STATE BREACHES OF CONTRACTS WITH ALIENS AND INTERNATIONAL LAW

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I

It has not been established with sufficient clarity and certainty whether a state commits a breach of international law by breaking a contract made by it with an alien. The question needs an answer.[1] It is not one of an entirely theoretical nature. On the answer to it will depend many important consequences. There are four of special significance. First, if the breach of contract is characterized as a breach of international law, the final arbiter of the question whether there had been a breach of contract and of the extent of that breach would be an international court whether as a court of last resort or otherwise.[2] This is the natural consequence of the fact that it is the organs of enforcement of international society that have the power of finally determining questions relating to the breach of legal norms belonging to that society. Municipal courts would not have the final decision. Secondly, the norms applicable by an international court in making such a decision would be the norms of international law and not necessarily the rules of a municipal system of law.[3] International rules should, of course, be applied in determining whether there has been a breach of international law. Thirdly, questions of evidence and procedure relating to the contract would be governed by international law.

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[1] Reference to breach of contract by a state in this paper must be understood to be confined to breaches of contracts of this kind only, unless otherwise stated. Contracts between two states and contracts between aliens and nationals are excluded from this article, and so are public bonds.

[2] The rule of international law requiring local remedies in the delinquent state to be exhausted would necessitate reference of the particular issue to the local courts, where such reference was possible and not obviously futile, right up to the top of the hierarchy: see the Panavezys-Saldutiskis Railway Case, P.C.I.J., Ser. A/B, No. 76 (1939), and the Finnish Ships Arbitration, 3 Int. Arb. Awards 1479. Then the international tribunal would be a final court. But where there are no such remedies, or the requirement has been waived with the consent of the delinquent state, the international tribunal will be the first and final court.

[3] That such principles do exist requires no proof, and is supported by the facts that (1) often states do ask tribunals to apply "principles of international law, equity and justice" in determining questions of contract submitted for arbitration, see U. S.-Mexico General Claims Convention, 1923, Art. I, Treaty Series 1078, 43 U. S. Stat. 1730; and (2) tribunals have purported to apply such principles in making decisions under these compromis: see the Illinois Central Railroad case, note 30 below; and Meron, "Repudiation of Ultra Vires State Contracts and the Responsibility of States," 6 Int. and Comp. Law Q. 273 (1957).

These may give international courts wider powers, particularly with respect to the obligations of this kind of a *state* party to a contract, than a municipal court may have. Fourthly, the remedial obligations and the manner of their fulfillment would be determined according to international law and not necessarily according to any municipal law. There is no reason why, for instance, an international tribunal should not decide that the contract be specifically performed rather than compensation be paid, since that is a remedy contemplated by international law, irrespective of what remedy the municipal law has given and, indeed, whether it has given a remedy at all. The Permanent Court of International Justice has stated quite clearly the principle of reparation in international law:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[4]

As applied to a breach of contract by a state, it would mean that the rights under the contract would be restored. Specific performance would be granted except where this is impossible. It is only where the impossibility of performance is proved that compensation would be substituted.

II

Text-Writers

On the question whether a breach of contract by a state party to a contract made with an alien is *per se* a breach of international law, there is little direct authority in the way of pronouncements by international tribunals, as will be seen later.[5] The matter is further complicated by the patent lack of agreement among writers. Some hold the opinion that such a breach of contract is *per se* a breach of international law.[6] This

[4] Case Concerning the Factory at Chorzów (Claim for Indenmity–Merits), P.C.I.J., Ser. A, No. 17 at p. 47 (1928). The case concerned the illegal taking of property by a state. The wording and spirit of the above passage, however, indicate that the Court was speaking of illegal acts in general.

[5] See p. 891 below.

[6] See, e.g., 1 Fauchille, Traité de Droit International Public 529 (8th ed., 1925); Clarke, "Intervention for Breach of Contract or Tort committed by a Sovereignty," 1910 Proceedings, Am. Soc. Int. Law 149, 155; 1 Oppenheim-Lauterpacht, International Law 344 (8th ed., 1954); Hershey, Essentials of International Law 261 (1927); Cavaré, La Protection des Contractuels Reconnus par les Etats à des Etrangers à les Exceptions des Emprunts 27 (1956); Brandon, "Legal Deterrents and Incentives to Private Foreign Investments," 43 Grotius Society Transactions 39, 54, 55 (1957). See

view seems mainly to derive from the notion that there should be no distinction between an act by a state alleged to be a tort and one which is alleged to be a breach of contract. If the former, it is argued, is regarded as a breach of international law, then why should not the latter? [7]

Among more recent writers, Mann suggests, *de lege ferenda* apparently:

> It may be that a workable solution of the problem can be found only by generalizing an established principle of international law and at the same time taking a leaf out of the American Constitution and out of the books of authority to which it has given life: without prejudice to its liability for any other tort (such as denial of justice, discrimination, expropriation), the state shall be responsible for the injuries caused to an alien by the non-performance of its obligations stipulated in a contract with that alien if and insofar as such non-performance results from the application of a state's law enacted after the date of the contract, this shall not apply where the law so enacted is required for the protection of public safety, health, morality or welfare in general.[8]

This view is proposed as a modification of what Mann believes to be the present state of international law, namely that breach of contract with an alien by a state party to it is not *per se* a breach of international law.[9] The proposal relates to a specific method of breaking a contract and does not introduce a rule that a breach of such contract is always *per se* a breach of international law. Professor Jennings examines the theory of breach of state contracts with aliens in the context of international law and comes to the conclusion that

> There is nothing in the structure of international law and nothing in the relationship between international law and municipal law that inhibits the recognition of international law remedies which relate directly to the contract.[10]

However, he seems to leave it open whether a breach of such a contract should always *per se* be a breach of international law, when he says:

> This is not to deny that there may be situations where the contracting state is entitled to change the law though the result be to the detriment of the alien contractor. The point is that the definition of these situations must itself be a question of international law.[11]

The assumption made by both these writers as to the present law, however, is in keeping with the views of several other writers who regard a

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also Schwebel, "International Protection of Contractual Arrangements," 1959 Proceedings, Am. Soc. Int. Law 266.

[7] Clarke, *loc. cit.* 155; 1 Fauchille, *op. cit.* 529, who says: "Si la responsabilité des États peut avoir pour origines des actes d'un caractère *délictuel*, elle peut résulter également d'obligations contractuelles. L'inexécution d'un engagement qu'ils ont souscrit constitue en effet un manquement à la parole donnée, c'est à dire une violation d'un de leurs devoirs internationaux. . . ."

[8] "State Contracts and State Responsibility," 54 A.J.I.L. 572, 590 (1960).

[9] *Ibid.* 577–588.

[10] "State Contracts in International Law," 37 Brit. Yr. Bk. Int. Law 156, 181 (1961).

[11] *Ibid.* 182.

breach of contract by a state *per se* as at the most a simple breach of municipal law without being a breach of international law as well. They require something more than a mere breach of contract by the state to give rise to a breach of international law.[12]

Hyde writes:

> It may be doubted, however, whether the mere breach of a promise by a contracting state with respect to an alien is generally looked upon as amounting to internationally illegal conduct, or as constituting the violation of a legal obligation towards the state of which he is a national. . . . In the estimation of statesmen and jurists international law is probably not regarded as denouncing the failure of a state to keep such a promise, until, at least, there has been a refusal . . . to adjudicate locally the claim arising from the breach. . . .[13]

Dunn makes a distinction between the situation where a state breaks a contract with an alien by the exercise of sovereign power and other situations.[14]

It is possible to take the view that whether or not a breach of contract by a state is *per se* a breach of international law depends on whether the government of the state concerned was acting as a sovereign and supreme power or in a private capacity in *entering* into the contract. As an absolute criterion of international responsibility the distinction is both vague[15] and difficult to justify for the purpose in hand. Does it really matter in what capacity the contracting state was acting in *making* a contract when it is a question of determining whether an act alleged to be a breach of the contract is a breach of international law or not? The distinction is predicated on the notion that where the state acts in its sovereign capacity it generally does not subject itself to judicial process in its own courts and may avoid its obligations, whereas when it acts in a private capacity there is generally redress through the local courts. This is, in fact, not a true representation of the actual situation in states, especially in regard to the Anglo-American jurisdictions. What is more, in practice, where the dis-

[12] *E.g.*, 2 Hyde, International Law Chiefly as Interpreted by the United States 988; Jessup, A Modern Law of Nations 104, 109 (1948); 3 Whiteman, Damages in International Law 1555, 1558 (1943); Borchard, Diplomatic Protection of Citizens Abroad, Ch. VII; 1 Westlake, International Law 331 (2nd ed., 1910); Decencière-Ferrandière La Responsabilité Internationale des Etats 174 (1925); Hoijer, La Responsabilité Internationale des États 117 (1930); Feller, The Mexican Claims Commissions 174 (1935); 3 Dahm, Völkerrecht 210, note 2; Dunn, The Protection of Nationals 165 (1932).

[13] 2 Hyde, *op. cit.* 990.

[14] Dunn, *op. cit.* 165.

[15] The distinction has been used by European continental jurisdictions and to a certain extent by U. S. courts in the law of sovereign immunity to determine whether a foreign sovereign is entitled to immunity from suit and has taken the form of distinguishing between acts *iure gestionis* and acts *iure imperii*. But they have experienced difficulty in applying it to particular situations and, indeed, the answers that the courts of the different countries have arrived at in similar situations have been conflicting. See Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 28 Brit. Yr. Bk. Int. Law 220 (1951). Moreover, it must be remembered that this distinction has not been accepted by common law jurisdictions; see The Porto Alexandre, [1920] P. 30.

tinction obtains, the presence of local remedies does not *always* coincide with the private nature of the contract nor does the absence of remedies *always* coincide with the sovereign nature of the contract, so that that basis of distinction is not an altogether logical one. Also, there seems to be no good reason of policy for adopting the distinction between contracts made in a state's sovereign capacity and those made in its private capacity for this purpose. However, the distinction between the absence and presence of legal remedies which is the premise from which such a view would seem to derive may be more relevant to our problem. It is the same distinction that is inherent in Hyde's thesis stated above, that international law does not denounce a breach of contract by a state until at least there has been a refusal to adjudicate locally.

