NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW

Volume 2 | Number 1 Article 6

1977

State Responsibility to Espouse Claims of Nationals Based on Contracts with Foreign Nations

David Hamilton

Notes and Comments

State Responsibility To Espouse Claims Of Nationals Based On Contracts With Foreign Nations

The international community today is experiencing unprecedented growth in international trade and commerce. The increasing number of international contracts which have resulted has heightened concern for providing adequate protection against contract breach.

This comment will focus on contract undertakings between an individual or a corporation and a foreign state. In particular, consideration will be given to the situation in which a state enters a contract with a foreign party that subjects it to a claim by the state of the alien individual or corporation under the theory of state responsibility in international law. An attempt will be made to determine why, how, and when a state may act to aid its citizen in the event that a contract breach occurs.

I.

Before considering the circumstances which would allow a state to intervene in the case of a contract breach by a foreign state, it should be noted that certain means of protection are available to the private contractor which can preclude the need of state-sponsored assistance. In fact, careful draftsmanship of an international contract should eliminate the need of sovereign aid by including provisions for the settlement of questions pertaining to contract performance.

The two most common provisions in a well-drafted contract are the choice-of-law clause and the arbitration clause.[1] Through these provisions, the contracting state can be prevented from manipulating its sovereign processes to its own advantage. For example, if the alien corporation can secure a clause making its national law applicable to both the construction of the contract and the requirements for perfor-

[1]A study of international contracts on file at the World Bank reveals that in nearly all cases these agreements contained an arbitration clause. While choice-of-law provisions were also found in numerous instances, they were not included as often as agreements to arbitrate. Broches, *Choice-of-Law Provisions in Contracts with Governments*, in INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 64 (W. Reese ed. 1962).

One should also note the importance of the arbitration clause in contracts made with the Soviet Union. The Soviets strongly prefer arbitration over litigation. The Soviet Foreign Trade Organizations, the government agencies which are responsible for the purchase and sale of specific goods for the production enterprises, will include in every draft contract a provision for arbitration, most likely before the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce. If this offer is rejected, the Soviets will continue to press for an arbitration provision, hoping to have some neutral country named as the site. *See* Ayre, *Negotiating Commercial Contracts with the Soviets*, 61 A.B.A.J. 835 (1975).

mance, the national state that is party to the agreement can avoid its commitments only by arbitrarily nullifying the contract.[2] Arbitration clauses are heavily relied on in international contracts and work in close conjunction with choice-of-law provisions. An agreement to arbitrate, even if the arbitrator may apply the law of the state that is a party to the contract, prevents the use of sovereign power by that state to circumvent contract obligations.

Use of either of the above provisions should prevent an injured corporation or individual from needing to rely on intervention by its own state when a contract breach occurs and from incurring the delay and expense of acting through international legal channels.

II.

Generally, international law governs the conduct of sovereign states.[3] Consequently, private parties have no standing to espouse a claim in the international system.[4] Usually, the only direct recourse for an injured corporation or individual against a foreign sovereign is through the municipal law of that state. If no satisfaction can be obtained in the local courts, then only the state of the injured party may demand redress by the foreign nation for the alleged violation of its duty in international law.[5]

In demanding redress, the claimant state acts neither as agent nor trustee for its national.[6] The state maintains its own legal right — its right to have its citizens treated in accord with the principles of international law. It is the denial of justice to the foreign sovereign's citizen which constitutes the distinct international basis for the claim.[7]

Given the individual character of the international claim, it follows that the injured individual has no legally enforceable right against his own government to compel it to press his claim internationally.[8] The

[2]Mann, *State Contracts and State Responsibility*, 54 A.J.I.L. 573 (1960).

[3]*See, e.g.*, 1 G.HACKWORTH, DIGEST OF INTERNATIONAL LAW 1-12 (1940).

[4]Contrary to orthodox theory, much evidence can be found suggesting that individuals or corporations may have international legal rights and responsibilities. *See, e.g.*, 1 C. HYDE, INTERNATIONAL LAW 33-40 (2d ed. 1945). Several recent international developments promote the extension of international status to entities that are not sovereign states. *See generally*, COUNCIL OF EUROPE, *Convention for the Protection of Human Rights and Fundamental Freedoms*, in EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS (6th ed. 1969).

