulate foreign investment in its territory and abrogate or violate contracts with an alien subject to the fulfilment of certain conditions of international law.⁹³ As Professor Schachter rightly observed:

It does not matter that a State, in repudiating or altering a contract, acts for governmental rather than commercial interest that, after all, is its primary obligation. What does matter, for purposes of international responsibility, is that it should not act in a discriminatory way, should pay compensation when due and should provide appropriate means of redress to an aggrieved private party.⁹⁴

Two other distinguished American lawyers, namely Clagett and Poneman, in the context of the Restatement of the Foreign Relations Law of the United States (Revised, 1986), observed that "[a]lthough the commercial-governmental distinction is well known in the context of the law of sovereign immunity, the meaning of that distinction cannot readily be incorporated into the law of injuries to aliens."⁹⁵

A contractual relationship between a State and a foreign private party, even though governed by international law, does not belong to the international legal system *per se*.⁹⁶ Thus, the simple repudiation or breach by a State of a contract with a foreign entity does not constitute a violation of international law thereby allowing the latter to invoke public international law remedies. Such an entity can plead international law only for the purposes of obtaining a

⁹¹ *Id.*

⁹² G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962); G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 501, U.N. Doc. A/9631 (1974); BASIC DOCUMENTS IN INTERNATIONAL LAW 230-249 (3d ed., I. Brownlie ed., 1994).

⁹³ *Id.*

⁹⁴ SCHACHTER, *supra* note 13, at 313. See also Jaenicke, *supra* note 13, at 188.

⁹⁵ Brice M. Clagett & Daniel B. Poneman, *The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law* 35, 51, 22 INT'L LAW. (1988).

⁹⁶ Schachter, *supra* note 13, at 311 ("... the fact that a contract has international importance because of its nature and magnitude does not result in an exception to the general principle that contracts are subject to domestic law").

remedies. Such an entity can plead international law only for the purposes of obtaining a contractual remedy.⁹⁷ There is considerable authority in support of this view.⁹⁸ A distinguished jurist restated the position in the following words:

[I]n so far as international law does form part of the chosen proper law, any breach of its relevant rules will remain a breach of contract *vis-à-vis* the private party. It would not *per se* become a basis of any international responsibility *vis-à-vis* the state of the nationality of that private party.⁹⁹

In a similar vein, Professor Jaenicke observed that:

Those rules of international law which are made applicable by such a [international law as applicable law] clause will become applicable by virtue of the contract between the parties and will remain part of the contractual relationship between the parties which is not part of the international legal system between States. It follows therefrom that the principles and rules of international law on the international responsibility of States which by their nature apply between States only, do not apply in case of a breach of an investment agreement. It cannot lightly be presumed that by consenting to the incorporation of such an international law clause in an investment agreement the host State intended to assume a separate international responsibility

⁹⁷ Professor Lalive has suggested that the implication of international law as applicable law is limited to an international law of contractual interpretation and that does not include the international responsibility of the State. See P. Lalive, 58 Y.B. INST. INT'L L. 194 (1980).

⁹⁸ See Schachter, *supra* note 13, at 305-314; BROWNIE, *supra* note 87, at 549-53; JENNINGS & WATTS, *supra* note 66, at 927-31 (parts 2 to 4); Derek W. Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, address delivered as the Brendan F. Brown Lecture at the Columbus School of Law (Oct. 1, 1985), in 35 CATH. U. L. REV. 929, 937 (1986); TOOPE, *supra* note 66, at 75-90; F.A. Mann, *State Contracts and State Responsibility*, in MANN, *supra* note 36, at 309-315; Jaenicke, *supra* note 13, at 179, 184; P. Lalive, *supra* note 97; Aréchaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179, 191 (1978); C.F. AMERASINGHE, *supra* note 81, at 66-120; M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 325-352 (1994); M. SORNARAJAH, *supra* note 76, at 203-08.

⁹⁹ Bowett, *supra* note 98, at 937. See also BROWNIE, *supra* note 13, at 547 n.36, 547-51; SCHACHTER, *supra* note 13, at 311-319; AMERASINGHE, *supra* note 81, at 77-84.

vis-à-vis the investor's home State for the protection of the investment.¹⁰⁰

The reason why the injured alien cannot invoke the responsibility of a State is, first, that he is not fully a subject of international law, and any international obligation for the injury sustained by him is owed to his home State.¹⁰¹ A State contract, even though governed by public international law, does not create an international obligation for either of the contracting parties. Thus, any simple breach does not give rise to a cause of action in international law and hence no international responsibility of the State party.¹⁰² Secondly, allowing an injured alien to invoke the responsibility of a State party to a contract is unfair because he is not subject to the equivalent concern, *i.e.* for the welfare of the country, as the State is, nor does he possess equivalent obligations to the public.¹⁰³ Hence, a private party to the contract should not be allowed to take advantage of the superior position of the State party, *i.e.* the subject of international law, in order to let it (the private party) climb onto the international level and receive all international law rights without corresponding duties or obligations attributed to it.¹⁰⁴ Otherwise, even Hohfeld would shy away with his famous legal philosophical gospel of fundamental jural relations between "right" and "duty"¹⁰⁵ that has dominated the judicial reasoning and the juristic thinking in the last century and still does now. Furthermore, the paradox is that those who characterise an EDA mainly as a private law contract rather than a public law one tend to attribute international responsibility to the State party in breach of such a contract. One may wonder, *arguendo*, if international law as the applicable law has more to

¹⁰⁰ Jaenicke, *supra* note 13, at 179.

¹⁰¹ See, e.g., The Barcelona Traction Case (Belg. v. Spain), 1970 I.C.J. 32 (Feb. 5); The Reparations for Injuries Case, 1949 I.C.J. 181-82 (1949) (advisory opinion). J.L. BRIERLY, THE LAW OF NATIONS 291 (6th ed. 1963) ("It has been stated that the theory underlying the law of state responsibility for injuries to foreigners is that the claimant state seeks redress, not directly for injury to one of its nationals, but for an injury suffered by itself through its national.").

¹⁰² See Prosper Weil, *The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage À Trois*, 15 ICSID REV. - FILJ 401, 493-04 (Fall 2000). Cf. S.M. Schwebel, *The Law Applicable in International Arbitration: Application of Public International Law*, in PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 562, 567-69 (Albert Jan Van Den Berg ed., 1994).

¹⁰³ See C.F. Amerasinghe, *State Breaches of Contracts with Aliens and International Law*, 58 AM. J. INT'L L. 881, 898, 905 (1964).

¹⁰⁴ F.A. Mann, *State Contracts and International Arbitration*, in MANN, *supra* note 36, at 262 ("Private persons, however, cannot and should not enjoy the privileges open to, or be exposed to the risks accepted by, States.").

¹⁰⁵ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36-38 (1919).

imply, *i.e.* beyond the contractual domain, in the context of an international contract between two private parties from two different countries. The answer is, of course, no. Thirdly, since the right to diplomatic protection of a national lies with his State, it cannot be transferred to the former without disrupting the latter's foreign policy and international relations with other States at least on the question of international claims.¹⁰⁶

Under general international law the question of State responsibility may arise from a breach of an international investment agreement when certain other additional factors are also present. The matter thus lies beyond the contractual domain. A State incurs international responsibility when in addition to the breach of the agreement it is also accused of denial of justice.¹⁰⁷ This means the State denies the private party access to its courts for the purpose of litigating its claim against the State, refuses to arbitrate the dispute in the face of a clear contractual commitment to do so,¹⁰⁸ or refuses to comply with a judicial or arbitral award against it.¹⁰⁹ These different counts of denial of justice are international delict, sanctioned by international law, which give rise to causes of action in international law.

It is thus only upon the exhaustion of local remedies¹¹⁰ and/or upon a denial of justice¹¹¹ by the local courts that an international claim arises. The claim is more properly pursued on the international plane by the State of nationality of the foreign private party by way of diplomatic protection, and not by the private party itself because the alleged injury is said to be mediately done to the former through the latter.¹¹² As Brierly noted: "It has been stated that the theory underlying the law of state responsibility for injuries to foreigners is that the claimant state seeks redress, not directly for an injury to one of its nationals, but for an injury suffered by itself *through* its national."¹¹³ Thus the international responsibility of the violating State is owed to the State of nationality of the alien and not to himself. This is the present position of

¹⁰⁶ See generally, J. CABLE, *GUNBOAT DIPLOMACY: POLITICAL APPLICATIONS OF LIMITED NAVAL FORCE* (1981).

¹⁰⁷ On denial of justice, see I. BROWNIE, *supra* note 13, at 529-30; C.F. AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 31-51 (1990).

¹⁰⁸ See E. Lauterpacht, 4 *INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT*, 50, 74 (1978).

¹⁰⁹ SCHWEBEL, *supra* note 83, at 115.

¹¹⁰ See generally C.F. AMERASINGHE, *supra* note 107; J.L. BRIERLY, *supra* note 101, at 281-82.

¹¹¹ C.F. AMERASINGHE, *supra* note 107.

¹¹² VATTEL, *THE LAW OF NATIONS* ch. 6, § 71 ("Whoever ill-treats a citizen indirectly injures the State.").

¹¹³ J.L. Brierly, *supra* note 101, at 291.

the positive international law on State responsibility as it has been traditionally.¹¹⁴ As Amerasinghe concluded: "A mere choice of law (international law) cannot, therefore, convert a breach of such a contract by a State into a breach of international law *vis-à-vis* the alien's State."¹¹⁵

There is no doubt, however, that a State incurs international responsibility for a breach of treaty obligations (*i.e.* of investment protection treaties) that impact contractual relations between the State and a foreign private entity. Here again the international responsibility is owed to the State of nationality of the foreign entity with which such treaty is entered into.¹¹⁶ And it is the State to which such responsibility is owed that can invoke it on the international level and not its national unless a special arrangement is made to that effect as in, for example, the cases of the International Centre for Settlement of Investment Disputes (ICSID)¹¹⁷ and Iran-United States Claims Tribunal¹¹⁸ arrangements. According to Article V of the Claims Settlement Declaration (CSD) the Iran-United States Claims Tribunal has to apply "such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable."¹¹⁹ In this context Professor Higgins (as she then was) observed that:

Under this clause, private parties have claimed violation of a treaty (the 1954 Treaty of Amity) which was made between two States. They have invoked international principles. And they have invoked the law on state responsibility (in the context of questions relating to the personal security of the plaintiffs). In none of these areas did the government of Iran, according to the precepts of classical international law, owe duties to the individuals or corporations concerned. We have here not only a waiver of the usual nationality-of-claims requirements, but also the bearing by private parties of substantive international law rights.¹²⁰

¹¹⁴ See generally TOOPE, *supra* note 66, at 97; H.A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 134-35 (1992).