For our purposes, then, the opinions of text-writers may be conveniently divided into two schools: those that maintain that a breach of contract by a state is *per se* a breach of international law and those that require something more than a mere breach of contract for a breach of international law to arise.

Societies of international lawyers have also expressed opinions on this question. For instance, in 1958 the American Branch of the International Law Association expressed the following view:

> The unsoundness of treating the legal rights arising from contracts between states and aliens as being of a lower order than those arising from agreements between governments or their agencies merits further illustration. Afghanistan recently granted the Soviet Techno-export Organization rights to explore for oil in Afghanistan. A breach by Afghanistan of the pertinent agreement would be a breach of international law. But a contract with a privately owned oil company, for the same object, of the same substance, upon the same terms, breached in the same way, by the same state would not be a breach of international law in the eyes of the formalists.[16]

The view here implicitly advocated is in favor of regarding breach of contracts with aliens by a state as *per se* a breach of international law.

State Practice

State practice is no more helpful in deriving the appropriate rule. On the one hand, there stands the argument adduced by Switzerland in the *Losinger & Co.* case that a state must be bound by its obligations to an alien under a contract as at the time the contract was made, since the contrary argument would enable a state to free itself of its obligations by enacting special laws:

> La validité d'une obligation assumée par un État doit évidemment s'apprécier d'après la législation en vigueur au moment où l'obliga-

[16] 1957–1958 Proceedings and Committee Reports of the American Branch of the International Law Association 70, 71. For expressions of opinion by other international societies of lawyers see 44 Annuaire de l'Institut de Droit International 251 ff. (II), and Report of the Conference of the International Bar Association, 1958.

> tion est née. Cette règle de simple bon sens ne souffre aucune discussion.[17]

In other words, the contract was regarded as giving rise to an international obligation, and the breach of contract was seen as a direct breach of international law. This argument was naturally opposed by Yugoslavia, the defendant in that case. Unfortunately the Permanent Court of International Justice did not find it necessary to proceed to a decision of the issue.[18]

In the recent *Norwegian Loans* case, a similar argument was raised by France in a case involving public loans, the argument being formulated in general terms so as to cover contracts generally. It was submitted that

> lorsqu'un État a conclu avec un particulier étranger un contrat quelconque, il ne peut l'en dépouiller, directement ou indirectement, sans engager sa responsabilité à l'égard de l'État protecteur de cet étranger.[19]

Norway opposed this formulation of the rule.[20] Here too the International Court of Justice was not required to proceed to judgment on the issue.

In the *Anglo-Iranian Oil Company* case, the United Kingdom memorial argued in a fashion similar to Switzerland and France when it said:

> *a fortiori* the principle of respect for acquired rights in the matter of concessions must be regarded as binding upon the Government or Governments of the State granting them when there has been no change of sovereignty over the territory where the concession operates.[21]

But apart from these instances of legal argument, there is little or no evidence in the practice of states of the view that a breach of a contract with an alien by a state is *per se* a breach of international law. The United States does not seem to espouse that view. In general the United States does not assist its citizens in contract claims of this kind except where there is "an arbitrary wrong," lack of good faith or abuse, *i.e.*, where there is some other additional element making the breach of contract a breach of international law.[22] In British practice Harding, Q. C., advised the British Government not to protect British subjects who enter into contracts with a foreign government "unless and until they have suffered a denial or flagrant perversion of justice or some gross

[17] P.C.I.J., Ser. C, No. 78, p. 32.

[18] See also the Belgian argument in the Electricity Company of Sofia case, P.C.I.J., Ser. C, No. 88, p. 54.

[19] 2 I.C.J. Pleadings, Oral Arguments and Documents 61. See also *ibid* 63, 181, 182, and 1 Pleadings, Oral Arguments and Documents 34, 404.

[20] 1 *ibid.* 485; 2 *ibid.* 134.

[21] Pleadings, Oral Arguments and Documents 84.

[22] See 4 Moore, Digest of International Law 289, 705, 723 (1906); 5 Hackworth, Digest of International Law 611 (1942). For other American practice, see 2 Wharton, A Digest of the International Law of the United States 654 (1886), and material in J. G. Wetter, "Diplomatic Assistance to Private Investment," 29 University of Chicago Law Rev. 275 (1962).

wrong."[23] The Latin American states naturally take the view that a mere breach of contract with an alien by a state is not *per se* a breach of international law.[24] Their attitude was significantly stated at the Hague Peace Conference of 1907. For instance, Argentina maintained that

> With regard to debts arising from ordinary contracts between the citizen or subject of a nation and a foreign Government, recourse shall not be had to arbitration except in the specific case of denial of justice by the courts of the country which made the contract, the remedies before which courts must first have been exhausted.[25]

Salvador and Ecuador expressed similar views.[26]

It is significant then that at the Hague Codification Conference of 1930, the basis of discussion relating to contracts was formulated in such a way as to avoid the assumption that the breach by a state of a contract with an alien is always *per se* a breach of international law. That basis of discussion reads:

> A state is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a consession granted or contracts made by the state.[27]

Draft conventions so far attempted do not expressly embody the rule that a breach of contract with an alien by a state is *per se* a breach of international law, perhaps for the reason that there is no clear agreement on such a rule among states nor is it borne out by the practice of states.[28] On the contrary the Draft Convention prepared by Garcia Amador for the International Law Commission contains a rule which presupposes that such an act is not *per se* always a breach of international law.[29]

III

In view of the uncertainty evidenced among text-writers and in direct state practice the material to be gathered from international decisions assumes particular importance as would any practice that may have been established by treaties.

[23] 2 McNair, International Law Opinions 202. For British practice see, further, Hall, International Law 334–336 (8th ed., 1924); 2 Phillimore, Commentaries upon International Law (3rd ed., 1888).

[24] Drago, 1 A.J.I.L. 692 (1907). See also, for the practice of states, Dulon, 38 Am. Law Rev. 648; for France, Journal officiel du 8 Juin 1907, Débats Parlementaires, Chambre des Députés 1231; for Germany, 1 Martens, Völkerrecht 379 (1883). Further, see The Suez Canal Problem, U. S. State Dept. Pub. 6392.

[25] Scott (ed.), Reports to the Hague Conferences of 1899 and 1907, p. 492 (1917).

[26] *Ibid.* 494, 495.

[27] 2 I.L.C. Yearbook (1956) 223, citing from L.N. Doc. C.75, M.69, 1929. V.

[28] These drafts are conveniently collected in the Annexes to the Report of the International Law Commission on State Responsibility, 2 I.L.C. Yearbook (1956) 221–230. For another convention, see the Abs-Shawcross Convention, 1961 Current Legal Problems 213.

[29] Art. 7. 2 I.L.C. Yearbook (1957) 116–117.

The Assumption of Jurisdiction in Contract Cases by International Tribunals

Cases concerning the establishment of jurisdiction of an international tribunal in contract cases must be distinguished from those which involve or discuss the question of the nature of a breach of contract with an alien by a state. Jurisdiction in a case alleging a breach of contract by a state depends on the instrument creating the tribunal, a treaty between the claimant state whose national alleges injury and the defendant state. The question is one of interpreting a treaty.[30] Although the tribunal may decide that the treaty does give it jurisdiction over such a claim, it does not follow that the breach of contract for that reason alone is a breach of international law giving rise to state responsibility. Nor, conversely, is it true to say that there must be a breach of international law giving rise to state responsibility to give a tribunal jurisdiction.[31] Even a stipulation in the *compromis* that claims should be decided according to "principles of international law" does not change this conclusion. Such a stipulation has been interpreted to mean that the claims must only have an international character. Claims between the citizens of one country and the government of another are of this character. Thus claims alleging a breach by a state of a contract with an alien would come within this concept, and tribunals have assumed jurisdiction in such cases.[32] Also clear is the fact that in such cases tribunals have not been interested in establishing whether the breach of contract was a breach of international law entitling the claimant to redress for such a breach. Instead they have granted compensation for a breach of contract if it could be established.[33] Thus in the *Illinois Central Railroad Co.* case (U. S. *v.* Mexico),[34] the United States claimed damages and interest on behalf of the above company for non-payment of the price of 91 locomotive engines on a contract with the Mexican Government Railway Administration. The defense argued that, since the claim was based on the non-performance of a contractual obligation, it was outside the Commission's jurisdiction. The Convention constituting the Commission stated in Article I that the Commission should decide "all claims against one government by nationals of the other for losses or damages suffered by such nationals or their properties. . . . in accordance with the principles of international law, justice and equity."

[30] See Illinois Central Railroad Co. case (U. S. *v.* Mexico), U. S. and Mexican General Claims Commission Opinions 1926–1927, p. 15.

[31] *Ibid.* at 17, interpreting Art. I of the General Claims Convention of 1923.

[32] See the Illinois Central Railroad Co. case, where the tribunal discussed at length this concept of "international character."

[33] Thus, under the Convention between the U. S. and Mexico of April 11, 1839, the Commission sustained a claim in contract for the furnishing of a war vessel in the Samuel Chew Case, 4 Moore, Digest of International Arbitrations 3428 (1898) (cited hereafter as Moore). See also *ibid.* Ch. 63 *passim;* 1 Hyde, International Law 1004 (2nd ed., 1945); Eagleton, Responsibility of States in International Law 160 (1928); Ralston, The Law and Procedure of International Tribunals 75 (1926); Borchard, Diplomatic Protection of Citizens Abroad 298 (1915).

[34] U. S. and Mexican Claims Commission Opinions 1926–1927, p. 15.

It was held that (1) the Commission had to derive its powers from a construction of the treaty; (2) there was no rule that contract claims were cognizable only in cases where some form of governmental responsibility was involved; and (3) the claims had to be of an international character and the present claim was of that character.

