PART III : CHOICE OF LAW PROVISIONS IN CONCESSION AND RELATED CONTRACTS

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Part A - The Trend in Contractual Documents: Some Examples

A Mining company contemplating a major investment in a developing country will always make a careful assessment of the non-commercial risks. The possibility that the government might, at some time in the future, expropriate the investment, and the uncertainty surrounding the whole topic of compensation for expropriated assets, are matters which would normally have to be taken into account. However, no less important in practice, particularly where there are detailed stipulations relating to the fiscal regime, is the risk that the government might in the future seek to extinguish or modify its contractual obligations by an exercise of legislative competence. An examination of a number of concession and related agreements made in Commonwealth countries suggests that the mining companies over the past 10 to 15 years have been concerned to protect themselves against this risk by seeking through choice of law provisions to establish for their investments, at least in some measure, an extraterritorial or enclave status. This objective has resulted in increasingly elaborate provisions in clauses purporting to establish the proper law[1] or specifying the law which arbitrators are to apply. Clauses of this kind give rise to difficult problems of construction, and their meaning and effect appears to turn on unsettled questions in the borderland where there is interaction between the principles of public and private international law.

During the colonial period it may generally be assumed that the mining companies treated the selection of a proper law to govern the contract as a matter of convenience rather than substance. Significant investment tended in the first instance to be made by companies incorporated in, or controlled from, the metropolitan country. Provided, therefore, that there was a settled system of government, and courts staffed by competent judges, applying principles of law with which the investors were

*This essay was first published in Modern Law Review Vol.39 No.6 pages 625-643

broadly familiar, there was generally no significant reason in a contract to which a colonial government was a party, for a mining company to seek to displace the law of the territory from its natural place as the proper law of the contract.[2]

If the case of Sierra Leone may be taken as typical,[3] the first real indication of some shift in the thinking of the mining companies came in 1961 the year in which Sierra Leone attained independence. In that year an important agreement relating to prospecting for and mining of aluminium ores was made between the Government and the Sierra Leone Ore and Metal Company and its parent the Aluminium-Industrie-Aktien-Gesselschaft of Switzerland. The agreement,[4] which was cast generally in terms which might now be regarded as rather favourable to the Company, provided for the proper law of the contract as follows:

> "Except as may be otherwise herein expressly provided this agreement shall be construed and the rights of the Government and the Company thereunder shall be determined according to the laws of Sierra Leone".

The qualifying words at the beginning of this provision are somewhat puzzling since no other clause in the agreement deals, or purports to deal, with the proper law of the contract. There is however a subclause headed "Limitation on Minerals Ordinance Application" which may well provide the explanation. It reads as follows:

> "The provisions of the Minerals Ordinance and any amending Ordinance and Rules made and to be made thereunder including the provisions of any official forms prescribed by such Rules shall be binding upon and inure to the benefit of the Company except such provisions thereof as may be inconsistent with the terms or provisions of this Agreement. Any inconsistency between a provision of any such Ordinance or Rule and a provision of this Agreement shall be resolved by giving effect to the provisions of this Agreement."

In so far as this subclause relates to inconsistency between the provisions of the agreement and legislation which might be enacted in the future (i.e. an amending Ordinance or Rules "to be made") it seeks to create an enclave status for the company by providing that the agreement will prevail. It was no doubt this aspect which was perceived by the draftsman of the agreement as requiring qualifying words in the clause establishing the law of Sierra Leone as the proper law of the contract. Whether this was a correct perception, and the effect (if any) of the qualifying words turns on questions of principle some of which will be examined hereafter. At this stage, however, it should be noted that the arbitration clause made no express provision about the law which was to be applied in arbitration proceedings. It provided without elaboration for arbitration "in accordance with the provisions of the Arbitration Ordinance of Sierra Leone, or any Ordinance or law amending or replacing the same for the time being in force".

