BOOK REVIEW


Juha Kuusi, an official with the Finnish Ministry for Foreign Affairs, has written a comprehensive study of the history, theory and practice of the legal relationships between host states and transnational corporations. The Introduction was contributed by Gabriel M. Wilner, Professor of Law at the University of Georgia.

The author notes that the 1933 oil concession granted to the Anglo-Persian Oil Company by Tehran set a major precedent because it was a departure from the doctrine that state contracts with foreign companies are governed only by a municipal system of law. The agreement provided that any arbitral award would be based on juridical principles contained in article 38 of the Statute of the Permanent Court of International Justice.

After the Second World War, there was a significant increase in the number of state contracts with choice-of-law or arbitration clauses referring to the general principles of law or to the rules of international law. It seemed that governments and transnational corporations "were not content to leave the contracts to be regulated by any one national legal system, and searched for a new system within which the agreements could operate. The difficulties of drafting the new choice-of-law provisions led to great variety and complexity in their formulation." 1

Of importance was the 1954 agreement between Iran, the National Iranian Oil Company, and certain American, British, Dutch and French oil corporations which contained the following clause:

In view of the diverse nationalities of the parties of this Agreement it shall be governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated and in the absence of such common principles, then by and in accordance with principles of law recognized by civil

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ized nations in general including such of those principles as may have been applied by international tribunals.²

This served as a model for clauses in other investment agreements concluded subsequently by several other countries.

Under the topic of “Arbitrations in Which Non-Municipal Legal Principles and Rules Have Been Applied,” the author discusses, among other cases, the historical significance of the Lena Goldfields Case (1930). Lena Goldfields Ltd. had entered into a long-term mining concession agreement with the Soviet Union in 1925. With the phasing out of the New Economic Policy toward the end of the 1920’s, however, the Soviet Government adopted a policy of obstructionism and harassment against Lena’s business activities. Finally, the company decided to discontinue its Russian operations and to initiate arbitral proceedings for damages against the Bolshevik Government. The arbitral tribunal held the U.S.S.R. liable to pay £8,500,000 plus twelve percent interest to Lena for the value of benefits of which the company had been wrongfully deprived. The tribunal held that the contract was governed by both Soviet law and the general principles of law. “The Lena Goldfields Ltd. Arbitration provided a significant precedent for subsequent arbitral rulings on state contracts. The splitting of the law to be applied, and, in particular, the reference to the general principles of law as a ‘proper law’ of a contract, were altogether novel.”³

With reference to postwar arbitrations, in three cases—Petroleum Development Ltd. v. Sheikh of Abu Dhabi (1951), Ruler of Qatar v. International Marine Oil Company Ltd. (1953), and Sapphire International Petroleums Ltd. v. The National Iranian Oil Company (1963)—the tribunals regarded the concessions to be governed by “general principles of law.” In the Arbitration between Saudi Arabia and the Arabian American Oil Company (Aramco) (1958), and the Electricity Companies Case (1966), the tribunals held that municipal legal systems together with “general principles of law” provided the proper law of the contracts.

In the opinion of this reviewer, chapter 9, “Legal Theories Supporting the Application of Non-Municipal Law to Contemporary State Contracts,” is the most outstanding part of the book. Kuusi summarizes some of the major contributions of A.P. Sereni,

² *Id.* at 68 (emphasis added).
³ *Id.* at 71.
Giovanni Kojanec, and Georges Abi-Saab, all of whom advocate the theory of incorporating general principles of law and principles of international law into municipal legal systems. These writers maintain that private corporations are not entities capable of possessing rights and obligations directly under international law, and that a private corporation and a state cannot choose international law to govern their relations. However, the parties can refer to the principles and rules of other legal systems, and these rules can then become part of the contractual system when they are introduced into the legal system of the state. Kojanec has theorized, for example, that a state can introduce into its legal order a provision that a contract agreed to by the two parties, the state and a private corporation, cannot be modified by subsequent legislation except in the case of mutual consent.