Furthermore, the fact that the governing instrument may specify that the claims should be decided in accordance with the principles of international law, equity and justice does not mean that a breach of international law must have occurred. It merely means that the parties to the instrument have chosen special principles to be applied in the settlement of their dispute.[35]

On the other hand, there are cases in which arbitral tribunals have refused to take jurisdiction over contract claims. In the *Hubbell* case (U. S. *v.* Great Britain),[36] the claim was on behalf of a U. S. citizen against Great Britain concerning the adoption of a patent on an improvement in breach-loading firearms belonging to the claimant. Article XII of the Arbitration Treaty provided for the submission of "all claims . . . arising out of acts committed against the persons or property"[37] of citizens or subjects of either contracting party. The objections to the jurisdiction by the defendant were upheld on the ground that claims based on contract did not come within the terms of the treaty. In *Pond's* case (U. S. *v.* Mexico)[38] it was held that, under an instrument granting jurisdiction over "claims . . . arising from injuries to their persons or property by the authorities,"[39] although claims arising out of contracts came under the cognizance of the tribunal, "the validity of the contract should be proved by the clearest evidence, and . . . it should also be shown that gross injustice has been done by the defendant."[40] It is clear that in this case something more than a mere allegation of a breach of contract was required for jurisdiction to be assumed. What the additional requirements are is not clear; for the term "gross injustice" needs definition.[41]

These cases show that, first, instruments submitting disputes have differed in their wording, though the variation may only be very slight and, secondly, tribunals have interpreted instruments in different ways. No conclusion can be drawn which points to any uniform rule of interpreta-

[35] *Ibid.*

[36] 4 Moore 3484.

[37] Treaty of Washington, May 8, 1871 (Great Britain-U. S.), 1 Malloy, Treaties, Conventions, International Acts, Protocols and Agreements 700 (1910).

[38] 4 Moore 3467.

[39] Treaty between U. S. and Mexico, 1868, Art. I, 1 Malloy, *op. cit.* 1128.

[40] 4 Moore 3467. See also the Leonard T. Treadwell and Co. case (U. S. *v.* Mexico), *ibid.* 3468, where jurisdiction over a claim based on a contract for the sale of arms and munitions was rejected on the same grounds.

[41] In some cases the tribunal has made its jurisdiction depend on whether or not the claimant entered voluntarily into the contract. If he had, the tribunal had no jurisdiction: State Bank of Hartford case (U. S. *v.* Mexico), 4 Moore 3473. See also the Kearney case (U. S. *v.* Mexico), *ibid.* 3467, where, in the case of a contract for the supply of arms and munitions of war, the tribunal refused jurisdiction. These cases were decided by the same tribunal that decided Pond's case so that the notion of involuntariness may really be a part of the concept of "gross injustice."

tion which establishes a presumption that such contract claims are subject to the jurisdiction of international tribunals.[42] Nor is any evidence forthcoming of any rule of interpretation based on the notion that a breach of contract is a breach of international law, a most important conclusion.

Treaties Conferring Jurisdiction over Contract Claims

In spite of the divergent interpretations given to arbitration treaties, it is clear that a large number of cases have held or assumed that the governing instrument purports to confer jurisdiction over claims based on breach of contract by the state party as such.[43] This means that in a large number of bilateral treaties states have regarded claims based on breach of contract by a state as *per se* cognizable by international tribunals.[44] Assuming that there was no rule of international law that the breach of contract with an alien by a state is *per se* a breach of international law, can it be said that these treaties represent a practice which has given rise to a new rule of international law that a breach by a state of a contract with an alien is *per se* a breach of international law giving rise to state responsibility? It must be noted that the numerical preponderance of those treaties that submit claims based on contract breaches *per se* to the jurisdiction of international tribunals over those that do not is not conclusive of the creation of a new rule of international law. There are factors, moreover, which clearly indicate that these treaties have not created a new rule of international law.

First, these treaties make no reference to a breach of international law as the basis on which claims are submitted to arbitration. They merely refer to "claims" by persons against the contracting state. These could very well be claims based on the breach of municipal law. For the creation

[42] See the Illinois Central Railroad Co. case, U. S.–Mexican Claims Commission Opinions 1926–1927 at p. 16.

[43] See, for instance, the case of the Hermon, 4 Moore 3425; Eldredge's case, *ibid.* 3460; Manasse & Co.'s case, *ibid.* 3462; Boulton, Bliss and Dallett's case, Morris, Report of U. S. and Venezuelan Claims Commission 105.

[44] The following treaties are examples of this category. Contract claims were accepted under them: U. S.–New Granada, 1857, Art. 1, 1 Malloy, *op. cit.* 319; U. S.–Ecuador, 1862, Art. 1, *ibid.* 432; U. S.–Peru, 1863, Art. 1, 2 *ibid.* 1408; U. S.–Costa Rica, 1860, Art. 1, 1 *ibid.* 346; U. S.–Venezuela, 1866, Art. 1, 2 *ibid.* 1856; U. S.–Peru, 1868, Art. 1, *ibid.* 1411; U. S.–Mexico, 1868, Art. 1, 1 *ibid.* 1128; U. S.–France, 1880, Art. 1, *ibid.* 535; U. S.–Venezuela, 1885, Art. 2, 2 *ibid.* 1860; U. S.–Chile, 1892, Art. 1, 1 *ibid.* 185; France–Venezuela, 1902, Art. 1, Declerq, 22 Recueil des Traités de la France (1901–1904) 68; U. S.–Venezuela, 1903, Protocol, Art. 1, 2 Malloy, *op. cit.* 1870; U. S.–Great Britain, 1910, Treaty Series No. 573; U. S.–Mexico, 1923, Art. 1, *ibid.* No. 678; U. S.–Great Britain, 1927, *ibid.* No. 756 (exchange of notes); U. S.-Panama, 1926, Art. 1, *ibid.* No. 842.

The following treaties did not admit contract claims as such: U. S.–Mexico, 1868, Art. 1 (Umpire Thornton's subsequent interpretation based on expediency, which changed the course of decisions), 1 Malloy, *op. cit.* 1128; U. S.–Great Britain, 1871, Art. XII, *ibid.* 700, 705; U. S.–Spain, 1871, par. 5, 2 *ibid.* 1661, 1662; U. S.–Haiti, 1919, Protocol, Art. III (4 classes of fiscal claims were excepted in this treaty), Treaty Series No. 643. See also 2 Hyde, *op. cit.* 306.

of a new rule of international law an explicit reference to the new rule would be required.

Secondly, cases such as the *Illinois Central Railroad Co.* case state quite clearly that it is not necessary that an allegation of a breach of international law entailing state responsibility be the basis of a claim in order that the tribunal may assume jurisdiction over it;[45] and this, it was said, was so even through the instrument said that decisions were to be given according to the "principles of international law, justice and equity." This clearly shows that the parties to the treaty did not regard a breach of contract by a state *per se* as a breach of international law, although the tribunal was given jurisdiction in such cases.

Thirdly, unless the contrary is stated in the governing instrument as in the *Illinois Central Railroad* case, the merits of the case are decided by the application of the relevant municipal law. In the *Frear* case,[46] for example, the tribunal decided a claim alleging a breach of contract to pay for potatoes delivered by the application of French law relating to performance and discharge of contracts, as if it were dealing with a case presented to a French court.

International Decisions

In the decisions of international tribunals there are a few bare statements that appear to support the view that a breach of contract with an alien by a state is a breach of international law.[47] There is little or no evidence, though, that any breach of such a contract by a state has *per se* been treated as a breach of international law in any case.[48] On the other hand, there is evidence that such breaches *per se* have not been regarded as breaches of international law.

The leading case is the *Martini* case (Italy *v.* Venezuela).[49] A concessionary contract for the construction and operation of a railroad between the Venezuelan Government and an Italian company was terminated by the former as a result of a Venezuelan court decision. Italy claimed, *inter alia,* on behalf of the company that a counter-claim by the company before the Venezuelan court to the effect that the Venezuelan Government had broken the contract by granting a monopoly to another individual had been wrongfully rejected. The tribunal held against Italy on this count, but what is of importance is the tribunal's approach to the contention. The judgment shows that

[45] See also the case of the Hermon, 4 Moore 3425.

[46] *Ibid.* 3488. The tribunal was set up by the U. S.–French Claims Convention of 1880.

[47] See Nielsen's reference to this view in his dissenting opinion in the International Fisheries Co. case (U.S.A. *v.* Mexico), U. S.–Mexico Claims Commission Opinions 1930–1931, pp. 207, 241, and Commissioner Findlay in the Venezuelan Bond cases, 4 Moore 3616, 3649.

[48] The Aboilard case, 12 Rev. Gén. de Droit Int. Public, Documents 12 (1905), and Hemmings case, Nielsen's Report 617 (1926), 15 A.J.I.L. 292 (1921), *seem* to support this view, but even they can probably be explained.

[49] 25 A.J.I.L. 554 (1931).

(a) the tribunal did not assert that the Italian company's counter-claim was an allegation of a breach of international law;

(b) it did not treat it as one either. It did not examine the merits of the counter-claim as a court of appeal from the Venezuelan court as it would have done if it regarded a breach of contract by a state as a breach of international law.[50] Rather it looked for certain other defects in the judgment of the Venezuelan court. The success of the counter-claim had depended largely on the interpretation of the contract, and on this the tribunal said:

> As the respondent has emphasized, there exists in several countries a well established jurisprudence by which the rights of a grantee under a contract of concession are interpreted restrictively. If the Court of Caracas, in adopting a restrictive interpretation of the Martini contract on the basis of the Venezuelan law, reached the conclusion that the Feo contract was not contrary to the contract of concession, that conclusion cannot be characterized as erroneous or unjust by an international tribunal.[51]

If the tribunal had been acting as a court of appeal, it would have examined the judgment of the Venezuelan court in order to find out whether that court's notion of the proper rule of interpretation coincided with the arbitral tribunal's opinion of it and whether that court had applied it in the way in which the arbitral tribunal would have applied it. Instead, the tribunal contented itself with finding out whether the rule of interpretation chosen was a *possible* one and whether it had been applied in a *possible* way;

(c) the tribunal does not seem to have even considered the question of applying international legal principles to determine whether the alleged breach was a breach of international law and whether the Venezuelan court had chosen those principles and applied them correctly in deciding the issue.[52] Instead it seems to have accepted the choice of rules for determining the issue of breach made by the Venezuelan court *ipso facto*.