[5]Of course, the private party must be a national of the state seeking satisfaction in the international arena. For a discussion of the concept of nationality, *see* 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-187 (2d ed. 1967).

[6]*See id.* at 1216.

[7]See the Mavrommatis Palestine Concessions Case, [1924] P.C.I.J., ser. A, No. 2.

[8]The Constitution of the United States contains no express provision concerning the duty of the sovereign to represent internationally the claims of its individual citizens. Such is not the case in several other nations. *See, e.g.* GRUNDGESTEL art. 29 (W. Ger., 1949). However, while there is no legal compulsion for the United States to act, there may be an obligation or a duty to act based on certain constitutional concepts such as the Executive's power over foreign affairs. For a discussion of this theory, see

government has complete control over such claims. Several factors — political, economic, legal and equitable — are considered by the state in determining whether to seek an international solution.[9] Once obtained, any such international solution is final.

If the government decides to espouse the claim, it communicates the claim to the foreign state charged with the contract breach. Thereafter, several avenues of negotiation are available to settle the dispute. Informal discussion and use of good offices are the least drastic means of settlement.[10] Formal diplomatic protests might also be used. If these means prove ineffective, there is recourse to existing international arbitral commissions.[11] Lump sum settlement agreements are also available in many cases.[12] Recourse to other international tribunals such as the International Court of Justice is also a possibility, but it must be recognized that persuading a foreign state to submit voluntarily to the jurisdiction of such a tribunal may be a problem.[13]

A corollary to the right of a government to refuse to submit a claim for international settlement is the power to have complete control of the means to espouse the claim.[14] Given this right, the government can alter, compromise, or abandon the claim without the consent of the holder. In addition, the claim is usually consolidated with other individual claims which the government has against the other party.[15] As a result, while any recovery paid to the government is customarily

---

Note, *The Nature and Extent of Executive Power to Espouse the International Claims of United States Nationals*, 7 VAND. J. TRANSNAT'L L. 95 (1973).

[9]The method of balancing these factors has never been clearly determined. Nor has it been determined whether any attempt is made to balance these competing interests. Whiteman suggests that a decision whether to espouse an individual's claim is simply "political in nature [and] within the province of the Executive..." 8 M. WHITEMAN, *supra* note 5, at 1216. Mr. Borchard writes that "it is a matter of expediency whether in the particular case [the state's] right of interposition shall be exercised." Borchard, *Contractual Claims in International Law*, 13 COLUM. L. REV. 457, 458 (1913). Professor Dunn considers the real basis for determining whether to press a claim to be a matter of allocation of risks involved in dealing in international business affairs. F. DUNN, THE PROTECTION OF NATIONALS 191 (1932).

[10]*See* note 24 *infra*.

[11]While there may be some hesitancy on the part of the United States to use official diplomatic channels in the case of a contract claim, the State Department generally is willing to submit contract claims to existing arbitral commissions with jurisdiction to hear such matters. *See* Borchard, *supra* note 9, at 471.

[12]For an explanation on the workings of lump sum agreements, see FOREIGN CLAIMS SETTLEMENT COMMISSION, DECISIONS AND ANNOTATIONS 1-10 (1968).

[13]*See, e.g.*, I.C.J. Stat. art. 36 para. 2.

[14]*See* E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 366-380 (1927).

[15]It should be noted that the claim retains its individual character until it is espoused by the government; and, until that time it is subject to the control of the individual who has suffered the injury. As a result, any reparation that is obtained prior to official government action, even if this recovery stems from unofficial government aid, goes directly to the private citizen. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §211 (1965).

passed on to the private party, the right to this payment is not a matter of domestic law but of equity.[16]

Although the power of a state to pursue international claims is extensive, it is also highly discretionary. But the duty of the state to respond to a violation of international law that injures its citizens is clear. The most difficult question which a state or its injured citizen must answer is: When did the international violations occur?

III.