The author discusses at some length Kojanec's thesis which attempts to reconcile the fact of a state's sovereignty with the legal guarantee of its self-imposed limitation. Governments which have passed laws modifying or annulling existing state contracts regardless of arbitration provisions have generally claimed to be exercising their sovereign powers. In Kojanec's opinion, however, the purpose of arbitral proceedings is to determine the legitimacy of the use of such powers and a provision calling for recourse to arbitration cannot be nullified by one of the parties. He argues that such a government which refuses to participate in international arbitration procedures may be charged with violating the rules of international law protecting foreign nationals.

A second theory calls for a new legal system to govern contracts between states and private foreign corporations. It has its starting point in the view that the prevailing legal systems, the municipal laws and public international law, are based on such different social and economic conditions and are so inflexible that they cannot successfully provide the legal framework for modern economic relations between states and foreign corporations. According to this theory, a new body of contractual rules must be developed to govern these state contracts with foreigners . . . .

The proponents of this theory—including Lord McNair, A. Verdross, A.A. Fatouros, and K. Zweigert—maintain that a "third order" is clearly emerging. Names commonly attached to it include lex contractus, "general principles of law," and "transna-
tional law." McNair states that private entities are not subjects of international law, and public international law, in the strict sense, is not applicable to their relations with states. On the other hand, the new legal order, which can be selected to govern these relations, "is closely related to public international law because they share a common source of recruitment and inspiration, the general principles of law recognized by civilized nations." In McNair's opinion, the third order is a separate body of rules which will develop in contractual practice and case law. The evolution of transnational law is viewed as a parallel process to the emergence of administrative law governing the internal relations of international organizations.

Verdross regards state contracts with private foreign companies as quasi-international agreements. He nevertheless adheres to the classical position according to which international law applies only to relations between sovereign states; these quasi-international agreements are not, therefore, governed by international law. He maintains, however, that each quasi-international agreement creates a *lex contractus*, which "is an independent legal order, regulating the relations between the parties exhaustively." He contends that the validity of a quasi-international agreement has its basis in the general principle of *pacta sunt servanda*.

Chapter 11, "Adoption in Practice of Proposals for the Application of Non-Municipal Law to State Contracts with Transnational Corporations," is a study of recent developments involving the United Nations. The author finds the *travaux preparatoires* of the 1962 U.N. Resolution on Permanent Sovereignty over Natural Resources revealing, and more than a little ominous. Iraq, for example, "considered that agreements between states and companies were straight-forward contracts which were adequately protected by the national legislation of sovereign states and that it was therefore unnecessary to stress the need for their observance in an international instrument." The Soviet Union opposed proposals advanced by the United States and the United Kingdom on the grounds that they were based on a desire to place states and private investors on an equal basis, which would infringe the rights of sovereign states.

In analyzing the first session of the U.N. Commission on Transnational Corporations (March 17-28, 1975), the author notes

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1. *Id.* at 93.
2. *Id.* at 95.
3. *Id.* at 123.
that a policy of subjecting the operations of transnationals to national laws was endorsed. These deliberations indicate that a group of leading industrial states—including the United States, the United Kingdom, and Japan—continues to consider it necessary that a minimum standard of international law on the protection of foreign investment should be upheld. According to these countries, the regulation of transnational corporations should be carried out only in conformity with the rules of international law.

On the other hand, a great majority of states have denied the applicability of traditional doctrines of international law to the treatment of investment by transnational corporations.

Developing countries, supported by socialist states..., contend that completely new principles and rules are required as a response to the spread of activities of transnational corporations. Developing countries regard the adherence of the leading industrial states to the old doctrines as a plain effort to defend the acquired interests and rights of these states against the demand for a revision of the fundamental principles of the international economic order presented by the Third World countries.⁸

In the last chapter, the author observes that the classical doctrine according to which state contracts with foreign corporations are governed virtually exclusively by national laws seems to have regained support.

Kuusi concludes his study on this note:

It is to be hoped that the development of new codes of conduct would contribute to the replacement of the old legal doctrines, rooted in the late nineteenth century, by a new body of rules relating to foreign investment and would lead to the recognition of a new notion of a favorable investment climate.... It remains to be seen, however, to what extent problems of such complexity and relations of such variety and intricacy as those between states and transnationals will, in the end, lend themselves to legal regulation.⁹

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