These factors lead to the conclusion that the tribunal in this case did not regard a breach of contract *per se* as a breach of international law. There seems to be one obstacle, however, to this view of this case. The *compromis*, according to the tribunal,[53] restricted its competence to defects in the action before the Venezuelan court. Can it be argued that it was because of this limitation of jurisdiction that the tribunal did not examine the question whether there had been a breach of contract by Venezuela on the basis that a breach of contract by a state is a breach of international

[50] This was the first conclusion stated above, p. 881, which must follow, if a breach of contract were a breach of international law.

[51] 25 A.J.I.L. 554 (1931).

[52] This was the second conclusion stated above, p. 881, which followed if a breach of contract were a breach of international law.

[53] "The Arbitral Tribunal will now examine the question whether 'in the action brought against Martini & Co., before the Federal Court of Cassation . . . there was a *denial of justice* or *manifest injustice*.'" 25 A.J.I.L. 564, at 565 (1931).

law and not because it did not regard a breach of contract by a state as a breach of international law? In discussing its competence the tribunal said that a "denial of justice" to which its jurisdiction was limited occurred, *inter alia,* when a judicial decision, which was final and without appeal and was incompatible with the treaty obligations *or other international obligations*[54] of the state, was given. Now, if acts of a state which constitute a breach of contract are breaches of international law, they are contrary to the international obligations of that state. If the courts of the state declare that those acts are not a breach of contract and consequently are not a breach of international law, when in fact they are, the judgment of the court is itself incompatible with the international obligations of that state. Therefore, in determining whether such a judgment is incompatible with the international obligations of that state and constitutes for that reason a denial of justice within the definition of that term, the tribunal must have had the competence to inquire into the question whether the acts themselves were a breach of contract and consequently a breach of international law. Hence, if the tribunal had taken that view of a breach of contract, it would have examined the acts alleged to have been a breach of contract in its own right in order to determine whether there was a breach of international law. But it did not. The only conclusion seems to be that it did not regard a breach of contract as *per se* a breach of international law.

There is much other evidence in favor of the view that a breach of contract is not *per se* a breach of international law in the attitude of international tribunals. In the *Illinois Central Railroad Co.* case, the main issue was whether the convention gave the tribunal jurisdiction over contract claims. The tribunal held that it was not necessary that either government should be responsible according to international law for a claim in order that the tribunal might have jurisdiction over it.[55] The Mexican argument was that only breaches of international law were within the tribunal's jurisdiction, and that, since breaches of contract were not *per se* breaches of international law, they were outside the tribunal's jurisdiction. While the tribunal denied that part of the contention which asserted that only breaches of international law were within the tribunal's jurisdiction, it seems to have assumed that the second part of the argument, namely, that a breach of contract was not *per se* a breach of international law was correct.

Again in the *International Fisheries Co.* case (U. S. *v.* Mexico),[56] where the cancellation of a fisheries contract by the Mexican Government on the ground that the claimant had failed to perform the contract was in issue, the tribunal said that the cancellation could have been contested in the Mexican courts, and therefore "was not an arbitrary act . . . which in itself might be considered as a violation of some rule or principle

[54] Italics added.

[55] U. S.–Mexican Claims Commission Opinions 1926–1927, p. 17.

[56] U. S.–Mexico Claims Commission Opinions 1930–1931, p. 207.

of international law. . . ." [57] It is clear that the tribunal took the view that a breach of contract *per se* is not a breach of international law, but that something more, making it an "arbitrary act," was necessary to make it one.

There are several other decisions which in effect regarded a breach of contract as a breach of international law when it was accompanied by some further element. These cases support the view that a breach of contract is not *per se* a breach of international law.

In the *General Company of the Orinoco* case (France *v.* Venezuela) [58] the breach of concessions for the exploitation of all vegetable and mineral products in and the extensive development of the territories of the Upper Orinoco and Amazonas during a period of thirty-five years and for the exclusive exploitation of sarrapia for a period of twenty-five years in a described area was put in issue. The company's property was seized, burned or sequestrated and what remained was sold at a nominal figure. Also a Venezuelan Federal Court decree had condemned the company to pay damages for non-fulfillment of its contract. Here there were other circumstances than the mere breach of contract which made the breach a violation of international law so that the arbitrator could decide the case on that basis.

A concession to run tramways for a period of fifty years was rescinded arbitrarily by the state and thus caused a violation of international law in the case of *Pieri Dominique and Pieri Dominique & Co.* (France *v.* Venezuela).[59]

In the *Oliva* case (Italy *v.* Venezuela),[60] fulfillment of a concession for the construction of a Pantheon was made impossible by expulsion of the claimant. This was a further element converting the breach of contract into a violation of international law, since the alien had no local remedies available to him.

Several other cases supporting the above view may be mentioned in passing, such as the *Kunhardt* case (U.S.A. *v.* Venezuela),[61] the *Punchard, Mctaggart, Lowther & Co. case* (Great Britain *v.* Colombia),[62] the *Cedroni* case (Italy *v.* Guatemala),[63] the *Delagoa Bay and East African Railway Co.* case (Great Britain *v.* Portugal),[64] the *Cheek* case (U.S.A. *v.* Siam),[65] and the *May* case (U.S.A. *v.* Guatemala).[66] Insofar as they took into account a further element in determining that there was a violation of international law, they cannot be said to support the view that a breach of a contract with an alien by a state is *per se* a breach of international law.

Against these are ranged three decisions [67] which appear to support or

[57] *Ibid.* at 218.

[58] Ralston's Report of the French-Venezuelan Mixed Claims Commission, 1906, p. 244.

[59] *Ibid.* 185.

[60] Ralston's Report 771 (1904).

[61] *Ibid.* 63.

[62] La Fontaine, Pasicrisie Internationale 544 (1902).

[63] *Ibid.* 606.

[64] *Ibid.* 397.

[65] 1897 U. S. Foreign Relations 461.

[66] 1900 U. S. Foreign Relations 659.

[67] The important cases on which considerable reliance has been placed by the authorities, such as Eagleton, *op. cit.* at 167, are the International Fisheries case, note 56

have been interpreted to support the contrary view that breach of contract by a state is in itself a breach of international law. But all these on examination reveal the contrary, or are distinguishable. In the *Rudloff* case (U. S. *v.* Venezuela),[68] where a contract for the construction of a building in the market place had been declared null and void by the Municipal Council of the Federal District, the objection was raised by the defendant state that the case was still pending before a Venezuelan court of appeal, that there had been no denial of justice, and that, consequently, there was nothing on which the tribunal could pronounce. In deciding the case against the defendant government, Commissioner Bainbridge let fall words which may appear to support the view that a breach of contract *per se* is a breach of international law.[69] It is clear, though, that that was really not his view. In the first place, in his own judgment he regarded the issue as whether a claim based on a private law breach of contract was cognizable while it was still pending in the municipal courts, under a *compromis* which stated that "all claims . . . not settled by diplomatic agreement or arbitration" were justiciable. It was not a question of what constituted a breach of international law, a notion which was irrelevant for the purposes of jurisdiction.[70] Secondly, he stated explicitly that states ordinarily have a right to intervene on behalf of their nationals in the case of contracts only where there was a "denial of justice,"[71] and proceeded to explain that the *compromis* gave the tribunal exceptional jurisdiction. Finally, the Umpire who settled the difference of opinion which occurred between the two Commissioners in this arbitration regarded the matter as entirely one of interpreting the treaty for the purpose of determining the tribunal's jurisdiction in a case where a contract claim was pending before a municipal court, irrespective of the question of breach of international law.[72]

In *Beales, Nobles and Garrison* (U. S. *v.* Venezuela),[73] the claimant was suing for non-fulfillment of a contract for the establishment of a steamship service between New York and La Guayra, involving obligations relating to immigration and commerce which had been made with the dictator of Venezuela. The question at issue was whether the latter had power to contract and whether the contract had been validly concluded. The Commission was confronted with the preliminary question whether it had jurisdiction. In the course of his judgment Commissioner Findlay said:

> It would be difficult, if not impossible, to assign a good reason why, on principles of abstract right and justice, an injury to a citizen arising out of a refusal of a foreign power to keep its contractual engagements, did not impose an obligation (sic) upon the government

above (Commissioner Nielsen's dissenting opinion), and the Venezuelan Bond cases, 4 Moore 3616 (Commissioner Findlay's opinion).

[68] Morris, Report of U. S. and Venezuelan Claims Commission 415.

[69] *Ibid.* at 423.

[70] *Ibid.* at 423, 426.

[71] *Ibid.* at 426.

[72] *Ibid.* at 431 and especially at 432.

[73] 4 Moore 3548.

> of his allegiance to seek redress from the offending country, quite as binding as its recognised duty to interfere in cases involving wrongs to persons and property.[74]

It is emphasized that the learned Commissioner says "injury . . . *arising out of*[75] a refusal of a foreign power to keep its contractual engagements." He subsequently indicates that the additional factor of failing to afford redress is the vital element which constitutes the international wrong and not the breach of contract by itself.[76] It is in the light of this that the passage cited above should be interpreted. Moreover, it is clear that his conclusion whether there was a cognizable claim or not was reached by an interpretation of the *compromis,* to which the question whether there had been a breach of international law was irrelevant. Thus any statement on the latter point may be regarded as *obiter.*[77] In any case, the analogy between wrongs to persons and property and contractual claims which Commissioner Findlay makes in this passage is not entirely satisfactory on the present issue, as will be submitted later.[78]

The *Venezuelan Bond* cases (U. S. *v.* Venezuela)[79] were based on a refusal to pay monies due under certain bonds issued by the old Republic of Colombia and forming part of the Colombian public debt for which Venezuela became responsible. Commissioner Findlay said:

> A claim is none the less a claim because it originates in contract instead of in tort. The refusal to pay an honest claim is no less a wrong because it happens to arise from an obligation to pay money instead of originating in violence offered to person or property.[80]

There was in this case a refusal both to adjudicate and to compensate. The statement of Commissioner Findlay must, therefore, be taken to include this material fact within the notion of a breach of international law arising from a breach of contract.[81] In other words, it is not the breach of contract *per se* that is characterized as a breach of international law

[74] *Ibid.* 3555. It would seem that Commissioner Findlay was more concerned with the question whether the state of the injured national has an obligation to intervene—a different aspect of state responsibility. In stating that there is such an obligation, as opposed to a right or power to intervene, the learned Commissioner is unorthodox, to say the least.