¹¹⁵ AMERASINGHE, *supra* note 81, at 97.

¹¹⁶ Bowett, *supra* note 98, at 937.

¹¹⁷ See, e.g., AAPL v. Sri Lanka 30 I.L.M. 577 (1991).

¹¹⁸ Many United States Claimants directly invoked the international responsibility of Iran under the 1955 Treaty of Amity between the United States and Iran before the Iran-United States Claims Tribunal.

¹¹⁹ The settlement of Claims by the government of the U.S. and the government of the Islamic Republic of Iran, 20 I.L.M. 230 (1981).

¹²⁰ HIGGINS, *supra* note 37, at 55.

III. PRACTICAL PROBLEMS OF SOLE APPLICATION OF INTERNATIONAL LAW TO EDAS

While often theoretical objections have been raised in the past against the application of public international law to the State-alien contractual relationship,¹²¹ it has now received wider acceptance. Such objections are further intensified by the fact that there remain practical problems for the application of public international law, especially when it is the sole proper law of the contract, as it does not contain detailed and concrete rules relevant to the different aspects, a truth widely recognised,¹²² including any breach, of the State-alien contractual relationship. As Delaume sums up the position:

Until such time as a consensus of opinion can be achieved in regard to the rules of international law applicable to the relations between foreign investors and host states (and not only developing nations), the effectiveness of 'internationalization' clauses is bound to remain uncertain. The difficulty is not that these clauses cannot perform the normal function of stipulations of applicable law, but rather that the substantive rules to which they refer are still in a state of flux.¹²³

It is surprising that none of the arbitral awards that uphold the concept of internationalized contract have ever revealed detailed rules of substantive law suitable for governing such contracts.¹²⁴ One scholar thus observed that "internationalization of [an EDA] resolves nothing by itself. It

¹²¹ See McNair, *supra* note 2.

¹²² HORACIO A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 131-35 (1992); Derek W. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRIT. Y.B. INT'L L. 49, 54 (1988); Bowett, *supra* note 98, at 936; BROWNLIE, *supra* note 87, at 549-53; TOOPE, *supra* note 66, at 75-90; M. Sornarajah, *supra* note 15, at 119-24; WOLFGANG PETER, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS 263 (2d ed. 1995); K. Lipstein, *The Place of Calvo Clause in International Law*, 22 BRIT. Y.B. INT'L L. 130, 143 (1945). FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 156 (1953); Cf. R.B. Lillich, *supra* note 50, at 110.

¹²³ G. Delaume, *Transnational Contracts: Applicable Law and Settlement of Disputes: Law and Practice*, BOOKLET I, at 15-16 (1988).

¹²⁴ C. Greenwood, *supra* note 61, at 64; A. Fatouros, *International Law and the Internationalized Contract* 74 AM. J. INT'L L. 134, 136 (1980) ("The only explicit rule the [Texaco] award appears to deduce is that the principle *pacta sunt servanda* is applicable, which does not help much.").

provides no generally accepted answers to the quest for the legal rules applicable."¹²⁵ However, it is certainly true that there was a time when the major arbitration cases, especially the petroleum disputes, were largely concerned with similar fact patterns involving complete repudiation of contract by way of expropriation or nationalization, and such cases did not provide an opportunity to elaborate the detailed contractual rules. As explained above, public international law, as it applies to the relations between States themselves as direct subjects of such law and to the relations between international organisations and States, is not suitable for application to State-alien contractual matters for various obvious theoretical problems. Hence one would have to search in vain, as well acknowledged by the majority of jurists,¹²⁶ in the *corpus* of public international law for appropriate contractual rules applicable to State contracts or economic development agreements. Judge Jessup noted:

Since the cases [before the Mixed Arbitral Tribunals established under the peace treaties at the end of World War I] ... were not international in the sense of being state v. state, public international law, or what the Permanent Court called true international law, was not considered generally applicable except for the purpose of interpreting treaties. The Tribunals, therefore, while resorting in

¹²⁵ Fatouros, *supra* note 124, at 136.

¹²⁶ See Professor Batiffol's comments before the *Institut de Droit International*. 58 ANNIDI TOME 141-46 (1979), 63-1 ANNIDI 133-34 (1989). Professor Bowett is also of the opinion that "the relevance of international law is theoretically undeniable in such a case (contract between a State and a foreign entity), but its practical relevance is limited by the fact that international law contains no rules relevant to a breach of contract as such." Bowett, *supra* note 98, at 936. Many other writers, after careful observations, could not but recognize that the paucity of precise rules is a stumbling block for the application of international law to such contracts. Verhoeven, *Contrats entre états et ressortissants d'autres états*, in LE CONTRAT ÉCONOMIQUE INTERNATIONAL: STABILITÉ ET ÉVOLUTION 115, 140 (1975); G. Delaume, 1 TRANSNATIONAL CONTRACT PARA. 1.13 (1976); Wolff, PRIVATE INTERNATIONAL LAW 417 (1950). See also Wolff, *Some Observation on the Autonomy of Contracting Parties in the Conflict of Laws*, 35 GROTIUS TRANSACTIONS 143, 152 (1950). J.E.S. Fawcett, *Legal Aspects of State Trading*, 25 BRIT. Y.B. INT'L L. 34, 44 (1948); Amerasinghe, *supra* note 103, at 906; W. FRIEDMANN, LAW IN A CHANGING SOCIETY (1959); K. Lipstein, *The Place of Calvo Clause in International Law*, 22 BRIT. Y.B. INT'L L. 130, 143 (1945) ("[I]nternational law contains no branch dealing with contracts. If the breach of contract is to form the basis of a claim based on international law, it must constitute a tortious act in the nature of a denial of justice."). Friedman, *supra* note 122, at 156 ("[C]ontracts cannot be the subject of international disputes since international law contains no rules respecting their form and effect."). NIELSEN, AMERICAN-TURKISH CLAIMS SETTLEMENT: OPINIONS AND REPORT 286, 287 (1937) ("the law of nations does not embrace any 'Law of Contracts', such as is found in the domestic jurisprudence of nations, and such cases are of course not actions on contracts in terms of domestic law"). But see R.B. Lillich, *supra* note 50, at 110 (where the author concluded that "In any event, the legal argument that public international law and general principles of law provide no rules about contracts, never persuasive, is becoming even less so with each passing year").

some cases to private international law and to national laws, frequently fell back on general principles of law and on equity."¹²⁷

It should be noted that with the recent developments on the international level, such as the UNIDROIT Principles of International Commercial Contracts (1994)¹²⁸ and the Principles of European Contract Law,¹²⁹ some scholars have expressed a renewed hope that these principles, being the general principles of law, can fill in the void of public international law to supply appropriate rules to govern EDAs or State contracts.¹³⁰ However, to be more precise, these new developments are primarily intended to lay the foundation for the *lex mercatoria*.¹³¹ There are also serious objections to the suitability of application of these new soft-law principles, which are primarily concerned with private international transactions, to

¹²⁷ PHILIP C. JESSUP, TRANSNATIONAL LAW 95-96 (1956). See also McNair, *supra* note 2, at 8, 10, 15, 19.

¹²⁸ See UNIDROIT, Principles of International Commercial Contracts, Principes d'UNIDROIT relatifs aux contrats du commerce international (1994); M.J. Bonnell, An International Restatement of Contract Law—The UNIDROIT Principles of International Commercial Contracts (1994); A. Hartkamp, *Principles of Contract Law*, in *Towards a European Civil Code* 37 (Hartkamp et al. eds., 1994); M. Bonnell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 Am. J. Comp. L. 617 (1992); M. Bonnell, *A "Restatement" of Principles for International Commercial Contracts: An Academic Exercise or a Practical Need?*, *Revue de Droit des Affaires Internationales* 873 (1988); M. Fontaine, *Les principes pour les contrats commerciaux internationaux élaborés par UNIDROIT*, *Revue de droit international et de droit comparé* 23 (1991); Klaus Peter Berger, *The New Law Merchant and the Global Market Place: A 21st Century View of Transnational Commercial Law*, *Int. A.L.R.* 91, 94-95, 97 (2000); M.J. Bonnell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?*, *II Uniform Law Review* 229 (1986); Michael P. Furmston, *Unidroit General Principles for International Commercial Contracts*, 10 J. Contract L. 11 (1996); M. J. Bonnell, *The UNIDROIT Principles in Practice - The Experience of the First Two Years*, available at <http://www.unidroit.org/english/principles/pr-exper.htm> (where the author mentions several arbitral awards and court decisions applying the UNIDROIT Principles as well as contracts in which these Principles are chosen as the law governing the contract).

¹²⁹ See http://itl.lrv.uio.no/trade_law/

¹³⁰ See R.B. Lillich, *supra* note 50, at 109-100; Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 143-49 (1998).

¹³¹ See Hans van Houtte, *The UNIDROIT Principles of International Commercial Contracts*, 11 ARB. INT'L 373 (1995) ("The Principles will only be part of the *lex mercatoria* if they are recognized as such by the business community and its arbitrators."). Tetley, *UNIF. L. REF.* 877, 888 (1999) (The UNIDROIT Principles of International Commercial Contracts have been described as "as authentic expression of what is usually called '*lex mercatoria*' and as 'a kind of *ratio scripta* of an emerging supranational legal order – a modern *lex mercatoria*.'"). See generally, KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* 278 *et seq.* (1999).

public law contracts such as State contracts.¹³² One cannot, however, pretend to say that an investment agreement can be governed exclusively by international law¹³³ or by general principles of law or for that matter by the *lex mercatoria* or the UNIDROIT Principles of International Commercial Contracts (1994) in the face of the reality that there are many matters relating to a contract which must inevitably be subject to the law, especially the mandatory public law rules or public policy rules, of the host State where most of the operations under an investment or economic development agreement take place.