In 1962, a year after the conclusion of this agreement, the Government of Sierra Leone granted an oil concession to an American company, Tennessee Sierra Leone Incorporated. In this case the foreign investor appears to have adopted a rather different approach. The proper law of the Agreement[5] was established by the following provision:

> "This agreement shall be governed by and interpreted in accordance with the laws of Sierra Leone and such principles and rules of international law as may be relevant and the arbitrators and umpire shall base the award upon these laws, principles and rules."

In contrast with the bauxite agreement no attempt was made to provide elsewhere in the agreement for the possibility that the law of Sierra Leone might in the future be amended in a manner inconsistent with the provisions of the Agreement. It appears to follow that the extent (if any) to which the investor succeeded in this case in insulating his transaction with the Government from changes in the municipal law of Sierra Leone must depend on the meaning and effect of the words "and such principles and rules of international law as may be relevant."[6]

At this point it may be convenient to turn from Sierra Leone to Zambia and to examine some of the provisions which were included in the agreements made with the copper mining companies when the Government of Zambia acquired a majority interest (51 per cent) in their operations.[7] At the time of the takeover two groups of companies were engaged in copper mining, the R.S.T.[8] group and the Anglo American group. Separate arrangements were made with each group in substantially similar terms, and for the sake of convenience reference is made here to the agreements with the R.S.T. group. The basic document was a contract of December 24, 1969 (the Master Agreement), made between the Government, the Industrial Development Corporation of Zambia (an agency of the Government) and R.S.T.

Ltd. The Master Agreement did not make explicit provision for the proper law of the contract but contained a clause dealing with the settlement of disputes. This provided for submission of disputes to the International Centre for the Settlement of Investment Disputes (ICSID), established under the auspices of the World Bank, and the parties agreed that, subject to a limited power to decide disputes ex aequo et bono, the arbitrators should apply "the law of Zambia (including its rules on the conflict of laws) as in force on the date of execution of this Agreement disregarding all legislation, instruments, orders, directions and court decisions having the force of law in Zambia (other than those contemplated by this Agreement) adopted, made, issued or given subsequent to the date of execution of this Agreement."

This provision may be regarded as typical of a number of clauses in investment agreements between companies and governments which seek to create an enclave status by freezing the law of the host country at the moment of contract. This device was, for example, adopted in Sierra Leone, when, influenced perhaps by events in Zambia, the Government in 1970 acquired a majority interest in the diamond mining operations of the Consolidated African Selection Trust (CAST). This was done by the establishment of a joint enterprise, the National Diamond Mining Company (Sierra Leone) Ltd. (DIMINCO). The agreement[9] between the Government and CAST for the establishment of the joint enterprise contained a schedule providing for the submission of disputes to ICSID. The schedule dealt with the applicable law as follows:

> "Any arbitral tribunal constituted pursuant to this Agreement shall subject to paragraph 8 below, in interpreting and applying any agreements, documents, legislation, orders, regulations and other instruments with which the dispute is concerned, apply the laws of Sierra Leone (including its rules on conflict of laws) as it existed on March 31, 1970 disregarding all legislation, instruments, orders, directions and court decisions having the force of law in Sierra Leone (other than those contemplated in the Heads of Agreement) adopted, made, issued or given subsequent to March 31, 1970, under the laws of Sierra Leone as then known, provided that nothing herein shall prevent the application of international law to any matter to which the arbitral tribunal determines international law to be applicable. Without limiting the foregoing, the parties agree that the various agreements and instruments referred to in paragraph 1 above are lawful and valid under the law

of Sierra Leone and are in no respect contrary to its public policy or national interest." [10]

It should, however, be noted that in contrast to the Master Agreement in the Zambian case the Agreement between the Government of Sierra Leone and CAST to which the arbitration clause was scheduled made express and separate provision for the proper law of the contract in the following terms:

"This Agreement shall be governed by the laws of Sierra Leone in force from time to time, save where such law is inconsistent with the terms hereof, and such rules of international law as may be applicable."