[75] Italics added.

[76] "Conceding now . . . that good faith as between nations binds the state as a personality to fulfil the terms of its private contracts, *or pay damages for their non-fulfillment* . . ." (Italics added). *Ibid.* 3555.

[77] "But, however this question may stand on principle it cannot be doubted that, if the present claim was valid in other respects, it would be the duty of the commission, under the convention between the U. S. and Venezuela, to make an allowance of damages sufficient to compensate for the wrong, notwithstanding that it originated in a breach of private contract between a citizen of one state and the government of another." 4 Moore 3555.

[78] Analogy is not a panacea in the law. The relevance and success of its use depends, among other things, on the similarity of purpose between the relevant fields of law. The relevance of this analogy is discussed below at p. 899.

[79] 4 Moore 3616.

[80] *Ibid.* 3649. Eagleton places much reliance on this passage, *op. cit.* 167.

[81] As the reference to "a refusal to pay an honest claim" indicates.

but the breach of contract accompanied by the refusal to adjudicate and to compensate. Also, this case was regarded as concerning the interpretation of a treaty conferring jurisdiction on the tribunal by both Commissioners Findlay and Little.[82] In the light of this fact, Commissioner Findlay's statement refers not to the distinction between that which is internationally wrong and that which is not, but is rather concerned with the question whether claims based on certain kinds of "wrong" can be distinguished from claims based on other kinds of wrong for the purposes of the treaty. "Wrong" was not being used in a technical sense to denote an internationally illegal act entailing state responsibility. Hence the question whether a breach of contract by a state was *per se* an internationally illegal act was not within the purview of this statement. Moreover, the fact that this case concerned public bonds is an important source of distinction, for different rules may apply to them.[83] Yet, since the statement of Commissioner Findlay seems to refer to contracts with aliens in general, they have been treated on that basis.

From this survey it is clear that none of the existing authorities convincingly support the thesis that a breach of contract is *per se* a breach of international law; those that seem to do so can be distinguished or explained. On the other hand there seems to be some very definite and clear evidence in support of the contrary view, which is proposed as the correct view of the law.

Functional Factors Supporting the Better View

There are functional reasons why the view supported by authority is justified. That view is that a breach of contract by a contracting state is not *per se* a breach of international law. There must be some other factor, such as the refusal of means to secure redress in a municipal court, to give rise to such a breach of international law. This does not mean that contractual relations between state and alien are outside the purview of international law. Claims arising out of such contracts can certainly be claims alleging a breach of international law, provided they contain the necessary additional features.

When an alien enters into a contract with a state, he is engaging in a business transaction. It is reasonable to expect that an ordinary business man will acquaint himself with the existing laws of the state with which he contracts concerning the transaction into which he is entering. He freely consents to enter into the transaction. He equally freely consents to the application of the existing laws to that transaction. There is free choice in respect of both, but the two are inextricably linked; the free

[82] Commissioner Findlay: "The great question that confronts us on the threshold of this case is: Whether by the use of the terms under which this commission has been created it was the intention of the United States to demand and Venezuela to assent to a submission of a portion of her public debt to the decision of this body as one of the claims agreed to be referred within the clear intent and purview of the treaty?" 4 Moore 3643; also Commissioner Little, *ibid.* 3626.

[83] See note 1 above.

choice of one involves the free choice of the other. There will be provisions of the law which provide both for determining the validity of a claim that the contract has been broken and for its adjustment. He accepts those provisions on redress as well. In business there is an important risk that the transaction will not be fulfilled, although this risk will be attended by remedial rights as provided by the legal system. A businessman can be expected to accept this risk together with whatever rights of adjustment there may be. Therefore, where he alleges a breach of contract he cannot expect that provisions different from these be applied to his claim.[84] International law can only protect him against abuses of the process of adjustment and its deprivation or absence.

Moreover, it is not clear that international law does, in general, have substantive provisions relating to the form and effect of contracts between states and individuals *as such*.[85] Hence, it is not clear how a breach of contract can *per se* be a breach of international law. It may be added that if international law governed a contract between a state and an alien, it could only govern the obligations of the state and not the obligations of the alien, for international law does not operate on the individual directly in this way. It would clearly be inequitable to subject the state to the regime of international law in the performance of its obligations under a contract, while leaving the obligations of the alien to the domain of municipal law, where the two sets of obligations are mutually interdependant in that one would not have come into existence without the other. The nature of contractual relations is such that the parties expect to be governed by the same law. It is with the questions whether means of redress are afforded in the state and if so, how these means are effectuated by the relevant organs of the state, that international law normally concerns itself. The alien is entitled to redress according to the municipal law existing at the time he entered into the contract and to a fair adjudication of claims relating to the contract. It is with these legitimate expectations that international law ought to deal. The substantive rights and obligations connected with the contract, including those of redress, should be left entirely to the municipal law for definition; it is the preservation of the substantive right of redress and the procedural methods by which it is given effect that should be within the competence of international law.

[84] Such as any that international law may provide.

[85] See the Serbian Loans case, P.C.I.J., Ser. A, No. 20 (1929), at p. 41. Those cases in which tribunals decided cases by reference to "principles of international law, equity and justice" in virtue of the *compromis* (see above, at p. 888), probably did so by the use of what may be called general principles derived by analogy; see Cheng, General Principles of Law as Applied by International Courts and Tribunals *passim*, especially at 143. However, it has been contended that general principles of law may govern a contract between a state and an alien; see Meron, *loc. cit.* note 3 above, at 276. In that case it may be argued that, where international law is the law governing the contract, a breach of contract is a breach of international law as well. No cases have arisen, however, in which this solution has been offered. The idea raises numerous difficulties such as, *inter alia*, what law governs the choice of "international law" as the governing law.

In this way it is possible to reconcile the interests of contracting states and aliens.

Attempts have been made to assimilate breaches of contract to torts committed against aliens.[86] But, apart from the question whether what international law may have to say on injuries to property or person is different from what it pronounces on contracts, the analogy may be questioned. There is more justification for making such injury *per se* subject to international law than there is in the case of contract breaches. In the case of a contract the alien has a choice of accepting the transaction, the existing laws applicable to it, and the risk of non-performance subject to the existing remedial rights provided, irrespective of the fact of his entering the territory of a foreign state or the fact of his property being on that territory. In the case of injury to person and property there is no such act of choice immediately relative to the laws and risk of injury, which is additional to the act of entering the foreign state or introducing property into that state. This difference is important. There is more justification in not expecting the alien to accept the risk of injury to his person or property subject to adjudication according to the existing local law *only* by his mere choice to enter or keep his property in the territory of the foreign state, as the case may be. That choice is not as significant for this purpose as the choice of entering into a transaction which is so closely connected with law and the risks of business in human experience. Hence it is more plausible in the case of torts that international law should concern itself with the actual injury, as opposed to restricting itself to the existence and procedure of redress for an alleged infringement of rights existing under municipal law.

Ordinarily, then, a breach of contract becomes a breach of international law not *per se* but when other conditions are also present. States become liable for violations of international law arising out of breaches of contract under the law of state responsibility for the treatment of alien. It is submitted that international law specifies what requirements should be present in order to enable a state to discharge its duty of treating an alien according to international standards in relation to contractual rights, and responsibility is incurred when these requirements are not met. Thus, ordinarily, it is not as a breach of contract *qua* breach of contract that contractual claims will be actionable at international law but as a delict committed in the treatment of aliens.

IV

It has been shown that the general proposition that a breach of a contract with an alien by a state is not *per se* a breach of international law is true. It remains to examine what factors would or would not make a breach of contract a breach of international law at the time of the breach.

[86] Commissioner Findlay in the Venezuelan Bond cases, p. 896 above.

The Obligation to Resort to the Local Courts before Refusing to Perform

The argument has sometimes been presented that a state commits a breach of international law if it does not first have recourse to the courts before declaring the contract terminated or refusing to perform it. This lays an undue burden on the state as a party to a contract. States would be in a worse situation than private individuals who are parties to contracts. Ordinarily, when an individual believes that his obligations under a contract are not what the other party contends they are or when he believes that he has a right to consider the contract discharged for some reason or other, he may cease to perform in the expectation of being sued by the other party in the courts, if the latter were not satisfied. Thus, he assumes the rôle of defendant which is a more advantageous position. There is no reason to subject a state party to a contract with an alien to the heavier burden of continuing to fulfill its contract and of assuming the rôle of plaintiff. In the *International Fisheries Co.* case (U.S.A. *v.* Mexico),[87] it was held that the state's failure to resort to the courts before canceling a fisheries contract on account of an alleged breach by the claimant company of its obligations to erect factories and establish shops did not make the non-fulfillment of the contract a breach of international law. The contract, however, contained a clause in which express provision was made for cancellation by the state party in case of certain failures by the claimant, among which were included the alleged breaches. It may be argued that this case does not support the general proposition that a state is not under an obligation to resort to the courts before canceling or refusing to perform its contract, because it has two limitations: first, it concerns cancellation for alleged breach as opposed to other methods of refusal to perform such as mere non-performance and, second, the contract contained a provision for cancellation on the alleged grounds. But these distinctions are not material.