Thus issues arising out of such incidental matters as the protection of the environment, labour relations, taxation, foreign trade and exchange regulations are to be addressed by the law of the host State, even though that law may not be agreed by the parties to a contract as the applicable law. Such inevitable application of the law of the host State sounds paradoxical to the theory of internationalization of State contracts which connotes the withdrawal of a contract completely from the impact of the law of the host State. The issue concerning the internationalization of State contracts still remains unresolved as Professor Dupuy did not explain clearly in the *Texaco* case¹³⁴ what he actually meant by 'the International Law of Contracts' in his theory of internationalization.¹³⁵ He generalized his theory stating that

¹³² See M. Sornarajah, *supra* note 15, at 120. See also generally A. F. M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657 (1999); A. F. M. Maniruzzaman, *New Generation of Natural Resource Development Agreements: Some Reflections*, 11 J. ENERGY, NAT. RESOURCES & ENVTL. 207 (1993).

¹³³ While the exclusive application of international law is usually found in loan agreements with international organizations such as the World Bank, it is exceptional in natural resource agreements. A clause of this kind figures in the Alcoa-Indonesia Contract of 1969: "Any such dispute referred for settlement by arbitration ... shall be decided in accordance with such rules of international law (within the meaning of that term as provided in art.38 (1) of the Statute of the International Court of Justice) as may be applicable" See M. BARTELS, *CONTRACTUAL ADAPTATION AND CONFLICT RESOLUTION* 110 (1985). It may be that the reason why the explicit reference to international law does not appear on the list (Prof. Dupuy's list in the *Texaco* case) of the elements of internationalization is perhaps that it is extremely rare, if not unheard of. Cf. J. Verhoeven, *Contrats entre Etat et ressortissants d'autre Etats*, in *LE CONTRAT ÉCONOMIQUE INTERNATIONAL: STABILITÉ ET ÉVOLUTION* 115, 141 (1975).

¹³⁴ *Texaco v. Libya*, 53 I.L.R. 389 (1977).

¹³⁵ See SCHACHTER, *supra* note 13, at 307 (1991). Professor Schachter notes:

But we are left to wonder what "internationalization" connotes beyond the specific characteristics on which that designation rests. Does it imply that the contracting State has assumed international obligations beyond those specified in the contracts? Does it mean that international remedies would be available to the private party for breach of these "international contracts" that would not be available for the violation of other "non-international" contracts. ... In the *TOPCO / Libya* decision, Dupuy states that internationalization does not mean that the private party is assimilated to a State or the contract to a treaty. What it does mean, he says, is that the private party is given "a limited capacity to invoke in the field of international law, the rights which he derives

"Treaties are not the only type of agreements governed by international law ... Contracts between States and private persons, under certain conditions, come within the ambit of a particular and a new branch of international law: the international law of contracts."¹³⁶

In Dupuy's *Texaco* award this new branch of international law, its nature, scope and implications remain unexplained: a mystery! One may wonder how and in what respects public international law differs from international law of contract. In the recent literature on the subject various related questions remain still unanswered, *e.g.* whether the latter is part of the former or whether the latter is a manifestation of a distinct third category known as the "*lex mercatoria*." The matter has given rise to theoretical as well as practical issues. Some writers tend to be philosophical about the proposed new body of law. As one said, "it rather seems that the discourse on an 'international law of contracts' is *only comprehensible* as a legal process involving [competing] values of social morality, economics and politics."¹³⁷

However, it should be noted that there are very few State contracts in which public international law is the only designated proper law; the obvious reason being its paucity of appropriate rules applicable to such contracts. There seems to be a trend among contracting parties, a reflection of the perception of the reality, to choose a combination of legal systems, including the host State's law and general principles of law or international rules and principles in the choice-of-law provision of their contract,¹³⁸ *i.e.* the *dépeçage* or the split proper law situation.¹³⁹

from the contract" (paragraph 47). We are still left to ask what is meant by invoking contractual rights "in the field of international law."

¹³⁶ *Texaco v. Libya*, 53 I.L.R. at 389, para.32.

¹³⁷ Esa Paasivirta, *Internationalization and Stabilization of Contracts versus State Sovereignty*, 60 BRIT. Y.B. INT'L L. 315, 323 (1989) (emphasis added).

¹³⁸ Such complex clauses may be found in many economic development agreements. One example may be a Syrian contract for the exploration, development and production of petroleum contract entered into force on August 21, 1985 :

The Parties base their relations with respect to this contract on the principles of goodwill and good faith. Taking into account their different nationalities, this Contract shall for the purpose of arbitration be given effect and be interpreted and applied in conformity with principles of law common to the SYRIAN ARAB REPUBLIC, the UNITED STATES OF AMERICA, THE NETHERLANDS and the UNITED KINGDOM, and the FEDERAL REPUBLIC OF GERMANY, and in the absence of such common principles, then in conformity with the principles of law normally recognized by civilized nations in general, including those which have been applied by International Tribunals

Dr. Mann, a supporter of the theory of internationalization of contract suggested over four decades ago that the legal principles invoked by States in their commercial dealings, in particular in commercial treaties, might provide a helpful source of international law in the context of internationalization of State contracts.¹⁴⁰ According to him, "the commercial law of nations which, in the appropriate cases, governs the relationship between States and which, admittedly, is in *statu nascendi* also applies to the relationship between States and private parties."¹⁴¹ Dr. Mann believed that a new branch of international law was in the process of formation, and that this law would in due course contain definite and detailed contractual rules concerning construction, interpretation, performance and termination. He suggested that the further development and consolidation of commercial law of nations would come about through a most comprehensive investigation and analysis of various legal systems, in particular the private law doctrines which provide the principal source of the emerging rules.¹⁴² This still remains a prophecy and has not been realised yet. Dr. Mann himself admitted later in 1989 while revisiting the same subject that "[i]n the course of more than 30 years since the commercial law of nations was subjected to scrutiny in the pages of this Year Book¹⁴³ its development was not appreciably promoted either by judicial or arbitral decisions or by academic contributions."¹⁴⁴ However, it should be noted that Dr. Mann's idea of this specific body of law does not seem to be the same as the *lex mercatoria*, as he observed :

"What this so called law is or should be is a complete mystery. It is usually said that it comprises uniform law embodied in or derived from international conventions, trade usages, custom and ideas of business fairness, efficacy or reasonableness. The object frequently

Syrian contract for the exploration, development and production of petroleum, Aug. 21, 1985, 26 I.L.M. 1186 (1987). Another example may be the Proposed Model of Petroleum Investment Agreement of the People's Democratic Republic of Yemen.

The Arbitral Tribunal ... shall apply principles of law common to the People's Democratic Republic of Yemen and the home country of the investor and, in the absence of such common principles, the principles of law normally recognized by civilized nations in general, including relevant rules of customary International Law.

PETER, *supra* note 122, at 262-63.

¹³⁹ A F M Maniruzzaman, *supra* note 58, at 154-59.

¹⁴⁰ F.A. Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B. INT'L L. 20, 22-23 (1957).

¹⁴¹ *Id.* at 22-23.

¹⁴² *Id.* at p.48.

¹⁴³ 33 BRITISH YEAR BOOK OF INTERNATIONAL LAW 20 (1957).

¹⁴⁴ F.A. Mann, *The Commercial Law of Nations as Reflected by CMND. 1 to 10,000*, 60 BRIT. Y.B. INT'L L. 359, 359 (1989).

is to dispense with the conflict of laws, which is said to create insoluble problems and to lead to artificial and unrealistic results. It is hardly necessary to emphasize that no such body of law exists."¹⁴⁵

IV. SCOPE OF INTERNATIONAL LAW IN THE SPECIAL SITUATION: CONVENTIONAL ARRANGEMENT AND IMPLICATIONS

When a State contract provides for international law exclusively, which is now very rare, or as part of the proper law, an international arbitrator, when settling disputes arising out of such a contract, can have recourse in specific circumstances to every source of international law provided in Article 38(1) of the Statute of the International Court of Justice. Such scope, especially as far as international law itself is concerned, is particularly devised in the second sentence of Article 42(1) of the ICSID Convention. The scope of international law thus applicable depends on the special arrangement or legal mechanism employed to that effect. This proposition is particularly relevant in the context of the applicability of treaty rules to the State-alien contractual relationship. It cannot be denied that since World War II considerable development in the law relating to the protection of foreign investment has taken place in a progressive manner. At present there are about 1800 bilateral investment protection treaties¹⁴⁶ and a few multilateral treaties at both the regional¹⁴⁷ and inter-regional¹⁴⁸ levels, most

¹⁴⁵ F.A. Mann, *Private Arbitration and Public Policy*, 4 CIV. JUST. Q. 254, 264 (1985). See also F.V. GARCIA-AMADOR, *THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT* 25 (1992).

¹⁴⁶ See INVESTMENT PROMOTION AND PROTECTION TREATIES 1959 (1983) (compiled by ICSID, World Bank) [hereinafter ICSID collection on Investment Protection Treaties]. There are, of course, various accounts in various sources lately. See Kenneth J. Vandeveld, *The Economics of Bilateral Investment Treaties*, 41 HARV. J. INT'L L. 469, 469 (2000) ("More than 1300 such treaties (bilateral investment treaties) have been negotiated, involving more than 160 countries in every region of the world."). See also Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201-275 (1988); Ibrahim Shihata, *Regulation of Foreign Investment, in INTERNATIONAL DEVELOPMENT LAW* (A F M Maniruzzaman, Honorary Theme Ed.) (Theme no. 6.67); *ENCYCLOPEDIA OF LIFE SUPPORT SYSTEMS* (UNESCO-EOLSS) (Eolss forthcoming).