The reference in this provision to the laws of Sierra Leone "in force from time to time" results, of course, in an imperfect correlation between the proper law of the contract and the law which the arbitrators are enjoined to apply in the event of a dispute. Even if the reference in the schedule to the law of Sierra Leone as it existed on March 31, 1970, is treated simply as an instance of incorporation this could give rise to a conceptual problem of some difficulty.[11]

Elements of the same problem reappear in some of the provisions agreed between the Government of Botswana and a group of foreign investors in connection with the establishment in Botswana of the Selebi Pikwe copper nickel mine (the Shashe Project). In this case the approach of the mining companies was rather different but the end result can be said to represent a high water mark in recent attempts to create, in terms of concession and related agreements, an enclave status for foreign investors. The legal documentation setting up the project was unusually complex and comprised a Master Agreement and some 40 "Scheduled Agreements". The Master Agreement contains provisions dealing with the proper law and with the settlement of disputes. Both sets of provisions are relevant for our purpose. The proper law of the contract appears to be established by a clause headed "Governing Law and Contraventions". It is an elaborate and in some respects a surprising provision and the relevant parts are worth setting out in full:

"44. Governing Law and Contraventions.

(a) Subject to the provisions of Clause 42 (j) hereof, this Master Agreement and the Scheduled Agreements to which there are no other parties than the parties to this Agreement plus the Water Corporation and the Power Corporation (except as otherwise expressly provided therein but subject always to the proviso to this subclause (a)) shall be governed by, and the Company. BRST and BCL Sales shall be subject to, the laws of Botswana, as amended from time to time; provided, however, that the enactment of any amendments to existing laws or regulations or the enactment of any new laws or regulations applicable to the Company or BRST or BCL Sales or any of their shareholders shall constitute a breach by Government of this Master Agreement in the event that:

Either

(i) such laws or regulations contravene the terms and conditions of this Master Agreement or any of the Scheduled Agreements;

Or

(ii) if such laws or regulations do not contravène the terms and conditions of the Master Agreement or any of the Scheduled Agreements;

(A) the application of such laws or regulations to the Company, BRST, or BCL Sales or any of their shareholders (either alone or taken together with the prior applications to the Company, BRST, or BCL Sales or to any of their shareholders of such laws or regulations on a cumulative basis) has or would have a materially adverse effect on the net income or financial position of the Company, BRST or BCL Sales or a financially materially adverse effect on the rights and obligations of their shareholders under the law of Botswana existing as at the date hereof;

and

(B) such laws or regulations impose requirements or standards on the Company, BRST or BCL Sales or any of their shareholders which are more onerous than requirements or standards generally internationally accepted at the time of enactment.

(b) In entering into agreement on this Clause the parties contemplate that there would be in most cases generally internationally accepted requirements or standards available with which such laws and regulations may be compared. It is recognised, however, that in some cases there may be no relevant or appropriate generally internationally accepted requirements or standards available with which such laws and regulations may be compared. In such latter cases the imposition of such new laws or regulations should be reasonable in all the circumstances."

The provisions of the Master Agreement relating to the settlement of disputes distinguish between disputes which are arbitrable and those which are not. Arbitrable disputes cover a wide area and are deemed (inter alia) to include "any dispute which involves a substantial sum of money and/or an issue of significance or which taking into account all relevant circumstances could reasonably be construed as involving a substantial sum of money or an issue of significance." Disputes which are not arbitrable are, in terms of the Agreement, to be submitted to the Courts of Botswana for final determination. In the case of arbitrable disputes the parties agreed to submit to the jurisdiction of ICSID and provision was made for the law to be applied in the two following sub-clauses:

"(j) Subject to the provisions of sub-clause (k) of this Clause and to the provisions of the proviso to clause 44 hereof, any international arbitration tribunal constituted pursuant to this Master Agreement shall apply the law of Botswana on the one hand and Public International Law and General Customary Law on the other hand, but in the event of a conflict between such two systems, shall apply only Public International Law and General Customary Law.