Taking the second point first, the fact that the contract does or does not contain a clause permitting cancellation for breach by the other party is not really material. It is only if there were a duty to submit to a court before cancellation that the agreement of the parties would be necessary to exempt from such a duty. As has been submitted, there is no reason for imposing such an exceptional duty on a state party and putting it in a worse position than a private individual. This, indeed, was the reasoning on which the majority of the Commission based its decision in the *International Fisheries Co.* case.[88] Therefore, the clause concerning cancellation was not a material factor in the decision. Moreover, there are no cases which have been decided on the basis that there is an international legal duty for a state to submit to a court before cancellation. On the contrary, the Umpire's decision in the *Turnbull* case (U.S.A. *v.* Venezuela) [89] discounted such a duty. The contract in question, which was for

[87] U. S.–Mexico Claims Commission Opinions 1930–1931, p. 207.
[88] *Ibid.* at 219.
[89] Morris, *op. cit.* 451 at 500.

the development of the national resources of a certain territory, contained a clause which required that "questions and controversies that arise for reason of this contract" [90] should be decided by the competent tribunals of the state. In those circumstances, it was held that there was no claim on which the tribunal could pronounce in the absence of such a decision. However, an argument was raised by the claimant that the defendant state was under an obligation not to cancel the contract without prior reference to a court, and since it was in breach of this obligation, there was good ground for recovery. Commissioner Bainbridge, who dissented, accepted this argument on the principle of natural justice, *"nemo debet esse judex in propria sua causa."* [91] The Umpire, however, adverted to the issue but did not draw the same conclusions, saying merely that the cancellation was nothing more "than a communication on the part of the government that it thought the contract was ended to which the other party could agree or not agree as it thought fit, and if it did not think this fit, the contract would subsist until its annulment was pronounced by the proper tribunal." [92] It would seem that the Umpire did not accept the argument that the state was under an obligation to resort to the courts before declaring a cancellation. The implied view that the principle *"nemo debet judex in propria sua causa"* could not be applied to a cancellation so as to give rise to an obligation to resort to the courts before cancellation was correct. As long as the courts are intended to be the final arbiters, the above principle is not infringed and there is no logical or other necessity for recognizing an obligation to resort to the courts before declaring a cancellation.

The *El Triunfo* case (U.S.A. *v.* Salvador) [93] does not seem materially to affect this proposition. It is true that the arbitral tribunal insisted that "by the rule of natural justice obtaining universally throughout the world wherever a legal system exists, the obligation of parties to a contract to appeal for judicial relief is reciprocal," [94] and found the Republic of El Salvador in breach of this obligation in declaring by decree a contract for the establishment of steam navigation in the port of El Triunfo canceled for failure to perform by the other party without prior resort to the courts. But apart from the criticism which has been made above of the application of this principle of natural justice, the tribunal's pronouncement on this aspect of the case was unnecessary, since the tribunal had already found that an appeal to the courts by the claimant company would have been in vain,[95] in short, that there was no redress available in the local courts. Hence, according to the tribunal's finding, there was a breach of international law by the state for the latter reason and any statement relative to the duty to resort to the courts must be regarded as *obiter*.

[90] *Ibid.* at 462, 505.
[91] *Ibid.* at 472.
[92] *Ibid.* at 505.
[93] 1902 U. S. Foreign Relations 859.
[94] *Ibid.* at 871.
[95] *Ibid.* at 870. On the facts of the case the correctness of this conclusion is open to doubt, but this is not in issue for our present purpose.

To rest the absence of a duty to resort to the courts before cancellation on the express agreement of the parties to the contract creates other difficulties. For, if there were such a duty at international law, how can it be waived by agreement between the state and the alien without the consent of the alien's national state when the duty, being international, is owed to that state? This is another cogent reason for not attaching to such a clause the effect of exempting from the duty to resort to the courts and for, therefore, not postulating the existence of such a duty.

A provision in the contract expressly requiring resort to the court before cancellation for breach is declared may appear to give rise to difficulty. There is no authority on this point. It is submitted that, since the clause is part of the contract, its nonobservance would merely result in a breach of contract. The express obligation is nothing more than a private law contractual one. It does not assume any greater significance for international law than any other express contractual obligation. Its breach may give rise to a breach of international law but only as a result of the presence of other necessary factors such as the absence of available remedies.

As for the first point of distinction mentioned above in connection with the *International Fisheries Co.* case, whether the breach of contract by the state derives from a mere failure to perform or a cancellation, it does not affect the chances of the other party of testing the legality of the act before the relevant tribunals. There is no essential difference between the categories of acts in this respect. Nor is there any intrinsic charm in a mere failure to perform as opposed to cancellation that would warrant an imposition of an obligation to submit to adjudication before a refusal to perform in the case of a mere failure to perform, an obligation to continue fulfilling the contract and assume the difficult rôle of plaintiff. There is no international duty to resort to the courts in either case.

The Tortious Character of the Breach

It has been said that a breach of contract is regarded as internationally illegal conduct, if it constitutes a tort as well.[96] The conclusion is based on the assumption that a wrong to person or property of an alien is an international wrong in itself. Granting this assumption, the conclusion is warranted, if it means that the act which consists of a wrong to person or property and at the same time is a breach of contract is an international wrong. But if it means that for this reason the allegation that the act constitutes a breach of contract is an allegation that it constitutes an international wrong, it is questionable. The distinction is important, for it will affect the nature and basis of recovery. In the former case recovery will be for a breach of an international rule governing the treatment of persons or property, and will be limited to injury to person or property. If the latter meaning were admitted, the injured party would be recovering for a breach of an international legal obligation stemming from the contract which may be wider both in its extent and in respect of the consequences that flow from its breach.

[96] 1 Hyde, *op. cit.* at 549, note 1.

No international decision goes so far as to hold that an injury to property or person which happens to give rise to a breach of contract converts the contractual obligation into an international one and the breach of it into a breach of an international obligation. The decisions that have been relied on for this proposition [97] have all been decided under the special terms of the *compromis,* which gave the tribunal jurisdiction over the claims in question. The holding in the *Moses* case,[98] in which certain custom house receipts, which had been secured for the purpose of payment for arms furnished, were diverted, was that this, being a tortious act, could form the basis of an award, irrespective of whether the Commission had jurisdiction over contract claims. This was not to say that the nonpayment of the contract debt was to be identified with the diversion of the revenues for the purpose of the tribunal's jurisdiction. It was only with the diversion of the revenues in which a property right had arisen that the tribunal had power to deal. Hence, even for the purpose of jurisdiction, the two notions of breach of contract and of tort are kept separate. It is the better view that a breach of contract does not become internationally illegal conduct because a tort is involved in its commission as well.

Confiscation

In a dissenting opinion in the *Interncional Fisheries Co.* case Commissioner Nielsen said:

> In the ultimate determination of responsibility under international law I think an international tribunal in a case grounded on a complaint of a breach of contract can properly give effect to principles of law with respect to confiscation. . . . If a Government agrees to pay money for commodities and fails to make payment, it seems to me that an international tribunal may properly say that the purchase price of the commodities has been confiscated, or that the commodities have been confiscated, or that property rights in a contract have been destroyed or confiscated. Claim is based in the instant case on allegations with respect to the confiscation of valuable contractual rights growing out of an arbitrary cancellation of a concession.[99]

The first point to be noticed is that Commissioner Nielsen's opinion was a dissenting one, and considerably less value attaches to it than would

[97] Walter's case (U.S.A. *v.* Venezuela) (1885), 4 Moore 3567; Moses case (U.S.A. *v.* Mexico) (1868), *ibid.* 3465. [98] *Ibid.*

[99] U. S.–Mexico Claims Commission Opinions 1930–1931, at 241. See also Nielsen in the Cook case (U. S. *v.* Mexico), 4 Int. Arb. Awards 213 at 214, in the Dickson Car Wheel Co. case (U. S. *v.* Mexico), *ibid.* 669 at 686, and in the American Bottle Co. case (U. S. *v.* Mexico), *ibid.* 435 at 438; and see statements in the following cases decided under the American-Turkish Claims Settlement of 1923, which required that the Commission proceed to a "summary examination of the claims": the Ina M. Hoffman and Dulcie H. Steinhardt case, American-Turkish Claims Settlement 286 at 287; Socony Vacuum Oil Co. Inc. case, *ibid.* at 374, Singer Sewing Machine Co. case, *ibid.* at 491; Malamatinis case, *ibid.* at 605. No attempt is made to distinguish all these statements individually but they can all be distinguished on the basis of the terms of the *compromis* or as dissents, or the statements in them are acceptable as applied to breach by legislation which was the issue in the case (see p. 908 below for this).

have, if he had not dissented. It is clear that the majority of the tribunal [100] and Commissioner Nielsen differed on the question whether there had been a breach of international law in the instant case, although they were in agreement on whether a breach of international law was required for the purpose in hand. This difference of opinion on whether there had been a breach of international law was clearly the result of a disagreement on what constituted a breach of international law in the case of contract claims. Thus the fact that the dissent was on this particular point deprives his opinion of authority on that point.

Apart from this comment on the value of the opinion, the general validity of this view may be questioned. In the case of an ordinary breach of contract, the dispute relates in some form or other to the existence of contractual rights and the corresponding obligations under a prevailing system of legal relationships. Where confiscation is in issue, however, the existence of the rights in the property concerned is a prerequisite for the operation of the rules relating to expropriation.[101] The dispute is only as to whether the property has been taken in circumstances, in a manner and with the accompanying factors required by international law. There is thus an essential difference between the two causes of complaint.

Furthermore, in the former case a contracting party may be expected to assume the risk of non-performance subject to adjudication under the existing regime of legal relationships. The same reasoning does not apply to the taking away of property as happens in connection with confiscation.

These general differences between the two situations warrant a separation of the legal rules governing them. An exception may, however, be made in the case of a particular class of acts amounting to a breach of contract. It has certain features which make it different from an ordinary contract and more akin to an act of confiscation. When contractual rights are taken away by legislation it may be called confiscation. This exception will be discussed in greater detail below.[102] It may be conceded here that Commissioner Nielsen's view is valid in relation to this category.

International Law Chosen to Govern the Contract

It has recently been suggested by Mann that contracts between states and aliens can be governed by international law, if such law is chosen to be the proper law of the contract:

> It is possible, however, for contracts between parties only one of whom is an international person to be subject to public international law. . . .
>
> (a) According to the theory referred to, a contract could be "internationalized" in the sense that it would be subject to public international law *stricto sensu,* that, therefore, its existence and fate would be immune from any encroachment by a system of municipal law in exactly the same manner as in the case of treaty between two inter-

[100] See p. 893 above for majority opinion.

[101] The Peter D. Vroom case (U. S.–Mexico) 1841, 1 Lapradelle-Politis, Recueil des Arbitrages Internationaux 461.

[102] See p. 908 below.