¹⁴⁷ Inter-Arab Investment Protection Treaty (1981); The ASEAN Agreement for the Promotion and Protection of Investments (Brunei, Darussalam, The Republic of Indonesia, Malaysia, The Republic of the Philippines, The Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments) (1987), Dec. 15, 1987, reprinted in 27 I.L.M. 612 (1988); The Framework Agreement on ASEAN Investment Area (AIA), signed on 7 October 1998, now ratified by all member countries; The North American Free Trade Agreement (NAFTA), Dec. 17, 1992, reprinted in 32 I.L.M. 289, ch. 11 (1993); The Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR (Colonia Protocol), Jan. 17, 1994, Mercosur/CMC/Doc.No.

of which contain a specific treaty obligation of the host State to observe the terms of an investment agreement with the investor.¹⁴⁹ The Treaties concerned also provide different specific rules relating to the treatment of alien property or foreign investment.

As treaty obligations are matters governed by international law, any violation of such an obligation by a contracting State is clearly a wrong to the home State of the foreign investor, which is also a contracting party to the treaty. The foreign investor cannot redress any wrong done to him by directly invoking the treaty except by the intention of the contracting parties to the treaty to that effect¹⁵⁰ or under special procedure prescribed by the parties. Thus, in the *Barcelona Traction, Light and Power Company case*,¹⁵¹ the ICJ, in addressing the question of whether a State was entitled to exercise diplomatic protection of its nationals who were shareholders of a company of another nationality, observed:

... in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States even more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the

11/93, reprinted in 2 UNCTAD, INTERNATIONAL INVESTMENT DOCUMENTS: A COMPENDIUM 513-22 (1996); The Protocol for the Promotion and Protection of Investments Made by Countries Than Do Not Belong to Mercosur (Buenos Aires Protocol), Aug. 5, 1994, reprinted in 2 UNCTAD, INTERNATIONAL INVESTMENT DOCUMENTS: A COMPENDIUM 527-34 (1996).

¹⁴⁸ See, e.g., Agreement for Promotion, Protection and Guarantee of Investment among Member States of the Organization of the Islamic Conference (Doc. Annex-I to ICFM 1281-E/D.6), reprinted in H. MOINUDDIN, THE CHARTER OF ISLAMIC CONFERENCE AND LEGAL FRAMEWORK OF ECONOMIC CO-OPERATION AMONG MEMBER STATES 197 (1987) (Appendix-III); The Energy Charter Treaty (1994), reprinted in 10 ICSID REVIEW-FILJ 258 (Fall 1995); The Lome Conventions between EU and ACP countries.

¹⁴⁹ The widespread use of such a clause may be illustrated by the following examples of recent investment protection treaties: France v. China, May 30, 1984, 24 I.L.M. 550 (art. 9); United Kingdom v. Philippines, Dec. 3, 1980, 20 I.L.M. 326 (para. 3); Swiss Federation v. Panama, Oct. 19, 1983, 22 I.L.M. 1255 (art. 6); United States v. Turkey, Dec. 3, 1985, 25 I.L.M. 85 (art. 2, para. 3); Article 7 para (2) Federal Republic of Germany v. Bangladesh, May 6, 198, Bu Tag Dr. 10/57 (art. 7, para. 2). The last treaty in the said Article provides the following formula: "Each Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by agreement with nationals or companies of the other Contracting Party." *Id.*

¹⁵⁰ Jurisdiction of the Court of Danzig, 1928 P.C.I.J. (ser. B) No. 15, at 17-18 (Mar. 1928). See SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 173-76, 176 (1996) ("The acquisition of treaty rights directly by individuals was made a function of the intention of the parties. The view that they can acquire rights only through the instrumentality of the municipal law of States was rejected."). See also Schwebel, *supra* note 102, at 568.

¹⁵¹ Barcelona Traction Case (Belg. v. Sp.), 1970 I.C.J. 3 (Feb. 5) (emphasis added).

framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. *Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures.*¹⁵² (emphasis added)

Thus, one may find the *prescribed procedures* which enable a foreign entity to defend its rights or interests directly against a State and invoke international law for such defence¹⁵³ in numerous bilateral investment protection treaties¹⁵⁴ as well as in a large number of private investment agreements which provide for ICSID arbitration in the event of a dispute between one contracting State and a national of the other contracting State.¹⁵⁵ Article 42 para. 1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 provides that

[t]he 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.*¹⁵⁶ (emphasis added).

¹⁵² *Id.* at 47.

¹⁵³ E. LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 67-72 (1991).

¹⁵⁴ In 1991, Paulsson examined and found that at least 162 bilateral investment protection treaties referred to ICSID arbitration. There are also 18 national laws referring to ICSID. See J. Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID REV-FILJ 380-82 (1991). See *AAPL v. Sri Lanka*, 6 ICSID REV-FILJ 523 (1991). It is the first case submitted to arbitration under the auspices of the ICSID based upon a consent provision in a bilateral investment treaty. See, e.g., Agreement for the Promotion and Protection of Investments (U.K. v. Sri Lanka), Feb. 13, 1980, 19 I.L.M. 886 (1980), and not in implementation of a freely negotiated arbitration agreement directly concluded between the parties among whom the dispute has arisen.

¹⁵⁵ See, e.g., BANGLADESH MODEL PRODUCTION SHARING CONTRACT ART. 29.5 (Mar. 1997).

¹⁵⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force on Oct. 14, 1966).

The interpretation of the reference to "international law" in the second sentence of Article 42(1) causes no difficulty. The accompanying Report of the Executive Directors of the World Bank on the preparation of the Convention has put expressly on the record that the reference to "international law," which the arbitral tribunal is required to apply, should be understood in the broad sense of Article 38(1) of the Statute of the International Court of Justice,¹⁵⁷ allowing for the fact that Article 38 was designed to apply to inter-State disputes.¹⁵⁸ Some contend further that the ICSID tribunal has "truly international" character.¹⁵⁹

In this context one may also mention Article V of the Claims Settlement Declaration between Iran and United States. The Article provides that "[t]he Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."¹⁶⁰ The scope of international law provided in this provision is quite clear because of the special arrangement between Iran and the United

¹⁵⁷ *Id.* art. 38(1) 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; (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.

¹⁵⁸ *Id.* para. 40.

¹⁵⁹ G.R. Delaume, *supra* note 70, at 784; *See also* II TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES RE-ISSUE chs. 15, 70 (1985); A. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 HAGUE RECUEIL DES COURS 331, 352 (1972-II) ("Under the Convention, mutual consent has the effect of elevating agreement between a private company and a State to have recourse to ICSID conciliation or arbitration to the level of an international legal obligation, and to that extent the Convention constitutes the private company a subject of international law."). But for the opposite view, *see* TOOPE, *supra* note 66, at 245-53. For a review of this book, *see* Karl-Heinz Bockstiegel, 86 AM. J. INT'L L. 228-30, 230 (1992):

Toope views that the task of coping with the unequal status of the parties as the central problem and suggests that the inequality of the parties must be preserved, or more precisely, that "our recognition of this inequality should not be obfuscated." If Toope means that, if an arbitration between a State and a foreign private party were truly "international", the obligations imposed upon the parties by the decisions of the Tribunal would have to be international legal obligations, others might not share his understanding of the term "international".

¹⁶⁰ Claims Settlement Declaration between Iran & U.S. Exports, U.S. DEP'T. ST. BULL. NO. 20744 (1987); 1 Iran-U.S. C.T.R. 10 (1987). GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL* 156 (1966).

States.¹⁶¹ In many cases a number of United States claimants before the Iran-United States Claims Tribunal have asserted a right directly to invoke the 1955 Treaty of Amity between the United States and Iran.¹⁶² Thus, it is clear from the foregoing analysis that public international law *stricto sensu* applies to the State-alien contractual relationship. However, in such a context the applicable source of international law or its scope depends on the particular legal arrangement made to that effect.¹⁶³ Here, of course, the question remains whether the conventional international law has been responsive to the developmental needs of developing countries or if it is more biased towards the protection of the foreign investor.¹⁶⁴

Many have claimed the current proliferation of bilateral investment treaties in virtually all parts of the world has created a new dimension in the protection of foreign investment.¹⁶⁵ Although there is no doubt that these treaties, including other regional and inter-regional ones, have across the board established certain substantive law in the field, providing normative content in the conventional international law on the matter, the issue of the status of the treaties in the corpus of international law has divided jurists into

¹⁶¹ See J.R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT'L L. 278 (1989); Stewart, *The Iran-United States Claims Tribunal: Accomplishments and Prospects*, in 1984 PRIVATE INVESTORS ABROAD - PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1984 525 (Carol J. Halgren ed., 1989); Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: Private Rights and State Responsibility*, in R.B. LILICH, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983, at 1 (1984); Carbonneau, *The Elaboration of Substantive Legal Norms and Arbitral Adjudication: The Case of the Iran-United States Claims Tribunal*, in LILICH, *supra*, at 104; Lloyd Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, in LILICH, *supra*, at 50; David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990); Westberg, *The Applicable Law Issue in International Business Transactions with Government Parties - Rulings of the Iran-United States Claims Tribunal*, 2 ICSID REV-FILJ 473 (1987); R. KHAN, IRAN-UNITED STATES CLAIMS TRIBUNAL (1990).

¹⁶² See, e.g., *Starrett Hous. Corp. v. Iran*, 16 Iran-U.S. C.T.R. 112, para. 261 (Aug. 1987) (AWD 314-24-1); *Mobil Oil Sales Iran, Inc. v. Iran*, July 24, 1987, 16 Iran-U.S. C.T.R. 3, para. 74 (1987); *Amoco Int'l Fin. Corp. v. Iran*, July 14, 1987, 15 Iran-U.S. C.T.R. 223, 246-48; *Sola Tiles, Inc. v. Iran*, 14 Iran-U.S. C.T.R. 223, 234 (1987); *Sedco, Inc. v. N.I.O.C.*, 10 Iran-U.S. C.T.R. 180, 184, 187 (1986); *Phelps Dodge Corp. v. Iran*, 10 Iran-U.S. C.T.R. 121, 132 (1986-I); *American International Group, Inc. v. Iran*, 4 Iran-U.S. C.T.R. 96 (1983); *Esphahani v. Bank Tajarat*, 2 Iran-U.S.C.T.R. 157 (1983).