The theory of state action and contract breach enunciated by the United States distinguishes contract breach claims of an individual against a foreign state from other international wrongs. While an international tort may bring an immediate response by the state of the injured individual, the Department of State of the United States has stated that:

> [C]laims arising out of contractual relationships between a national of this government and a foreign government do not, generally speaking, provide a proper subject for diplomatic intervention on the part of this Government in the absence of a clear showing that the American national has exhausted such local remedies as may be open to him and has sustained a denial of justice as that term is understood in international law.[17]

This rule presupposes that the breach of contract has no tortious elements. Generally, contract claims may not be classified as tort claims. They are distinguishable.[18]

There are several bases for this distinction. First, a citizen enters a contract voluntarily. Second, the private investor subjects himself to local law by going abroad to do business. And third, practically every civilized state may be sued for breach of contract but the same may not be true for tort claims.[19] But if the state conduct is tortious in the contract breach or constitutes a denial of justice,[20] action by the government of the aggrieved private party may be immediately forthcoming.[21]

However, the absence of some international wrongdoing does not mean that the aggrieved individual's sovereign must remain entirely

---

[16]*The Nature and Extent of Executive Power to Espouse the International Claims of United States Nationals*, *supra* note 8, at 105.

[17]Letter from Attorney Adviser Matre to Hershel Davis, May 14, 1956, MS. Department of State, file 284A.1141 Davis, Hershel/4-3056, quoted in 8 M. WHITEMAN, *supra* note 5, at 907.

[18]Distinctions must also be made among contract claims themselves. This paper deals with contracts for the supply of goods and for the exercise of concessions. Contracts involving bonded indebtedness cover a different topic of inquiry. For a discussion of claims dealing with bonds see, *e.g.*, Borchard, *supra* note 9; *see also* Mann, *The Law Covering State Contracts*, 21 BRIT. Y.B.INT'L L. 11 (1944).

[19]Borchard, *supra* note 9, at 460-61.

[20]*See* text accompanying note 49, *infra*.

[21]*See* 2 C. HYDE, *supra* note 4, at 988.

inactive. Prior to a showing of an international breach, the state may use its informal good offices in an effort to bring about a solution to a contract dispute.[22] Though the action is unofficial, the results may be as concrete as if gained through an international settlement.

The theory of contract breach illuminates what may constitute internationally wrongful conduct. There is dispute as to whether a breach of a contract by a state with respect to a foreign national is a *per se* violation of international law or whether something in addition to a mere contract breach is necessary.[23] Determination that a contract breach would result in an international violation has important consequences.[24] If a contract breach by a foreign state violates international law, the government of the injured individual could espouse the claim without showing any more internationally wrongful conduct. But, if the *per se* concept is rejected, then an international tribunal hearing a dispute would be acting as an appeals court for the local judiciary in deciding contractual issues.[25]

Generally, those who claim that an immediate violation of international law results from a contract breach by a state believe that there should be no distinction drawn between an alleged tortious delict and a wrong stemming from a state's attempt to avoid its contract obligations.[26] Others would apply the concept of *pacta sunt servanda;* that is, that contracts are to be honored absolutely.[27] A third view asserts that the normal expectations of the parties to a contract are that the contract will be performed in the manner originally agreed upon. These expectations are said to be fundamental and are cited as the basis for international investment. Thus, in order to assure continued international investment, this view proposes immediate international sanctions in the event of a state instigated contract breach.[28]

---

[22]Borchard, *supra* note 14, at 288, defines good offices as "... personal recommendations [which] are not tendered officially, although the government may authorize or direct a diplomatic representative to extend them."

[23]*See* RESTATEMENT, *supra* note 15, §193, comment c.

[24]Professor Amerasinghe details four important procedural consequences resulting from a determination that a breach of contract by a state with an alien is *per se* a violation of international law. First, the final arbiter of the contract dispute would be an international court, whether as a court of last resort or otherwise. Second, the norms of international law, not those of municipal law, would be applicable for any court hearing the dispute. Third, questions of evidence and procedure would be governed by international law. Fourth, any remedy and its mode of fulfillment would be governed by international standards. Amerasinghe, *State Breaches of Contracts with Aliens and International Law,* 58 A.J.I.L. 775, 786 (1959).

[25]*See* Jennings, *State Contracts in International Law,* 37 BRIT. Y.B. INT'L L. 156, 167-69 (1961).

[26]Amerasinghe, *supra* note 24, at 882-83.

[27]Wehberg, *Pacta Sunt Servanda,* 53 A.J.I.L. 775, 786 (1959). An interesting modification of this theory is suggested by Professor Jennings, *supra* note 25.