> national persons; but that, on the other hand, it would be caught by such rules of *jus cogens* as are embodied in public international law.[103]

Some support for this view was sought from the arbitral award between *Petroleum Development (Trucial Coast) Ltd.* and *the Sheikh of Abu Dhabi,* where Lord Asquith of Bishopstone referred to a "modern law of nature" as governing the contract between a state and an alien company.[104] Jessup seems to have been thinking on the same lines.[105]

This view is not without its theoretical difficulties and has been opposed by Martin Wolff,[106] Fawcett[107] and Friedmann.[108] Their argument against that view is that the "internationalizing" of a contract would not in practice be carried out because public international law has allegedly not yet succeeded in developing, or sufficiently developing, the necessary legal rules.

A cardinal difficulty would seem to be that of mutuality. If the contract whose proper law is international law is governed by the international legal system, it follows that both parties have a right to invoke international law to settle any grievances arising out of the contract. Not only would a breach of contract by the state party to the contract be a breach of international law, but a breach of contract by the alien party to the contract would also amount to a breach of international law. From this it would follow that the totality of the contractual relations has its existence in international law and that the alien is given international personality by a mere choice of law. It could then be argued that, where the state party to the contract violates the contract, it has broken international law vis-à-vis the alien personally and not necessarily vis-à-vis the alien's national state by maltreating one of its nationals. This is a revision of the present law of state responsibility. Moreover, it would also follow that the alien who violates a contract of this kind may be sued at international law for the breach, which is a considerable advance on the present position. It would be illogical to say that the alien's national state must be sued as a representative of the alien when it has done no wrong. This would place an unfair burden on states whose nationals enter into contracts with foreign states. Also it is not sound legal theory. This is so, although in the converse case it may be proper for the alien to be represented in international proceedings when the alien is plaintiff. Clearly this difficulty, arising from the reciprocal nature of the contractual complex, can be overcome if it be conceded that the alien has international personality either for these purposes or in general, but it is questionable whether such a concession can be made in the present state of international law.

[103] "The Proper Law of Contracts Concluded by International Persons," 35 Brit. Yr. Bk. Int. Law 34, 43 (1959).

[104] 1 Int. and Comp. Law Q. 247, 251 (1952).

[105] A Modern Law of Nations 139 (1948).

[106] Private International Law 417 (1950), and "Some Observations on the Autonomy of Contracting Parties in the Conflict of Laws," 35 Grotius Society Transactions 143, 150–152 (1950).

[107] "Legal Aspects of State Trading," 25 Brit. Yr. Bk. Int. Law 44, note 3 (1948).

[108] Law in a Changing Society 472 (1959), and 50 A.J.I.L. 483, 484 (1956).

On the other hand, it is possible to say that, although a contract between a state and an alien may refer to international law as its proper law, it is not thereby raised to a position in the international legal system as such. 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 approach in the case cited above 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.

However desirable and useful it may be that aliens and states should make contracts which have their existence in the international, as opposed to the municipal sphere, it is submitted that the present state of international law and the state of the authorities do not permit such "internationalization." A mere choice of 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.

V

So far four situations which do not affect the nature of a breach of contract by a state have been discussed. It remains to consider those factors which would positively give rise to a violation of international law simultaneously with a breach of contract.

The Absence of Remedies

In the *International Fisheries Co.* case the fact that the claimants "had the right to appeal to the Mexican courts for justice, as the government of Mexico can, as a general rule, be sued in its own Federal Tribunals . . ."[109] was held to be sufficient to prevent the breach of contract by administrative declaration from being internationally illegal. In this holding is implicit the notion that, where a state cannot be sued in the courts of the land, a situation arises in which there is a violation of international law. This is an example of the absence of legal remedies giving rise to a violation of international law and is the most obvious case.

Equally clear is the proposition that the absolute prevention of the alien from appearing in court, whether as a result of some particular or general treatment, in relation to a class of cases to which his case belongs or in relation to cases in general, is a denial of free access to the courts and amounts to an absence of legal remedies. In the *Ambatielos* case (Greece *v.* U.K.) it was said that the modern concept of

> free access to the courts represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a

[109] U. S.–Mexico Claims Commission Opinions 1930–1931, p. 219.

> practice which existed in former times and in former countries and which constituted an unjust discrimination against foreigners.[110]

The principle was there stated as being based on discrimination between aliens and nationals. But it is arguable that the principle should extend further to cover such cases as, for example, those where a certain class of contract cases or contract cases in general are not presentable against the state, irrespective of discrimination against aliens. That is to say, access must be allowed in any contract case without exception in which an alien claims against the state or the principle will be infringed.

Apart from this absolute prevention from suing the state in its courts, there is no authority on what would constitute a denial of access in those cases where conditions, taxes or other such restrictions are imposed on the presentation of cases before state courts, *except* that where there is discrimination between aliens and nationals to the detriment of aliens there will certainly be a denial of free access. The *Ambatielos* case went thus far in dealing with the question.[111] But on the question whether there is an international minimum standard in this department there is no authority. The answer is that there should be such a standard.

A further problem is raised by the nature of the courts set up to deal with the case. The existence of a special jurisdiction for dealing with a particular case is not of itself a sufficient defect to cause an absence of remedies. Thus, for example, the fact that there exists a special court of claims for dealing with cases against the state would not amount to a denial of free access to the courts. In the *Croft* case (Great Britain *v.* Portugal), which concerned a decision by a special court on the cancellation of patent rights, it was held that there was no denial of justice *per se,* if the decision involved an actual judicial activity by that special court, "since its [the court's] practice depended solely on the free and independent righteous convictions of the individuals legally entrusted with it and not on obedience to superior orders."[112] The international legality of special courts depends on their independence. By the same token legally instituted ordinary courts will not be of avail as a means of adjudication, if the judiciary is not independent. Thus where the courts are packed with corrupt judges, albeit in accordance with the municipal law, there would be a denial of justice or an absence of remedies.[113]

Finally, an illegally constituted court would give rise to an absence of means of adjudication. In the *Idler* case (U.S.A. *v.* Venezuela)[114] it was held that a judgment in connection with a breach of contract claim, given in favor of the state and without the consent of the claimant by a court to which two *ad hoc* judges had been appointed "in violation of the express provision" of the law, was internationally illegal. It is a logical

[110] Commission of Arbitration, Ambatielos Case, Greece *v.* U.K., Award March 6th 1956 at p. 20 (H.M. Stationery Office). [111] *Ibid.*

[112] 50 Brit. & For. State Papers (1859–1860) 1288 at 1290.

[113] For an analogous situation exempting the alien from exhausting local remedies where there has been violation of an international obligation, see The Robert E. Brown case (U. S. *v.* Great Britain), 19 A.J.I.L. 193 (1925).

[114] 4 Moore 3491.

inference from this that, where such a court has been illegally constituted, there is an absence of judicial remedies at the time the alleged breach of contract by the state occurs, and there will be a breach of international law simultaneous with the breach of contract.

Legislation Causing a Breach of Contract

The question whether legislation has any special relevance to the problem under discussion has not been expressly discussed in any international decisions. When a state interferes or attempts to interfere with its existing contractual obligation and the existing contractual rights of an alien by resort to its lawmaking powers, it may be argued that this form of breach of contract ought to have a special status at international law. The following reasons are submitted for this thesis: First, the state is resorting to its power of changing an existing system of rights and obligations in using legislation to disrupt a contract to which it is a party. It is distinctly a different power from that of cancellation or simple nonperformance under the prevailing system of rights and obligations. Secondly, it is acting in its capacity of legislator and not in its capacity of party to the contract in acting thus. It is a level of functioning which is different from that of parties to a contract. Thirdly, the effect of legislation is to take away rights and obligations, including existing rights of redress irrespective of the question whether they exist under the system of law prevailing at the time or not. In the case of an ordinary breach, the non-performance is based on the theory that under the existing law there is no obligation to perform for some reason or other. But in the case of legislation, this aspect is completely overshadowed by the fact that the act purports to change the existing system of rights and obligations, whatever it may be. Fourthly, an alien does not expect his contractual rights to be taken away by legislative action in the ordinary course of business. Legislative action is not in the same category as ordinary refusal to perform, subject to adjudication, as far as expected risk is concerned.

The reasoning that applies to an ordinary breach of contract is of no avail in reference to this instance of a breach of contract. Hence, should not this case be regarded as an attempt to deliberately take away [115] the existing rights of an alien? The rights under the contract should be regarded as property [116] and the case as one of confiscation of property. The rules of international law relating to the confiscation of property should, therefore, be applied to it.[117] Breach of contract by legislative

[115] Whether the obligation of the state and the corresponding right of the alien are changed in whole or part or a different obligation and right substituted for the old one, in any of these cases the existing right is taken away.

[116] It is clear that this amounts to a rejection of the theory that contracts can *never* be regarded as property for the purposes of the international rules relating to confiscation (*cf.* Friedman, Expropriation in International Law 153 (1955)), at any rate as far as breach of contract by legislation is concerned.

[117] For rules of international law relating to confiscation of property, see 1 Lauterpacht, Oppenheim's International Law 351 and note 1 (8th ed., 1954).

act will *ipso facto* be a breach of international law, if the legislative act is not accompanied by the factors required by international law for the taking of property. A legislative act purporting to change contractual rights would *prima facie* be a breach of international law, unless the presence of the other required factors can be shown.[118]

Support for this view is found in the *Shufeldt Claim* (U.S.A. *v.* Guatemala),[119] where a legislative decree of the Assembly of Guatemala by which a contract-concession was declared annulled, was treated as an act of taking away property rights as a result of which the government "ought to make compensation for the injury inflicted and cannot invoke any municipal law to justify their refusal to do so."[120] In the *George W. Hopkins* case (U.S.A. *v.* Mexico), legislative decrees nullifying certain money orders issued by a previous government were held to be measures which could not operate "to destroy an existing right vested in a foreign citizen."[121] The question was regarded not as one of breach of contract as such but rather as a question relating to the taking of property. In the *George W. Cook* case (U.S.A. *v.* Mexico), where a payments law purporting to regulate obligations under certain money orders was in issue, Commissioner Nielsen regarded the case purely as one in which "property rights under a contract had been impaired or destroyed."[122] Now the two latter cases were decided under a *compromis* which, according to a decision made on it, did not require a breach of international law for the purposes of jurisdiction.[123] Moreover, in the latter of the two above-mentioned cases, the rest of the tribunal preferred to base its decision on these wide powers.[124] Nevertheless, the approach cited above in both cases is the right one in general. Further, in the *Panevezys-Saldutiskis Railway* case (Lithuania *v.* Estonia) the Bolshevik law, which resulted, *inter alia,* in the destruction of the concession granted to a Lithuanian railway company in Estonia, was implicitly regarded as an illegal seizure of property giving rise to an international cause of action.[125]

In the *Serbian Loans* case (France *v.* Serbia)[126] Serbian laws affecting the substance of the Serbian Government's obligations to bondholders appear to have been treated as acts interfering with property rights, not as a pure breach of contract. So also in the *Case of Certain Norwegian Loans* (France *v.* Norway), where a Norwegian law suspending the operation of certain gold clauses in state loan contracts was in issue, Judge Lauterpacht took a similar view. In dealing with the question whether there was a dispute relating to international law before the court, he said:

[118] This would not affect the rule relating to exhaustion of local remedies, which would in this case be a procedural requirement, prior to the presentation of claims before an international tribunal: see Judge Lauterpacht's approach in the Case of Certain Norwegian Loans, [1957] I.C.J. Rep. at 39.