Without limiting the foregoing, the parties hereto agree that this Master Agreement and the Scheduled Agreements define the rights and obligations of the parties thereto and beneficiaries thereof and that resort beyond such agreements to any other sources of law shall be required only in cases where the agreement in question is so ambiguous that its intent cannot be determined or where such agreements do not apply to the dispute in question or are not relevant to it.

(k) Any arbitration tribunal constituted pursuant to this Master Agreement shall have power to decide any dispute ex aequo et bono."

A strictly legal analysis of the significance of these provisions must focus on the conceptual difficulties involved in reconciling clause 44 which purports to establish the proper law of the contract with a disparate regime established in the context of arbitration proceedings. In a broader framework the proviso to clause 44 is of particular interest. It appears to break new new ground in seeking to protect the investors from the adverse consequences of legislative changes in Botswana falling outside the scope of the matters regulated by the complex of interrelated agreements establishing the project. It is this aspect of the Master Agreement which is thought to justify a description of these provisions as representing a high water mark in recent attempts to create an enclave status for foreign investments.

Part B - The Theoretical Framework

The provisions extracted from concession and related agreements and set out in Part A are of course no more than a selection chosen from material which happens to be available for public inspection.[12] There is however, no reason to suppose that they are not typical of the way in which legal draftsmen have approached the problem of establishing, at least in some measure, an enclave status for the foreign investor in developing countries. It would not be appropriate to attempt a systematic analysis of the particular clauses. However, taken together, they do provide a context in which to examine some of the elusive conceptual problems inherent in attempts by the mining companies to insulate their transactions with governments from the effect of changes in the law of the host country.

An analysis of this topic should perhaps begin with an apparently simple question. Where a government is a party to a contract with a foreign national does a breach of that contract by the government, in the absence of any additional factors, give rise to liability under settled principles of public international law? This question has been said to need an answer.[13] However the text writers are divided[14] about what the answer should be, and situations do not often arise in which it is pertinent to pose a question in this simple form. The issues which arise in practice are rather different. If there is a breach of a contract to which a government is a party it is normally the case that in international law no issue of state responsibility can arise unless the foreign national has exhausted his local remedies.[15] If he is prevented from doing so, or if the court is intimidated or otherwise suborned the issue is not directly concerned with breach of contract as such, but turns on the extent to which international law can provide a remedy for a denial of justice.[16] In any event in the context of a mining concession this is not generally the contingency against which the foreign investor is concerned to protect himself. As suggested earlier in this article his anxieties are more likely to focus on the possibility that the contractual obligations of the government may be discharged or modified by an exercise of the legislative competence of the State. If such an event occurs the contract as originally agreed between the parties no longer exists, and remedies for breach of it may not be strictly in point.[17] It follows that in a situation in which the dominant concern of the foreign investor is with the legislative competence of the State, attention, in the first instance, at least, must focus on questions concerned with the proper law of the contract.

Within the framework in which questions stem from consideration of the proper law of the contract, it may be convenient to begin with the case of a contract which provides, without qualification, that the agreement between the State and the foreign investor is governed by the law of the host country. Given this context what is the situation if the State by an exercise of its legislative sovereignty discharges or modifies its contractual obligations? In terms of its own municipal law there can of course be no argument, and if the matter is looked at as one giving rise to a problem in the conflict of laws, there can again be no doubt that the proper law, as determined by the private international law of the forum, "not merely sustains but, because it sustains, may also modify or dissolve the contractual bond."[18] Does the matter end there? Or does public international law provide a remedy for the foreign investor whose rights under a contract with the State have been adversely affected by an exercise of legislative sovereignty? Opinion on this issue is sharply divided and on what emerges as the crucial point decisions of international tribunals are inconclusive, or open to diverse interpretation.[19]