[28]*See, e.g.* Schwebel, *International Protection of Contractual Arrangements,* in PROCEEDINGS 256, 269-70 (Am. Soc'y Int'l L. 1969). Schwebel also enumerates several additional factors he considers supportive of a *per se* theory. *Id.* at 267-71. First, he

A view contrary to the *per se* theory requires something in addition to a mere contract breach in order to hold a state responsible under international law. The basis for this view rests on the assumption by the individual of his contract responsibilities. A private party entering a contract is seen as consenting freely not only to the entry into the contract but also to the application of municipal law to that contract. Unless contract provisions have specified otherwise, any remedy must come from local courts.[29] International law can protect the individual only from abuses stemming from manipulation of the local judicial system.[30]

Language from international decisions can be found which supports either view;[31] though in most cases, the issue of the theory of contract breach is not specifically addressed.[32] Nor does state practice follow a uniform theory. Nations, in furthering their own interests, naturally espouse the view most beneficial to their cause.[33] Hence, "the expropriating state [takes] one position, and the state of the investor, another."[34]

The United States has consistently required more than a mere breach before it will act on an individual's contract claim.[35] Given the firmness with which the State Department has expressed the American position, it seems unlikely that this view would change. Even though a unified theory of remedy for contract breach has not developed in international law, an American corporation will likely need to show more than contract breach by a foreign party to get its claim assumed by the United States government. This burden exists partly because of the point of view of the State Department and partly because of the lack of uniformity given the meaning of various terms used to indicate when a breach of international law occurs. But if precise definitions are given the terms most often relied upon in discussing international delicts, the acts constituting such wrongs can readily be isolated.

---

notes that most states have some roles in the negotiation and drafting of international contracts which gives these agreements an immediate quasi-international character. Second, he states the proposition that nations are not the sole subjects of international contract clauses calling for the use of international law in the event disputes arise. *See* text accompanying note 3 *supra*.

[29]*See* text accompanying note 1, *supra*.

[30]*See* Amerasinghe, *supra* note 24, at 897-98.

[31]*E.g.*, International Fisheries Co. Case (United States v. Mexico), American-Mexican Claims Commission Opinions 207, 218 (1930-31); The Arabian American Oil Co. Case, Arbitral Award at 61, 125, quoted in 8 M. WHITEMAN, *supra* note 5, at 912-13.

[32]Professor Amerasinghe discusses in detail numerous international discussions dealing with contract breach. Amerasinghe, *supra* note 24, at 891-97.

[33]*See e.g.*, Losinger & Co. Case, [1936] P.C.I.J., ser. C, No. 78; Norwegian Loans Case, [1957] I.C.J. 9.

[34]Schwebel, *supra* note 28 at 269.

[35]*See* text accompanying note 17, *supra*.

The concept most prone to abuse is the much cited "denial of justice". This term has been given a vast number of interpretations.[36] Definitions range from a broad concept of "any violation of the rights of an alien resulting from acts or omissions on the parts of the executive, legislative, or judicial branches of government," to a narrower scope of a "judicial" definition of the phrase. Under this latter definition, a denial of justice is limited to wrongs committed by the judicial branch of government.[37]

This judicial interpretation is more effective than a broad definition because it enumerates the acts which would constitute an international breach. It makes the nature of the international wrong more comprehensible by focusing on the local nature of the violation. The result of the act is an international violation, but the origin of the act is the improper conduct of the local judiciary.[38]

Acceptance of the judicial concept of a denial of justice is widespread.[39] Since the State Department requires exhaustion of local remedies before a denial of justice[40] claim may be asserted, it is clear the United States impacts a judicial meaning to the term. Former legal advisor to the State Department Hackworth has written, "[Denial of Justice] is more frequently employed with acts or omissions of the judicial branch, as distinguished from other branches of the government, since generally speaking, exhaustion of available judicial remedies is a prerequisite to a valid complaint that the alien has been denied justice."[41]

Thus, the assumption can be made that the term is limited to judicial activity. But what specific acts would incur international liability? The requirement that there should be an exhaustion of local remedies prior to a claim of a denial of justice would seem to limit the concept to some active injustice imposed by the local courts of the contracting state. Therefore, judicial action would be required before

---

[36]Six general meanings have been given the phrase by writers: 1) the equivalent of every international wrong committed to the prejudice of foreigners by a state; 2) a limitation to certain unlawful acts or omissions on the part of judicial authorities; 3) a procedural definition limited to a denial of access to the courts; 4) a third judicial interpretation which includes not only a denial of access to the courts but also wrongful judgments; 5) a failure of an alien to obtain redress for an earlier wrongful act committed either by a private person or by a state agent; 6) an additional judicial definition encompassing any failure on the part of governmental organs charged with administering justice to aliens to conform to their international duties. A. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 96-97 (1970).