¹⁶³ See L.J. Bouchez, *The Prospects for International Arbitration: Disputes between States and Private Enterprises*, in INTERNATIONAL ARBITRATION: PAST AND PROSPECTS 109 (A.H.A. Soons ed., 1990); G. Jaenicke, *The Prospects for International Arbitration: Disputes between States and Private Enterprises*, in *id.* at 155.

¹⁶⁴ See generally Andrew T. Guzman, *Why LDCs sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

¹⁶⁵ See, e.g., Elihu Lauterpacht, *International Law and Private Foreign Investment* (The Inaugural Earl Snyder Lecture in International Law), available at <http://www.law.indiana.edu/glsj/vol14/no2/laupgp.html>.

various camps.¹⁶⁶ The arguments of the majority of jurists could be boiled down to the proposition that the treaty regime for the protection of foreign investment is merely a *lex specialis* and has not gained the status of customary international law yet.¹⁶⁷ Although the legal status of the bilateral investment protection treaties has not been resolved unquestionably in contemporary international law, the treaty regime as a whole has, of course, some functional value in clarifying many legal principles and translating them into commonly perceived goals, values and spirits in the field of international investment law. This functional value could ultimately lead such treaties to develop the status of customary international law. However, it must be cautioned at this juncture that, although all is well so far, as the numbers of bilateral treaties have been constantly on the increase over the last few decades because of the intense desire of many countries to attract foreign investment into their territories for their economic development, this trend may reverse when the main philosophies of capital recipient countries are not reflected or adversely affected.

A reverse trend may not be far away. There are various factors that could ultimately contribute to such reverse trend. It is now well known that in many countries the signing of bilateral treaties may not in fact increase foreign investment, rather there may be other factors that could be attributed to such an increase. Thus, there may be countries with fewer bilateral investment treaties that can attract more investment than countries with more of such treaties. If bilateral investment protection treaties prove to be an investor-biased regime at the expense of the developmental needs and other pertinent considerations for human rights standards, labour standards, and environmental factors of the capital receiving country, there is less likelihood of this regime prospering despite the great enthusiasm that many may cherish.¹⁶⁸ Thus, in the context of a bilateral treaty regime, Lauterpacht observes:

We must, of course, try and think of the direction in which the law will move. In terms of standards of the treatment of property we should not assume that the content of the law is not like a pendulum and the rules which have swung one way will not eventually reverse their direction. . . . Economic conditions within particular States may alter to such a degree that hostility to foreign investors will once

¹⁶⁶ For a discussion on various views, see M. SORNARAJAH, *supra* note 98, at 225-229, 275-276; NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES 190-93 (1997); Andrew T. Guzman, *supra* note 164, at 384-87.

¹⁶⁷ *Id.*

¹⁶⁸ See Vandeveld, *supra* note 146, at 469.

again emerge and that States will no longer see advantage in according them special protection.¹⁶⁹

The glowing future of this part of conventional international law in the field thus cannot be guaranteed for an indefinite period to come. It is true that even customary international law principles may be subsequently replaced by evolved customary principles and that the ever-lasting effect of law can thus never be granted. From a relative point of view, for a long-lasting bilateral treaty regime some more considerations must be given for the balance of interests between the capital exporting and the capital importing countries. Perhaps a third generation of bilateral investment treaties could ensure a balanced position thus laying down the foundation for the undisputed status of customary international law in the future. One should also be mindful of the fact that recent enthusiastic efforts to negotiate a Multilateral Agreement on Investment under the auspices of the Organization for Economic Cooperation and Development (OECD) abruptly ended in failure mainly because of its provision for excessive liberalization of international investment, and its unbalanced regime for the protection of interests of foreign private investors, *i.e.*, usually multinational corporations, against the host States of such investment.¹⁷⁰ A similar initiative under the auspices of the World Trade Organization in the near future is expected to be responsive to the lessons learned from the failures of the OECD, otherwise history will repeat itself.

V. THE FLIGHT FROM THE MODERATE INTERNATIONALIST APPROACH TO INTERNATIONAL DEVELOPMENT LAW

It is true that in international arbitration both customary and conventional international law and principles have been applied to various aspects of international economic development agreements (EDAs). As far as customary international law is concerned, which is the principal focus of

¹⁶⁹ Elihu Lauterpacht, *International Law and Private Foreign Investment* (The Inaugural Earl Snyder Lecture in International Law), 9 available at <http://www.law.indiana.edu/glsj/vol4/no2/laupgp.html>.

¹⁷⁰ See generally Sol Picciotto, *A Critical Assessment of the MAI*, in *REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION* 82 (Sol Picciotto & Ruth Mayne eds., 1999); Raymond Cl  men  on, *Foreign Direct Investment and Global Environmental Protection*, 1 J. WORLD INVESTMENT 199 (July 2000).

this article, only a limited number of rules and principles may be found suitable for application to such agreements. It is now well recognised, as examined above, that EDAs are not equivalent to treaties, hence international law and principles applicable to treaties should not be applied to EDAs. Under an EDA the private contracting party or entity is not equivalent to the State party as a subject of international law and a simple breach of an EDA by the State party does not give rise to its international responsibility. This moderate internationalist approach seems to have been widely accepted by the majority of jurists and also prominently reflected in arbitral jurisprudence. Despite this well favoured theoretical framework, there still remains questions as to the very nature of international law applicable to EDAs. There is no doubt that the moderate internationalist approach paves the way towards the development of such a set of rules and principles suitably applicable to EDAs.

It is a truism that on the international level various sets of rules and principles have been developed and codified to cater to the suitability of application to different international transactions such as international sale of goods, international documentary credits, bills of exchange, etc. One may wonder why efforts are not made to develop a tailor-made set of rules and principles particularly suitable for application to EDAs. It cannot be denied that over the last few decades scholars have invested a significant amount of time in defending and attacking the theory of internationalization of EDAs and have paid little attention to consider objectively the role of international law and the actual nature of its rules and principles that ought to be developed in this area. Considering the theoretical impropriety of applying public international law *stricto sensu* to EDAs,¹⁷¹ distinguished jurists have put forward various suggestions such as "international law of contract,"¹⁷² "general principles of law recognized by civilized nations,"¹⁷³ "commercial law of nations,"¹⁷⁴ "transnational law,"¹⁷⁵ "*lex mercatoria*,"¹⁷⁶ "new

¹⁷¹ See McNair, *supra* note 2, at 10.

¹⁷² See *Texaco v. Libya*, 53 I.L.R. 389, para. 32 (1977). P. Weil, *Principes Généraux du Droit et Contrats D'État*, in *LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES, ETUDES OFFERTES À BERTHOLD GOLDMAN* 387, 406-07 (1982); R.B. Lillich, *supra* note 50, at 110. Cf. M. Sornarajah, *supra* note 15, at 119-20.

¹⁷³ McNair, *supra* note 2, at 1.

¹⁷⁴ F.A. Mann, *supra* note 140, at 20; F.A. Mann, *supra* note 144, at 359.

¹⁷⁵ JESSUP, *supra* note 127, at 106.

¹⁷⁶ Berthold Goldman, 3 *LEX MERCATORIA*, FORUM INTERNATIONALE, 1, 1-24 (1983).

international law of foreign investment"¹⁷⁷ and "international development law"¹⁷⁸ (IDL).

The author is of the view that amongst these variables "international development law" sounds most appropriate for application to this special category of agreements, *i.e.*, EDAs. Unlike other proposals, this body of law is not only regulatory in nature; it also absorbs policy considerations for economic development of nation States. Professor Weil also considers IDL to be pragmatic as opposed to traditional international law which is somewhat "abstract and sophisticated."¹⁷⁹ It is a functional *corpus juris* of development for economic developmental goals in an economically divided world. Thus viewed from this angle, IDL has international social functions on its agenda. This body of law aims to perform such functions through international co-operation in development.

A. INTERNATIONAL DEVELOPMENT LAW AS THE APPLICABLE LAW

It has to be acknowledged that the main purpose of EDAs lies in the economic development of the host State. IDL, being responsive to this need of developing countries, can most effectively serve this purpose. Furthermore, IDL can be designed in a way to remedy the theoretical problems of applying public international law to EDAs. State and non-State actors or development partners can be direct subjects of IDL. As the concept "development" itself is dynamic and evolving, IDL can accommodate this phenomenon unlike other branches of law such as public international law, or the *lex mercatoria* based on the general principles of law. Hence IDL is a dynamic, progressive and forward looking legal system. Its value lies in serving the special developmental needs of the developing world by setting a dualistic normative standard in international economic relations between the developed and the

¹⁷⁷ Ibrahim F.I. Shihata & Antonio R. Para, *Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, 9 ICSID REV.- FILJ 183, 211 (1994); Antonio R. Para, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV.- FILJ 287, 361 (1997). See also Weil, *supra* note 102, at 412-16.

¹⁷⁸ See generally MAURICE FLORY, *DROIT INTERNATIONAL DE DÉVELOPPEMENT* (1977); A. PELLET, *LE DROIT INTERNATIONAL DU DÉVELOPPEMENT* (1978); H. THIERRY, J. COMBACAU, S. SUR & C. VALLEE, *DROIT INTERNATIONAL PUBLIC* ch. XII (Paris, 1979).

¹⁷⁹ As noted in F.V. GARCIA-AMADOR, *supra* note 145, at 44.

developing world and also between States of different levels of development within the developing world itself.¹⁸⁰

Among such duality of norms one may count the principle of preferential treatment for developing countries in international trade, financial aid and technical co-operation,¹⁸¹ the purpose of which is to ensure distributive justice in the international legal system. In fact, IDL is to provide contextually and horizontally differential normative standards, *i.e.*, a "normative plurality."¹⁸² There is no denying that over the last few decades many distributive justice elements in various forms, mainly based on equity, have infiltrated the international legal system as a matter of necessity to give it a new facelift.¹⁸³ It is outside the scope of this paper to embark on a detailed analysis of the sources, nature and scope of IDL. There is already a vast literature on the subject.¹⁸⁴ The purpose here is to reflect on the relevance of IDL to EDAs and to identify the trend in juristic attitude and in case law towards the clarification of the candidate principles for IDL. The significance of this study is ever more acute in the context of recent movements towards globalization and liberalization of trade and investment and more specifically in the context of recent efforts towards the codification of a Multilateral Agreement on Investment under the auspices of the Organization for Economic Co-operation and Development and the World Trade Organization. Globalization and liberalization movements do not necessarily obliterate the developmental needs of the developing world, rather it can be accommodated

¹⁸⁰ H. J. Geiser, *A New International Economic Order: Its Impact on the Evolution of International Law*, 9 ANNALS INT'L STUD. 97 (1978); Guy Feuer, *Les principes fondamentaux dans le droit international du développement*, in COLLOQUE D'AIX-EN-PROVINCE: PAYS EN VOIE DE DÉVELOPPEMENT ET TRANSFORMATION DU DROIT INTERNATIONAL 191-234 (1974); Garcia-Amador, *supra* note 145, at 36-41; MILAN BULAJIC, PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW 48-51 (2d ed. 1993).