On one side of the line a distinction has been drawn between situations in which the contracting State has acted in a way that must, without regard to the provisions of any particular agreement, attract international responsibility, and situations in which its conduct is open to attack only by reason of being inconsistent with antecedent contractual obligations. In the latter case it is argued[20] that a government which in answer to an assertion that it is in breach of contract relies on changes in the proper law does what it is entitled to do, and international law neither can, nor should, seek to provide a remedy for the foreign national who is adversely affected. If this analysis is correct it is of great importance for governments and foreign investors alike to be able with some measure of certainty to identify those situations which, without regard to contractual stipulations, will attract international responsibility. In some cases this will present no problem. If there is expropriation without payment of appropriate compensation, or if legislation is discriminatory, the foreign investor may invoke the protection of his own State. In the context of a mining concession if laws are enacted which abrogate the concession, and terminate the right to mine, expropriation has clearly taken place. On the other hand it must be recognised that international law is largely silent about the extent to which measures which do not involve a direct taking of property may amount to expropriation.[21] The right of the State, without incurring an obligation to pay compensation, to regulate property, including foreign owned property, is not in dispute, and it extends, of course, to the right to levy taxes.[22] It follows that difficult problems may arise in distinguishing regulation on the one hand from a taking or confiscation on the other. Nor is the concept of discrimination free from difficulty, particularly in the context of mining concessions. In many developing countries a single mine, or group of mines, may occupy a unique position in the economy, and where this situation obtains a basic conceptual difficulty arises in finding an appropriate, indeed perhaps any, meaning for the idea of discrimination, especially in connection with the fiscal regime.[23]

Problems of this kind do not of course arise on the other side of the line, where, without reference to the proper law of the contract, international law is seen as providing a remedy for any action by the State which in terms of its own municipal law discharges or modifies its contractual obligations.[24] In its most extreme form this approach assimilates government contracts to treaties and invokes the principle pacta sunt servanda. This was how Switzerland presented her argument to the Permanent Court of International Justice in the Losinger case,[25] and essentially similar arguments were adduced by France in the Norwegian Loans case.[26] It has been said that no other country has adopted the Swiss/French approach,[27] and in the stark form in which the argument was presented in these cases it is not consistent with what appears to be British and United States practice.[28] Certainly no international tribunal can be said, in unequivocal terms, to have applied the principle pacta sunt servanda in the context of a government contract. Apart from these considerations there are difficulties in principle inherent in this approach, and it may be worthwhile drawing attention to two in particular:

(a) At least one writer has pointed out that the principle pacta sunt servanda, standing in isolation, is not responsive to the situation under consideration where contractual rights are modified or extinguished by a change in the proper law.[29] In such cases as far as the proper law is concerned no breach of contract has taken place.

(b) Application of the principle pacta sunt servanda to all cases in which a government has entered into a contract with a foreign national would impose a major limitation on the right of a sovereign State to expropriate foreign property. At least where there is no discrimination the right to expropriate for a public purpose and against payment of compensation is not in dispute, and it is difficult to see why contractual rights which are a species of property, should be seen as a unique case requiring special rules.

What might be described as a more moderate approach seeks to limit the effect of changes in the proper law of government contracts by invoking the concept of acquired rights.[30] Essentially, if the matter is looked at in this way, rights of a foreign national under a government contract are seen as a species of property and interference with them as expropriation or at least as something analogous to expropriation. If this position is pushed to its logical conclusion and any change in the proper law of a State contract affecting the rights of a foreign national is treated as expropriation the result in practice would be very similar to the result which would follow from an application of the principle pacta sunt servanda.[31] However the concept of acquired rights has been described as flexible,[32] and if it is taken as the starting point for an analysis of this problem the crucial question concerns the extent to which acquired rights under a government contract may be "regulated" in the public interest by changes in the proper law which are not discriminatory in their effect.[33] In certain situations (with which most capital exporting countries are familiar in their own experience) some degree of flexibility is often taken for granted. Transfer restrictions and exchange control in time of war are cases in point, and some writers would also see gold clause legislation in much the same way.[34] What is perhaps most obviously lacking in this analysis is not just a principle to give shape to the notion of flexibility, but some recognition of the predicament of many developing countries facing a continuing crisis of poverty. An international jurisprudence cannot be built exclusively on the experience of the capital exporting countries. The way in which their governments have responded to recurrent crises may indicate the need for flexibility, but this particular body of experience cannot be treated as defining the limits of what may be regarded as acceptable conduct.[35]