[37]*Id.* at 97.

[38]*Id.* at 105-15.

[39]Writers generally accept this view. *See, e.g.*, C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 115 (1928). International tribunals are also mostly in accord with this definition. *E.g.* Mexico (Garcia and Garza) v. United States, Opinion of Commissioners 163 (1927), quoted in 21 A.J.I.L. 585 (1927).

[40]*See* text accompanying note 17, *supra*.

[41]1 C. HACKWORTH, *supra* note 3, at 526.

an international claim could be made. However, this restrictive view has not been accepted. Instead, the term has been viewed as encompassing any acts or omissions on the part of all governmental organs charged with administering justice.[42]

The individual or corporation trying to meet the burden of showing more than mere contract breach through proving denial of justice must show a willingness to submit the contract dispute to the local judiciary for settlement. After acceptance of local judicial authority, any subsequent injustice, whether it be an affirmative act or an existing bar to justice, would be a sufficient basis for international action by the state of the injured party. Under this view, an exhaustion of local remedies would not be necessary where justice in the local courts is wholly lacking, where the local courts are menaced or controlled by a hostile mob, or where past experience and prior judicial decisions have shown that local remedies are insufficient.[43]

If the dispute reaches the local courts, several types of affirmative judicial action could also result in a denial of justice. An unjust judgment would be cause for international complaint. A judicial decree should be denied international recognition if it fails to conform to international concepts of fairness and good faith.[44] In addition, there is general agreement among scholars that unreasonable delay in the prosecution of an action by judicial authorities constitutes internationally improper conduct.[45] Prejudice on the part of the local courts because of the alien status of the private party would also be a denial of justice.[46] Any arbitrary abuse of judicial power by the local courts based on the character of the parties involved falls short of international standards and provides a basis for an international claim. However, the fact that the opinion of the court could or should have been different is not a sufficient basis for a claim of a denial of justice. "Nations are considered to be equal, and with but few exceptions, judgments of their courts of last resort are considered to be and are accepted as just and proper."[47]

While a denial of justice most often reflects only judicial impropriety, this definition ignores a major source of concern in contract dealings today which is the use of sovereign power by the legislative and executive branches of government to annul or modify a contract with an alien investor. The distinguishing feature in this type of breach is the interjection of arbitrary governmental power to alter or terminate

---

[42]*See* note 38 *supra; see also* RESTATEMENT, *supra* note 15 §§ 178-82.

[43]*See* 5 G. HACKWORTH, *supra* note 3, at 511.

[44]*See, e.g.*, HARVARD LAW SCHOOL, RESEARCH IN INTERNATIONAL LAW, DRAFT CONVENTION ON THE LAW OF RESPONSIBILITY OF STATES FOR DAMAGES DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS, 23 A.J.I.L. 133, 134 (Special Number 1929).

[45]*See, e.g.*, Freeman, *supra* note 36, at 118.

[46]5 G. HACKWORTH, *supra* note 3, at 526.

[47]*Id.* at 526.

contractual duties.[48] Given this view, a distinction can be made between acts of a government in breaching a contract which are based on its role as a private entity or corporate contractor and a government breach based on its sovereign power. Sovereign action could bring about an immediate international breach while a breach stemming from the normal contractual relationship would require initial recourse to the local courts. In the latter case, the basis of the claim would be strictly contractual in nature, while in the former instance, the basis of the international wrong would arise from the tortious character of the act.[49] A difficulty arises in determining what type of governmental activity is tortious. The question to be answered is what type of confiscatory breach by a state is forbidden under international law.