¹⁸¹ See generally W.D. Verwey, *The Principle of Preferential Treatment for Developing Countries*, in UNITAR/DS/5 (1982).

¹⁸² Garcia-Amador, *supra* note 145, at 41.

¹⁸³ See generally Thomas M. Franck, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS ch. 3 (1995); OSCAR SCHACHTER, SHARING THE WORLD'S RESOURCES (1977).

¹⁸⁴ See generally F.V. GARCIA-AMADOR, *supra* note 145; M. BULAJIC, *supra* note 180; S.R. CHOWDHURY, *et al.*, THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW (S.R. Chodhury *et al* eds., 1992); A. CARTY, LAW AND DEVELOPMENT (A. Carty ed., 1992); P.A. MUTHARIKA, THE INTERNATIONAL LAW OF DEVELOPMENT, BASIC DOCUMENTS (1978); F. SNYDER & P. SLINN, INTERNATIONAL LAW OF DEVELOPMENT COMPARATIVE PERSPECTIVES (Snyder & Slinn eds., 1987); P. Kahn, *Law of Development and Arbitral Tribunals*, in *id.*; G. FEUER & H. CASSAN, DROIT INTERNATIONAL DU DÉVELOPPEMENT (1985); M. BENNOUNA, DROIT INTERNATIONAL DU DÉVELOPPEMENT (1983); Q.D. NGUYEN, DROIT INTERNATIONAL DU DÉVELOPPEMENT (1977); M. BENCHIKH, DROIT INTERNATIONAL DU SOUS-DÉVELOPPEMENT (1983); OSWALDO DE RIVERO, NEW ECONOMIC ORDER AND INTERNATIONAL DEVELOPMENT LAW (1980); P. VER LOREN VAN THEMAAT, THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW (1981); E. Kwakwa, *Emerging International Development Law and Traditional International Law - Congruence or Cleavage*, 17 GA. J INT'L & COMP. L 431 (1987); O. Schachter, *The Evolving Law of International Development*, 15 COLUM. J. TRANSNAT'L L. 7 (1976).

by hammering out rules and principles within the international legal regime representing legal pluralism, which may thus be the concerns of IDL.

As acknowledged by distinguished jurists, such as Jennings,¹⁸⁵ McNair,¹⁸⁶ and Jessup,¹⁸⁷ traditional public international law lacks suitable rules to govern State contracts. These jurists felt the ingenuous need to develop such an apposite body of law under different labels such as "public international law," "general principles of law" and "transnational law" respectively. It should be realised that their suggestions for and aspirations to develop this appropriate body of law were mainly biased for investor's protection in the rule-game which has done little to address the developmental needs of the developing world. On the contrary, it is proposed that IDL should be such an ideal or just legal regime, or better still a "justice-based" legal system that is to balance between the protection of investors' interests and the developmental needs of the developing world in order to ensure distributive justice internationally. In other words, it is a legal system which must ensure justice as much as legitimacy, *i.e.*, to maintain the balance between legitimacy and justice.¹⁸⁸ With this end in view, jurists, tribunals, States, intergovernmental organisations, international organisations, non-governmental organisations and the global civil society active in the field can develop or contribute to the development of this body of law with appropriate normative content in it. Unfortunately, little or a modest progress has been made in developing the normative content of IDL governing EDAs despite the movements over the last few decades towards a New International Economic Order. There also appears to be noticeable reluctance of authors to deal with international law in connection with Third World development in the standard textbooks taught in the law schools of the developed world.

Not surprisingly though, the ICJ in the *Barcelona Traction Case*¹⁸⁹ also noted the unsatisfactory progress in the evolution of international investment law and the marked absence of the generally accepted rules in the field concerned on the international plane. It is not, however, intended here to make an exhaustive study of the progress that has been made in IDL. Rather it is proposed in the next section to sketch recent tendencies in juristic and jurisprudential approaches towards such a goal in the context of EDAs.

¹⁸⁵ R.Y. Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156, 182 (1961).

¹⁸⁶ McNair, *supra* note 2, at 1.

¹⁸⁷ JESSUP, *supra* note 9, at 141; JESSUP, *supra* note 127, ch. 3.

¹⁸⁸ See generally FRANCK, *supra* note 183, ch. 2.

¹⁸⁹ *Barcelona Traction Case* (Belg. v. Sp.), 1970 I.C.J. 3 (Feb. 5)

The approach is thus directional. It should be appreciated that IDL is a very wide subject encompassing myriad aspects, including foreign investment. In its wider sense the subject matter of IDL is not only economic development of a country through foreign investment but far beyond it that encompasses the total well being of human individuals. Professor Allott, synthesizing the recent United Nations and similar documents concerning the matter, notes that

[t]he overall principle that the ultimate end of development is to achieve a better quality of life for all, which means not only the development of economic and other material resources but also the physical, moral, intellectual and cultural growth of the human person, was emphasized in most of the declarations of principles.¹⁹⁰

The topic of EDAs is thus just a pocket of IDL; hence while highlighting the emerging principles of IDL concerning EDAs, the whole field of IDL cannot be explored in this article.

B. APPLICABLE RELEVANT RULES OF INTERNATIONAL DEVELOPMENT LAW: RECENT TRENDS

If the situation is such that there is no investment protection treaty, bilateral or multilateral, between the host contracting State and national State of the foreign investor affecting such investment relationships, the question arises of what the implication of applying international law would be when it is the proper law of the contract. Since an investment agreement is not analogous to a treaty as such, there cannot be any analogous application of treaty rules to the former and that of their resultant consequences. When international law is chosen in addition to or instead of the law of the host State as the proper law of the contract between a State and a foreign private party, it would normally mean the applicability of the rules concerning State conduct and other general principles of international law applicable to the State-alien contractual relationship.¹⁹¹ It should, however, be noted that the

¹⁹⁰ Antony Allot, *The Law of Development and the Development of Law*, in FRANCIS SNYDER & PETER SLINN, *INTERNATIONAL LAW OF DEVELOPMENT: COMPARATIVE PERSPECTIVE* 69, 70 (Snyder & Slinn eds., 1987).

¹⁹¹ See G. van Hecke, *Contracts Subject to International or Transnational Law*, in *INTERNATIONAL CONTRACTS* 25 (1981); G.A. Bermann, *Contracts between States and Foreign National: A Reassessment*, in *id.* at 183; Bauxbaum, *The Role of Public International Law in International Business Transactions*, in *PUBLIC INTERNATIONAL LAW AND THE FUTURE OF WORLD ORDER, LIBER AMICORUM IN HONOUR OF A.J. THOMAS, JR.* 16 (J.J. Norton ed., 1987); Kunzlik, *Public International Law - Cannot Govern a Contract, Can Authorize an Arbitration*, 45 *CAMBRIDGE. L.J.* 377 (1986); M.E. Dickstein,

handful of general principles of international law claimed to be applicable should be applied *mutatis mutandis* bearing in mind the *sui generis* character of EDAs. In this context, arbitrators need to be imaginative while applying such principles. There is a feeling in some quarters, and rightly so, that in the context of EDAs at least certain general principles of international law, such as *pacta sunt servanda*, *rebus sic stantibus* and those relating to remedies, especially specific performance, should be applied in a somewhat modulated way, as opposed to their *stricto sensu* application, in the light of various emerging notions such as permanent sovereignty over natural resources and sustainable development, etc.¹⁹² It cannot be denied that in some recent important arbitration cases, however, this attitude towards the principles of *pacta sunt servanda*¹⁹³ and *rebus sic stantibus*¹⁹⁴ in the context of economic development agreements has reverberated, though indirectly. Amongst other general principles which arbitral tribunals often have had recourse to are: the autonomy of the will of the parties, the *pactum de contrahendo*,¹⁹⁵ *abus de droit*,¹⁹⁶ the *exceptio non adimpleti contractus*,¹⁹⁷ the adjustment of unjust enrichment,¹⁹⁸ and the duty of full disclosure.¹⁹⁹

¹⁹² *supra* note 13, at 54; Goldie, *State Responsibility and the Expropriation of Property*, 12 INT'L LAW. 63 (1978).

¹⁹³ M. SORNARAJAH, *supra* note 98, at 347-352; M. SORNARAJAH, *supra* note 76, at 108-112, 133-35; Dickstein, *supra* note 13, at 71-74, 75-79, 83-85; Fatouros, *supra* note 124, at 136 ("Any law of contracts, national or international, is bound to start with this principle (*pacta sunt servanda*). But it cannot stop there"); Troy E. Elder, *The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes*, 13 ARB. INT'L 1 (1997); TOOPE, *supra* note 66, at 165-68, ch. V. Cf. Stephen M. Schwebel, *Speculations on Specific Performance of a Contract between a State and a Foreign National*, in SCHWEBEL, *supra* note 83, at 416-24 (where the author has argued for the case of specific performance).

¹⁹⁴ *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran*, 15 Iran-U.S.C.T.R. 189, 242-43 (July 1987); *Aminiol v. Kuwait*, 21 I.L.M. 976, 1024. (1982)

¹⁹⁵ *Aminiol v. Kuwait*, 21 I.L.M. at paras. 97, 98, 99, 100; *Mobil Oil Inc. v. Iran*, 16 Iran-U.S.C.T.R. 3 (1987-III). See M. SORNARAJAH, *supra* note 76, at 133-35; Abba Kolo & Thomas W. Wälde, *Renegotiation and Contract Adaptation in International Investment Projects: Applicable Legal Principles and Industry Practices*, 1 J. WORLD INVESTMENT 5, 41 (July 2000).