The uncertain state of international law with regard to the effect of a change in the proper law of the contract may be taken as the origin of some of the clauses set out in Part A which provide that the proper law of the contract is the law of the host country, and then seek by adding additional words to qualify or supplement that proposition. Basically there are two different kinds of provision which need to be considered:

(a) A clause which seeks to limit the operation of the proper law by reference to the provisions of the agreement itself, e.g. "This agreement shall be governed by the law of Atlantis save where such law is inconsistent with provisions of this agreement."

(b) A clause which incorporates a reference to international law, e.g. "This agreement shall be governed by the law of Atlantis and such principles of international law as may be applicable."

With regard to provisions of the first type their inclusion in concession contracts suggests a failure on the part of the draftsman to distinguish between a provision which indicates a choice by the parties of a proper law for the contract and a case of incorporation.[36] If the intention of the parties were simply to incorporate a body of rules which could not conveniently be set out in the contract itself, a limitation of this kind might be seen as appropriate, indeed perhaps necessary. However the choice of a proper law is something very different. It is a reference by the parties to a system of law which is to give life to the contract. A contract is the creature of its proper law, and provisions in the contract itself cannot limit the application of the proper law without in effect stating a contradition.[37] It follows that in cases where the context indicates that the intention of the parties is not confined to incorporation, the effect of words of limitation of the kind set out in subparagraph (a) above must be regarded as nugatory.

A clause of the type set out in subparagraph (b) raises different and perhaps more difficult issues.[38] Much has been written about the possibility of "internationalising" concession and other significant transnational agreements,[39] but positions taken on that issue are only marginally relevant to a situation in which the parties make, in the first instance, express reference to a municipal law system, characteristically, of course, to the law of the host country. Given that context it is not immediately apparent that there are any principles of international law which might be applicable to supplement the muncipal system which the parties have chosen for themselves as the proper law. If it is correct to regard the principle enuniciated by Lord Radcliffe in Kahler's case[40] as one of universal application it is difficult to see what role is left for "principles of international law" if the task of a court or tribunal is to determine the rights and obligations of the parties under the contract.

If the municipal law system chosen suffices to dispose of the matter can international law be "applicable" except in a case (likely to be of limited importance in practice) where municipal law itself ordains that a particular issue should be determined by reference to international law? Moreover international law, at least in the traditional view, regulates the conduct of States in their relations with each other — is jus inter gentes and can have no direct application to a dispute between a State on the one hand and a foreign investor on the other. These arguments tend to the conclusion that the effect of the additional words in a clause of this type is again nugatory. However they state only one side of the case. The crux of the matter appears to turn on a basic question of principle — the extent to which it is right to see the individual as the object only, and never the subject, of international law. In that context arguments can be adduced for taking a broader view. "To say that international law is not 'applicable' to relations between States and individuals but only between States and States, is to attribute to the distinction between the rights of the State and the rights of its national a rigidity which hardly reflects the essentials of even traditional (to leave aside contemporary) international law. It has long been recognised that fundamentally a State is injured only because of the injury done to its nationals, and not independently of it."[41] If this argument is sound does it follow that appropriate words in a contract can confer upon a foreign national the rights which customary international law accords to his State in the event of an injury to his person or property? Should this question be answered affirmatively it would still, of course, be necessary to consider, in the case where the obligations of government had been modified by a change in the proper law, what those rights might be.