There is unanimous agreement that the arbitrary non-performance of a contract by a state, where there is no attempt to justify the breach, constitutes internationally illegal conduct. "It is the power of the state coupled with the disregard of the alien's legitimate interests that constitutes internationally illegal conduct."[50] The American Law Institute has expressed the United States' view in a similar manner. In its opinion a breach of contract by a state is wrongful under international law where "the breach is effected in an arbitrary manner without bona fide claim of excuse..."[51] By such state actions, the interests of the individual are extinguished by the state without the guise of legality. This type of breach immediately characterizes it as an act amounting to an international tort, regardless of its concurrent nature as a possible breach of contract.[52]

Varying opinions exist as to whether sovereign acts purporting to have legal justification may violate international law as well as breach an international contractual obligation. One view declares any use of sovereign legislative or executive power to alter contract obligations to be contrary to principles of international law.[53] Others see the use of a sovereign decree to modify or annul a contract as entirely free from the constraints of public international law. "Contracts are governed by the law determined by the private international law of the forum. That law 'not merely sustains but because it sustains, may also modify or dissolve the contractual bond.' "[54]

But in most instances the problem of confiscatory breach has not been viewed as an "either-or" proposition. Instead, attempts have been made to distinguish different exercises of power and categorize only certain types of confiscation resulting from a contract breach as

[48] *Id.* at 511.
[49] F. DUNN, *supra* note 9, at 165.
[50] Mann, *supra* note 2, at 574.
[51] RESTATEMENT, *supra* note 15, § 193.
[52] Mann, *supra* note 2, at 574.
[53] *See, e.g.*, F. Dunn, *supra* note 9.
[54] Mann, *supra* note 2, at 580.

internationally illegal. This moderate approach concedes that the sovereign right of a nation to amend laws and protect its interests must be recognized. It follows that due to the sovereign character of the contracting party, some mobility as to contract obligations must be given the state party. Yet, how does one formulate a rule recognizing the existence and rights of a sovereign power while also protecting the legitimate interests of the private party to the contract?

The 1961 Harvard Draft Convention suggests that laws altering or annulling contract obligations may be made if they are in accord with the general legislative practice of the nation or with generally recognized principles of international law.[55] Hence, "it is recognized that some leeway [must be given] to the State in the regulation of the performance of contracts... [yet] in order to place some limitations upon the autonomy of the state... annulment or modification, to be internationally lawful, must be consistent with local law, but consistent only in the sense that there is no 'clear and discriminatory departure' from that law."[56] Though limits on sovereign power are recognized, such an approach appears to favor the state at the expense of the private party for many acts can be characterized so as to give them an appearance of legitimacy.

Another approach would limit a state's right to alter its contract responsibility to cases where the decree involved reflects a general trend in public policy.[57] Under this theory, the emphasis appears to be on the intent of the particular law. If the act directly focuses on the contract in question or on trade concessions and is an effort to mitigate or extinguish the state's contract obligations, then it would be contrary to international law. But, if the law stems from a trend in the state's public policy, the change and its resulting effects on contract performance can be consistent with international law. The interests of the nation as a whole have preference over the concerns of the alien investor, even if the subordination of the investor's interests might mean the loss of valuable rights and the disappointment of legitimate expectations.

This public policy concept suggests a distinction of proper from illegal state action by analogy to the law of expropriation.[58] By comparing a confiscatory breach of a contract with an expropriation of real or personal property, a stronger case for redress in the event of a breach can be made. Such a case could be established by showing that the state party to the contract had expropriated the contract property rights of the alien party to the contract even though the state party may

[55]HARVARD LAW SCHOOL, RESEARCH IN INTERNATIONAL LAW DRAFT CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS, Art. 12 (1961), reprinted in 55 A.J.I.L. 548, at 566 (1961).

[56]*Id.* at 574.

[57]*See e.g.*, RESTATEMENT, *supra* note 15, §195, comment d.