¹⁹⁶ *Government of Kuwait v. American Independent Oil Co.*, 66 I.L.R. 518, 575 (1984).

¹⁹⁷ *Libyan Oil v. Government of the Libyan Republic*, 20 I.L.M. 1, 196 (1977); *B.P. v. Government of the Libyan Republic*, 53 I.L.R. 297, 330 (1974).

¹⁹⁸ *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, 35 I.L.R. 136, 182 (1936).

¹⁹⁹ *Liamco v. Libya*, 20 I.L.M. 1, 196 (1981); *Kuwait vs. Aminoil*, 21 I.L.M. 976, 565 (1982).

²⁰⁰ See *Klöckner v. Cameroon*, *supra* note 35 at 3 (1994); Jan Paulsson, *supra* note 35, at 145. See also *Redfern, I.C.S.I.D. - Losing its Appeal?*, 3 INT'L ARB. 98 (1987); *Banque de Montreal v. Bail L.*, 2 RCS 554 (1992).

The last principle in the context of a contractual relationship between a transnational corporation and a developing country may be directly concerned with the developmental concerns of the latter. Here, the transnational corporation, with its superior knowledge and understanding of the industry and business connections, may have relevant material information at its disposal which it is under an obligation to disclose in good faith to its contractual partner, the developing country, as it may have a bearing on its decision on the contractual matters. Thus this principle protects the interests of the host developing countries *vis-à-vis* the mighty, knowledgeable and manipulative transnational corporations in their contractual relationships. Therefore, the reasoning of the ICSID arbitral tribunal in the case of *Klöckner v. Cameroon*²⁰⁰ on the issue merits citation *in extenso* as follows:

We take for granted that the principle according to which a person who engages in close contractual relations, based on confidence, must deal with its partner in a frank, loyal and candid manner is a basic principle of French civil law, as is indeed the case under the other national codes which we know of. This is the criterion that applies to relations between partners in simple forms of association anywhere. The rule is particularly appropriate in more complex international ventures, such as the present one.²⁰¹

The tribunal then continues:

We have not established that there is a law applicable to such contracts. We do not intend to apply new or exceptional legal principles to turn-key operations only because they concern projects affecting the economic and social development of a given country. But we are convinced that it is particularly important that universal requirements of frankness and loyalty in dealings between partners be applied in cases such as this one, where a multinational company seeks and freely undertakes the obligation to supply an overall package of feasibility, analysis, design, management, bidding, construction and marketing for an industrial plant, and obtains in return the agreement of the Government to pay for the factory, whether or not it is profitable.²⁰²

²⁰⁰ *Klöckner v. Cameroon*, *supra* note 35, at 3.

²⁰¹ *Id.* at 59.

²⁰² *Id.* at 59-60.

The tribunal then observes that:

In the present case, as we have suggested, we do not feel that Klöckner has dealt frankly with Cameroon. At critical stages of the project, Klöckner hid from its partner information of vital importance. On several occasions it failed to discuss facts which, if they had been known to the Government, could have caused it to put an end to the venture and to cancel the contract before the expenditure of the funds whose payment Klöckner now seeks to obtain by means of an award. When a partner in a financially complex international venture learns of certain facts which could influence the attitudes and the actions of the other partner with respect to the project; when the first partner fails to disclose this information to the other; and the second thereupon continues with the project and incurs additional costs, the first partner has not acted frankly and loyally *vis-à-vis* his partner, and he cannot rightly present a claim to funds whose expenditure would perhaps never have been necessary if he had been frank and candid in his dealings. In a very significant sense, the fault is his. The fact that the funds were spent becomes his responsibility and not that of his partner. In this respect, we decide that Klöckner violated its fundamental contractual obligations and may not insist upon payment of the entire price of the Supply Contract.²⁰³

The tribunal's reasoning and observation underscore the need to protect an under-developed and politically weary country by imposing the duty of full disclosure on multinationals, which is ever so more important – here and now – in the age of technological innovation and progress to the advantage of multinationals and their parent countries and also in the wake of ever-growing movements towards globalization and liberalization. By developing such principles or rules based on international political justice, IDL can provide an answer to such tensions of the unwary vulnerable peoples, though not of their governments on some occasions.

In the context of EDAs the general principles governing public law contracts, whether known as government contracts or administrative contracts, recognized by the major and representative legal systems of the

²⁰³ *Id.* at 60.

world, are particularly relevant.²⁰⁴ International contracting practice relating to renegotiation and contract adaptation can illuminate law on the matter because of the lack of relevant adequate rules in international law.²⁰⁵ It is not proposed here to prepare a catalogue of rules of law and principles likely to be recognised as a whole in IDL. That is still a long way off. The intention here is rather to identify the trend in general international law that may lead to the development of that proposed body of international development law in a progressive way.

A relevant part of customary international law concerning the treatment of alien property relates to the international standard of State conduct. The standard is normally known as "minimum international standard" or "minimum standard of international justice."²⁰⁶ No doubt, this standard is well recognised and supported in both national and international spheres. A majority of the States represented at the Hague Codification Conference²⁰⁷ supported the standard, and it has also enjoyed the support of many tribunals and claims commissions. In the well-known statement of the measure of the standard in the *Neer Claim case*, the General Claims Commission, set up by the United States and Mexico, stated:

... the propriety of governmental acts should be put to the test of international standards ... the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.²⁰⁸

²⁰⁴ See generally A F M Maniruzzaman, *supra* note 13, at 141; A F M Maniruzzaman, *supra* note 132, at 207; Cuneo, *Some Practical Applications of International Law to Government Contracts*, 50 NOTRE DAME LAW. 843 (1975).

²⁰⁵ Abba Kolo & Thomas W. Wälde, *Renegotiation and Contract Adaptation in International Investment Projects: Applicable Legal Principles and Industry Practices*, 1 J. WORLD INVESTMENT 5, 42-47 (July 2000); BARTELS, *supra* note 133.

²⁰⁶ A. ROTH, MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS (1914); E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1949); E. Borchard, *The Minimum Standard of Treatment of Aliens*, 38 MICH. L. REV. 445 (1940); M. GIBSON, ALIENS AND THE LAW (1946); Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 521 (1910); Nillick, *The Diplomatic Protection of Nationals Abroad: an Elementary Principle of International Law under Attack*, 69 AM. J. INT'L L. 365 (1975); A.O. Adede, *The Minimum Standards in a World of Disparities*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 1001, 1004-05 (Macdonald and D.M. Johnston eds., 1983).

²⁰⁷ See E.J. de Aréchaga, *International Responsibility*, in MANUAL OF PUBLIC INTERNATIONAL LAW 531, 556-57 (Max Sorensen ed., 1968).

²⁰⁸ *Neer Claim Case* (U.S. v. Mex.), 17 I.L.M. 1 (1926).

Brierly understood the standard in the sense of "reasonableness." Thus, in his words: "this international standard cannot be made a matter of precise rules. It is the standard of the 'reasonable State', reasonable, that is to say, according to the notions that are accepted in our modern civilization."²⁰⁹ It is noteworthy that the traditional international minimum standard is mainly a manifestation of Eurocentric value judgement, or moral or social norm.²¹⁰ However, since the nineteen-fifties- in the wake of the Third World movement towards a New International Economic Order - there has been a tension between the competing norms in the normative content of international minimum standard as a result of newly emerging values and moral standards concerning, *inter alia*, developmental needs or developmental prerogatives of developing countries.²¹¹ This tension is further intensified by the recently discovered unique relationship between human rights and economic development of a country²¹² that has triggered a variety of rights of nation States, or rather "peoples" according to some²¹³, such as the right to development,²¹⁴ the right to sustainable development²¹⁵ and so on. These rights are now considered to be the subject matter of an emerging

²⁰⁹ J.L. BRIERLY, *THE LAW OF NATIONS* 279-80 (Sir H. Waldock ed., 1963). This part of international law may be well understood from what Lord Mansfield, perhaps the greatest judge who ever sat on the English bench, said "The law of nations is founded on justice, equity, convenience, and the reason of the thing and confirmed by long usage." See Pollock, *Essays in the Law*, in *id.* at 68.

²¹⁰ BRIERLY, *supra* note 209, at 279; HALL, *INTERNATIONAL LAW* 59-60 (8th ed. 1924).

²¹¹ A.O. Adede, *The Minimum Standards in a World of Disparities*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 1001, 1004-05 (R.S.J. Macdonald & D.M. Johnston eds., 1983); SCHRIJVER, *supra* note 166, at 176-77.

²¹² See generally O. Schachter, *Human Rights and Economic Development*, in *ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS* 389-98 (Bello & Ajibola eds., 1992).

²¹³ JOHN RAWLS, *THE LAW OF PEOPLES* 23-25 (1999). See also SCHRIJVER, *supra* note 166, at 369-71.

²¹⁴ See The UN Declaration on the Right to Development, G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., No. 53, at 186, U.N. Doc. A/4/53 (1986). The resolution was adopted by one hundred and forty-six votes, with eight abstentions and one against (the United States of America). See IAN BROWNLIE, *THE HUMAN RIGHT TO DEVELOPMENT* (1989); H. Petersmann, *The Right to Development in the United Nations: An Opportunity for Strengthening Popular Participation in Development: Programs and Prospects*, in *DES MENSCHEN FESTSCHRIFT PARTSCH* 125-40 (Jekewitz et al eds., 1989); *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* (Chowdhury et al eds., 1992); *THE HAGUE*, 16-18 OCTOBER 1979 (Alphen aan den Rijn, 1980).