[119] 2 Int. Arb. Awards 1083.

[120] *Ibid.* 1095.

[121] 4 Int. Arb. Awards 41 at 46.

[122] *Ibid.* 213 at 215.

[123] Illinois Central Railroad Co. case, note 34 above.

[124] 4 Int. Arb. Awards at 217.

[125] P.C.I.J., Ser. A/B, No. 76.

[126] P.C.I.J., Ser. A, No. 20, at 41.

"it is that very legislation, in so far as it affects French bondholders, which may be the cause of the violation of international law of which France complains."[127] There can be no doubt that the learned judge took the view that the legislation amounted to a taking away of property which, insofar as it did not manifest those factors required by international law, was illegal. These last two cases, it must be mentioned, relate to public loans which are outside the purview of this paper. Nevertheless, the principles were stated broadly and are applicable to contracts as well.[128]

In several cases the notion has been suggested that a cancellation consisting of an "arbitrary act" is a breach of international law.[129] What is meant by an "arbitrary act" has, however, not been explained. It would appear that this term refers to cancellation by legislation or cancellation in the absence of legal remedies. Insofar as the term contemplates legislative cancellation, the notion that an "arbitrary act" of cancellation involves a breach of international law is in accord with the view expressed here.

A novel idea was mooted by Judge Badawi in a separate opinion in the *Case Concerning Certain Norwegian Loans*. He took the view that the legislation could only have been a violation of international law if the interpretation of the loan contracts contained in the legislation constituted "*un déni de justice.*"[130] The question whether there had been a breach of international law was dependent neither on whether relief was available in the courts nor on the fact of legislation being the instrument of the breach. This view purports to give the state party to a contract the right to decide, through legislation at any rate, what the contract means in the case in hand, and there is no reason why this should not be extended to disputes on other issues founded in contract as well, provided it is not a decision which amounts to a "denial of justice." The term "denial of justice" as used here means something different from "wrong according to the law of the contract." It appears to imply that, although the interpretation may be wrong according to the governing law, yet, if it is not so wrong as to be unjust, it will not be internationally illegal. Hence, this view seems to give states parties to contracts a certain latitude to affect contractual rights of aliens with impunity. This view is not advocated.

Treaties

The general proposition that, where a state performs an act which is prohibited by a treaty to which it is a party, it will be responsible for a

[127] [1957] I.C.J. Rep. at 36. See also Judge Basdevant, dissenting, *ibid.* at 48, and Judge Read, dissenting, *ibid.* at 86. The majority of Court upheld the objection to its jurisdiction based on a reservation to the declaration by one of the parties accepting the Court's jurisdiction under Art. 36 (2) of the Statute. It did not, therefore, consider the point discussed above.

[128] See also the British Government's argument in the Anglo-Iranian Oil Co. case —Pleadings, Oral Arguments and Documents, I.C.J., 1952, 83, at 93.

[129] International Fisheries Co. case, U. S.–Mexico Claims Commission Opinions 1930–1931 at p. 218; see p. 893 above.

[130] [1957] I.C.J. Rep. at 33.

breach of international law to the other party or parties to the treaty requires no substantiation. In accordance with the same principle, an act which constitutes a breach of contract would be a breach of international law, if it is an act which that state is under an obligation not to commit by virtue of a treaty to which it and the national state of the alien are parties. Thus, where state A and state B have an agreement that state A shall enter into contracts for the purchase of oil with the nationals of state B and take delivery under these contracts, a refusal by state A to take delivery under the terms of the contracts would be a breach of the treaty and a breach of international law.[131] Needless to say, much will depend on the interpretation of the treaty as to what are the extent and nature of the international obligations in relation to the contracts. Thus a treaty which merely specifies that certain contracts should be entered into may well leave outside the purview of international law the substantive law governing them, their terms and the settlement of disputes between the contracting parties in connection with their fulfillment as such. In that case, the customary international law elaborated above will apply to the breaches of these contracts. On the other hand, where the treaty specifically enjoins the performance of certain contracts, its terms may be such that the substantive law intended to govern them is international law. In that case it follows that an actual breach of contract would also be a breach of international law. A third case may be postulated where the treaty does not contain a specific reference to contracts but prohibits acts which could interfere with contracts, among other things. In such a case, it is clear that the treaty purports to lay emphasis on the interference with contractual rights in a particular way. Hence, interference with them in that way is both a breach of contract and a breach of international law, and the logical consequences would follow. For instance, in the *Martini Co.* case, a treaty of 1861 between Venezuela and Italy contained an undertaking that neither party would "grant, in their respective states, any monopoly, exemption or privilege, to the detriment of the commerce, the flag or the citizens of the other state." The granting of a monopoly to one Feo for the shipping of oxen from certain Venezuelan ports was claimed to be breach of a concession for the working of a railroad and coal mines held by the Martini Co., while at the same time being a breach of the treaty. As has already been said in the discussion of the case,[132] the jurisdiction of the tribunal was confined to examining whether there had been "a denial of justice or a manifest injustice in the judgment of the Court of Caracas." These terms were interpreted to mean that the tribunal had jurisdiction to examine whether a decision of the court of Caracas on any issue was incompatible with the treaty obligations

[131] This does not mean that local remedies need not be exhausted. But the reference to state courts will serve a preliminary procedural function; see Fawcett, "The Exhaustion of Local Remedies: Substance or Procedure?", 31 Brit. Yr. Bk. Int. Law 452 (1954). The state courts will be the first in the hierarchy of courts and the international tribunal the last. The proceedings in the international court will be by way of quasi-appeal on the merits.

[132] Above at pp. 891 ff.

owed by Venezuela to Italy.[133] The tribunal's attitude was an admission that the question whether there was a breach of the treaty of 1861 by the granting of the monopoly was a question for the tribunal to decide on the merits as a court of quasi-appeal from the court of Caracas. Thus the question whether there had been a breach of contract in this way was also one for the tribunal to decide on the merits as a court of quasi-appeal from the court of Caracas, insofar as it concerned the treaty. It is clear that the tribunal regarded the breaking of the contract in this way as a breach of international law *per se*.[134]

VI

Conclusion

This study shows that a breach by a state of a contract with an alien is not a breach of international law *per se*. There are special circumstances which bring about a violation of international law simultaneous with a breach of contract. Reasons have been given above in justification of this position at each stage of the discussion. To sum up, it may be said that the first rule is that only a non-provision of sufficient means of adjudication by a state party to a contract for the purpose of deciding an allegation by the other party that the contract has been broken will cause a violation of international law at the time of the breach. An alien's contractual rights are adequately protected, if provision is made by international law for preventing the absence of adequate remedies, where an infringement of those contractual rights takes place. There are two other circumstances in which international law is directly infringed in the case of a breach of contract by a state. The first is where express protection is granted to the contractual rights as such by international instruments. This circumstance needs no explanation. The violation of international

[133] "The Arbitral Tribunal hence is only competent to judge whether, by its decision in the Martini Case, the Federal Court of Cassation of Caracas has rendered Venezuela liable according to the treaty of 1861. It is a question for the Arbitral Tribunal to judge the attitude of the Court of Caracas by reference to the treaty." 25 A.J.I.L. 564 (1931). This competence was held to exist as opposed to the general competence to examine the question whether the treaty had been infringed *dehors* its relation to the contract. The language of the tribunal seems to indicate that it is the decision that would have rendered Venezuela liable, while in fact the decision could only have continued the liability but could not have destroyed it by pronouncing the original act not a breach of contract and so not a breach of treaty. It is in this sense that the tribunal's pronouncements must be understood, notwithstanding the actual words used.

[134] The tribunal decided the point regarding the treaty in the defendant state's favor on the grounds that (1) the claimant had not raised it in the proceeding before the Caracas court; and (2) the treaty did not give the claimant a right on which he could rely at international law without his state's actually claiming it before such proceedings. Both grounds relate to the question whether local remedies had been exhausted in relation to the breach of treaty and not as to whether there had, in fact, been a breach of international law by the granting of the monopoly which caused the breach of contract, which is the aspect of the case that concerns us here. Both the above points relate to the procedural methods to be followed in obtaining redress for a breach of international law. The correctness of these points is not in issue.

law is dependent on the express agreement of the states concerned, *i.e.*, the state party to the contract and the national state of the alien. The next circumstance in which a breach of contract is accompanied by a violation of international law is where the state party to the contract attempts to change the contractual rights and obligations outside the existing system of legal rules governing the contractual relationship, *i.e.*, by legislation. The law of confiscation applies in this instance. It is the special nature of the power resorted to in this case that justifies this rule.

Only these circumstances and no others bring about a breach of international law simultaneous with a breach of contract by a state. Other factors, such as the failure of the state to resort to its courts before canceling the contract or refusing to perform it, or such as the tortious nature of the breach do not make the breach of contract a breach of international law. Nor is a breach of contract by a state ordinarily to be treated as a confiscation of property causing a breach of international law. The law of confiscation operates with this effect only in the case of a legislative breach of contract by a state.