[58]*See* Mann, *supra* note 2, 582-91.

have been operating under the rubric of public policy changes made by the host government consistent with principles of international law. Theoretically, it would be possible for a party to alter its performance under the contract and not commit a breach by the standard of reasonable expectations and yet violate another standard of international law through an accidental or intentional expropriatory taking of a property right in the contract. If this situation occurred, a party to the contract could maintain an argument for a damages claim measured by valuation criteria appropriate under the law of expropriation for just compensation.[59]

Unfortunately, no decision of an international tribunal has dealt specifically with the question of a state's expropriation of contract rights between it and an alien as distinct from other property of an alien.[60] However, the Permanent Court of Arbitration in the case *United States v. Norway* recognized contract rights as vested property rights. Even though the case centered on a dispute between an alien and a national, the decision used the theory of expropriation in awarding just compensation for the extinction of existing contracts.[61] Also, in the *Shufeldt Claim (United States v. Guatemala)*, a legislative decree annulling a concession contract was viewed as an act of taking away property rights for which the government should compensate.[62] These cases express international recognition of the equivalence of contract rights with other property rights;[63] in the *Norway* case, the express notion of expropriation was used in dealing with state nullifications of contract obligations.

Allowing such an equation, what must still be shown is that the exercise of sovereign power constitutes a taking and not merely regulation. In cases where the decree is obviously meant to aid the

[59]*See, e.g.*, 8 M. WHITEMAN, *supra* note 5, at 1085-1136.

[60]RESTATEMENT, *supra* note 15, §195, reporters' note.

[61]Proceedings of the Tribunal of Arbitration 111 (1922), reprinted in 17 A.J.I.L. 362, 383 (1922).

[62]2 U.N. Rep. Int'l Arb. Awards 1079, 3 *Dept. of State Arb. Series* 851 (1932).

[63]The American Law Institute has expressed a similar view. They state, "The taking by a state, of an alien's rights under a contract with the state, is governed in general by the same principles as the taking of an alien's property." RESTATEMENT, *supra* note 15, §195, comment a. A like approach also appears to have been taken by the Foreign Claims Settlement Commission of the United States. In determining whether a claim for a contract breach will be recognized, the Commission has made an attempt to find whether the particular claim constitutes a taking of property. This has been necessary since lump sum settlement agreements reached between the United States and other nations inevitably require a showing of some taking of a defined property interest prior to allowing a recovery by the individual claimant. Yet whatever the reason, in the claims before the Commission based on a contract breach it has been necessary for the claimant to demonstrate that the loss resulted in the taking of some vested property right. Mere executory agreements, short of some type of performance, have not been held sufficient to bring a recovery. But where the claim has been allowed the Commission has noted that the contract rights amounted to property rights, the taking of which required compensation. Foreign Claims Settlement Commission of the United States, *supra* note 12.

state in avoiding particular contract obligations or in furthering some specific end the success of which is hindered by the particular contract, a taking would not be difficult to prove.[64] But where the law is less definite, difficulty might arise in distinguishing an expropriation from mere regulation. The conclusion that must be reached in order to allow such a decree to be termed "regulation" is that the law is directed to the general health and safety of the nation's citizens or is a legitimate means of protecting national interests.[65]

IV

Several conclusions can be made. The first is that careful draftsmanship of an international contract can avoid an international dispute in most cases. Second, the espousal of a claim by a state is a discretionary matter. Further, if a nation chooses to pursue a claim, the individual loses his particular interest in the aggregation with other claims, thereby making recovery a matter of equity. Also, in determining when a claim can be made by the state, it is necessary and expedient to distinguish an international breach based on a "denial of justice" from one which arises from a confiscatory breach by the state. In the former instance, an international violation occurs through judicial abuse at any stage of the proceedings. What must be shown before an international claim can be made is the willingness of the private party to submit the dispute to local judicial authorities. After this prerequisite is met, any arbitrary or capricious judicial act or omission constitutes a violation of international law. However, not all sovereign decrees resulting in a contract breach violate international law. Only where the use of sovereign power is highly discriminatory or arbitrary will international principles become involved. Perhaps the best way to define such conduct as arbitrary is to distinguish between government acts which are regulatory in nature and those which constitute a taking of property. In the former instance, no international violation would occur. But where there is a taking, an analogy to the theory of expropriation should be made. The confiscatory breach should be declared contrary to international principles and just compensation should be forthcoming.

DAVID HAMILTON

---

[64]An example of such a case is El Triunfo Co. (U.S. v. Salvador), 1902 U.S. FOREIGN RELATIONS 859, where an executive decree expressly directed to the particular concessions involved was found contrary to principles of international law.

[65]*See* Mann, *supra* note 2, at 586-87. Prof. Mann suggests ample guidance in making a taking-regulation distinction can be found in United States decisions focusing on the proper scope of what is called the "police power" of the State.