²¹⁵ See The Rio Declaration on Environment and Development, June 13, 1992, 31 I.L.M. 814, 814 (1992). JOHNSON, *The Earth Summit*, *THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (UNCED)* (1993); *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* (Winfried Lang ed., 1995); P. Sands, *International Law in the Field of Sustainable Development*, 65 B.Y.I.L. 303-81 (1994). See generally Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 1 (Sept. 25).

branch of public international law, commonly known in juristic parlance as international development law.²¹⁶

Now the time has come to ask whether the traditional minimum international standard is a universal one or if it just represents only the western values even at the expense of the host developing country's developmental prerogatives.²¹⁷ It is a truism that if the normative content of a standard of international law does not represent universality in an ever evolving multicultural world, the standard loses its appeal and is destined to wither away over the course of time. For an international standard to be valid, its quality of universality is of the essence.²¹⁸ The same applies to the minimum international standard. Although surely there may be competing goals and competing values in a multicultural world of today, the proper balance or "trade-off among competing values"²¹⁹ in the context of the standard has to be achieved for a fairer and a better world.

There is no denying that the Declaration of the United Nations General Assembly adopted by its Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources endorsed this traditional customary international law standard. Paragraph (4) of the Declaration reads:

²¹⁶ See generally O. Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1-16 (1976); M. BULAJIC, *supra* note 180; BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979); MAKARCZYK, *PRINCIPLES OF A NEW INTERNATIONAL ECONOMIC ORDER* (1988); M. FLORY, *supra* note 178.

²¹⁷ BROWNLIE, *supra* note 87, at 530 ("The present writer considers that it is not possible to postulate an international minimum standard which is in effect supports a particular philosophy of economic life at the expense of the host state.").

²¹⁸ See Sir Rober Y. Jennings, *Universal International Law in a Multicultural World*, in *LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE* 39, 40-41 (Dr. Maarten Bos & Ian Brownlie eds., 1987).

it is vital above all to keep constantly in mind that the first and essential general principle of public international law is its quality of universality; that is to say, that it be recognized as a valid and applicable law in *all* countries, whatever their cultural, economic, socio-political, or religious histories and traditions. International law must now develop and change to make it more suited to the new and truly global community of States. It already provides a much-divided world with its one common bond; and it is not without significance that, in those departments of the law where the the States of the Third World demand changes in the law, for example concerning investment, or the distribution of wealth and resources, or the availability of skills, those demands are made in the form of proposals for changes in the relevant international law. The 'New International Economic Order' is the most obvious example of this tendency. The acceptance of international law as the vehicle of change is one of the most hopeful signs of the present times.

²¹⁹ *Id.* See also J.I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529-51 (1993).

O. SCHACHTER, *SHARING THE WORLD'S RESOURCES* 24 (1977).

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law ²²⁰

As the Declaration reflects the state of customary law²²¹ in this field, it commanded universal recognition by the States of all representative groups. The subsequent U.N. General Assembly Resolutions on the "New International Economic Order"²²² did not enjoy universal support as Resolution 1803 did, for they deviated *inter alia* from the customary law principles. The minimum international standard²²³ - that an alien's property rights cannot be expropriated or nationalized unless done 1) for a public purpose 2) on a non-discriminatory basis and 3) subject to appropriate or fair compensation - has been confirmed by numerous international arbitral awards²²⁴ and by most legal systems of the world. This has also invariably been reflected in all the investment protection treaties²²⁵ and in some

²²⁰ G.A. Res. 1803, 17 U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962). See also 57 AM. J. INT'L L. 710 (1963).

²²¹ See *The Texaco v. Libya Award*, 53 I.L.R. 389, 483-95 (1978). See also *Amoco International Finance Corporation and Iran*, 15 Iran-U.S. C.T.R. 1899 (July 1987) (case 56, Award 14, at 50).

²²² What is true in UNGA resolutions is equally true in those of other UN agencies like UNCTAD. For instance, Resolution 88 (XIII) of 19 October 1972, UNCTAD Doc., TD/B/421 (1972); *The OPEC Resolution XVI 90 Declaratory Statement of Petroleum Policy in Member Countries*, 7 I.L.M. 1183 (1968) (this cannot be considered to represent a source of customary international law). See also G.A. Res. 3171, UN GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973), reprinted in 13 I.L.M. 238 (1974); Resolution on Permanent Sovereignty over Natural Resources, GA Res. 3201, U.N. GAOR, Sess. 28, Supp. No. 1, at 3, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974); G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974), reprinted in 14 I.L.M. 251 (1975).

²²³ See E.I. NWOGUGU, *THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES* (1965). The author rightly explained the minimum international standard as meaning, in concrete terms, "fair treatment, free access to the courts, respect for human rights. In relation to foreign investment, this standard stipulates the payment of fair, adequate and effective compensation in cases of expropriation or nationalization." *Id.* at 124.

²²⁴ For most recent references on this matter see Jennings & Watts, *supra* note 66, at 920-21 nn.33-35 (1992).

²²⁵ See ICSID collection on Investment Protection Treaties, *supra* note 146.

proposed provisions for the Code of Conduct for Transnational Corporations.²²⁶

One should not cast eyes off the fact that since there is the paucity of rules concerning international contracts, especially State contracts, in the corpus of international law, arguments have developed to regard "contractual rights" as "property rights"²²⁷ and, hence, the rules relating to expropriation/nationalisation of property are applicable to breach of contract.²²⁸ As international law contains no rules relevant to a breach of contract as such, Bowett observes that

[i]t is really to overcome this deficiency that some authors, including the United States Restatement on Foreign Relations Law make the argument that the rules on expropriation of property apply. The argument is that contractual rights are a form of property. Therefore, interference with contractual rights is a form of deprivation of property rights, and international law prohibits such interference unless done for a public purpose, on a non-discriminatory basis, and subject to appropriate or fair compensation.²²⁹

Thus from this standpoint of customary international law, the breach of contractual rights is considered to be equivalent to an act of expropriation or deprivation of property rights.

Although the three conditions of customary international law for the exercise of a State's power to expropriate the property of aliens are well-recognised general principles of international law.²³⁰ Until recently, their precise content has created a great controversy amongst international lawyers representing different ideologies and schools of thought. The United States

²²⁶ Different formulae reflecting the positions of different groups within the "Working Group on the Code of Conduct" were drafted in 1983. Given the wide differences between these formulae, none of them should be read as representing a codification of a generally accepted international law rule. See *Report on the Special Session*, U.N. Commission on Transnational Corporations (UNCTC), para. 54, U.N. Doc. E/1983/17/Rev.1.E/C.10/1983/s/5 Rev. (1983). See also S.K.B. Asante, *The Concept of the Good Corporate Citizen in International Business*, 4 ICSID REV-FILJ 1 (1989).

²²⁷ German Interests in Polish Upper Silesia Case (Ger. v. Pol), 1926 P.C.I.J. (ser. A) No. 7 (1927); Norwegian Shipowners Claims, 1 UNRIAA 307 (1922); Shufeldt Claim (U.S. v. Guat.), 2 REP. INT'L ARB. AWARDS, 1949, 1083. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987); SCHACHTER, *supra* note 13, at 313-14; HIGGINS, *supra* note 37, at 140.

²²⁸ Cf. Dickstein, *supra* note 13, at 86-88 (where the writer tends to underscore the disparity between concession law and nationalization law).

²²⁹ Bowett, *supra* note 98, at 936. See RESTATEMENT OF FOREIGN RELATIONS LAW § 712 (1986).

²³⁰ See U.S. Department of State Statement on Foreign Investment and Nationalization, Dec. 30, 1975, 15 I.L.M. 186 (1976). The status of these principles are so well known that there is little need to cite the authorities concerned.

Supreme Court noted, "there are few if any issues in international law today on which opinion seems to be so divided as the limitations of a State's power to expropriate the property of aliens."²³¹ Even the Reporteurs of the Revised Restatement (Third) of the Foreign Relations Law of the United States had once refused at an early stage of the debate to insert the "prompt, adequate and effective" formula as black letter stating, "because we [Reporteurs] do not think that that can be said as an honest statement of customary international law."²³²

Thanks to the recent wave of arbitral jurisprudence, including that of the Iran-United States Claims Tribunal and the International Centre for Settlement of Investment Disputes (ICSID), the law in this area has to some extent been clarified, though not, however, to the extent of fully establishing all the pertinent rules and principles beyond controversy. With respect to the Iran-United States claims tribunal case-law, in particular, one scholar has thus cautioned that "... it is not easy to identify common trends in the awards of the often deeply divided Chambers and to assess their impact on international investment law and expropriation law in general."²³³ One cannot lose sight of the confusion and controversies given rise to by the three different international arbitral tribunals by divergent rulings on the lawfulness of nationalizations and the remedies available in the three Libyan nationalization cases,²³⁴ sometimes described as 'the hot oil cases,' despite the fact that all the tribunals were concerned with similar facts of the case. Thus in Stern's words, "*Trois arbitrages, un même problème, trois solutions.*"²³⁵ The International Court of Justice has had little occasion so far to elaborate the law in the field.²³⁶ Although efforts have been made recently in various sources such as

²³¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

²³² REVISED RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW (Professor Louis Henkin, the chief reporter for this Restatement, affirmed this in the 59th Annual Meeting, ALI PROC. 238-39 (1982)).

²³³ SCHRIJVER, *supra* note 166, at 195. But see CHARLES N. BROWN & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 655-56 (1998). See also generally *id.* at 631-54.

²³⁴ *Texaco v. Libya*, 53 I.L.R. 389 (1979); *BP Exploration v. Libya*, 53 I.L.R. 297 (1997); *Liamco v. Libya*, 20 I.L.M. 1 (1981).

²³⁵ BRIGITTE STERN, *REVUE DE L'ARBITRAGE* 1,3 (1980) (Translation: "Three arbitrations, the same problem, three solutions.").

²³⁶ The International Court of Justice lost that opportunity to contribute in the field of foreign investment in two important cases, viz., the *Anglo-Iranian Oil Company case* (U.K. v. Iran), 1952 I.C.J. 112 (July 2), and the *Barcelona Traction case* (Belg. v. Sp.), 1970 I.C.J. 1981 (Feb. 5) (where the Court found that it had no jurisdiction). However, in the *ELSI case* (U.S. v. Italy), 1989 I.C.J. 15 (July 20), the I.C.J. dealt with certain important issues such as the requisition of a US company in Italy in violation of the bilateral FCN treaty between the USA and Italy,