If the conclusion reached about clauses of the type set out in sub-paragraph (a) above is correct, as a matter of principle it would be difficult to avoid reaching a similar conclusion about a provision which requires an arbitrator in the event of a dispute to apply the law of the host country as it existed at the date of the contract. However clauses in this form are not uncommon, and the elaborate way in which some of them have been drafted justifies separate treatment. Some of the baffling problems of construction to which they give rise can most easily be identified in terms of a hypothetical example.

Let us suppose that the Government of Atlantis enters into a contract with a foreign investor which contains a clause of this type. The substantive provisions of the contract provide for the establishment of a joint company to be incorporated in Atlantis, and a Memorandum and Articles of Association are agreed and annexed to the contract. They include special provisions dealing with the composition of the Board of Directors to which the foreign investors attach the greatest importance. Subsequently Atlantis, which is a member of a regional community, makes changes in its company law in order to bring it into harmony with the law in neighbouring countries. These changes involve far-reaching provisions for workers' representation at Board level. The foreign investors complain that they are inconsistent with the Articles of Association previously agreed with the Government and damaging to their interests. A dispute results and the matter is referred to arbitration. The arbitrators are of course enjoined to apply the law of Atlantis as it existed at the date of the contract and to disregard subsequent legislative changes. How can they comply with this injunction? On the facts assumed the existence of a dispute depends on a change in the law, and if no change in the law has taken place, or is disregarded, the foreign investor's case appears to be misconceived. Faced with this dilemma, one approach open to the arbitrators, not necessarily inconsistent with their mandate, would be to ask how a court sitting in Atlantis on the date the contract was signed would have dealt with a case in which rights under a contract to which the Government was a party were said to have been modified by subsequent legislation. If this approach were adopted the result in practice would be to resolve the dispute by reference to the proper law of the contract without antecedent qualifications.[42]

If this is the correct approach in the circumstances of the hypothetical case considered in the previous paragraph, it is also the correct approach where the logic of the situation is less compelling? In place of that rather complicated hypothesis let us suppose that the Government enters into a contract under which it is obliged to make periodical payments to foreign investors in discharge of a loan obligation. The contract contains a gold clause but subsequently Atlantis enacts legislation of general application abrogating gold clauses in terms similar to the Joint Resolution of Congress.[43] Given that set of facts the issue which arises between the Government and the foreign investors turns on whether a payment by the Government in accordance with the requirements of its own legislation is a good discharge of its contractual obligations notwithstanding the gold clause in the contract as originally signed. In this situation if the arbitrators are required to apply the law of Atlantis, as it existed at the date of the contract, they do not face any logical difficulty in complying literally with their mandate. They can approach the question of the Government's contractual obligations by disregarding the legislation abrogating the gold-clause, i.e. treating it as though it had never been enacted. But apart from the basic question of principle which must focus on the significance of the proper law of the contract, as a matter of construction would they be right to do so? This depends on what is meant by the requirement that the arbitrators should apply the law of Atlantis as it existed at the date of the contract. Is it possible for arbitrators to set up an accurate model of the law of Atlantis at a particular point in time on the assumption that in the case of a contract governed by the law of Atlantis the rights of the parties would be determined without regard to relevant legislation enacted in the proper manner and form? If the matter is looked at in this way the mandate given to the arbitrators (like the clauses which seek to limit the application of the proper law by reference to the terms of the contract itself) appears to state a contradiction. The dilemma which results could, of course, be resolved by adopting the approach suggested in the previous paragraph. However, where the facts of the case do not impose their own logic, that way out of the dilemma is less attractive, and could hardly be described as compelling.

If reference is made to some of the material set out in Part A it will be seen that the difficulties inherent in the construction of clauses of this type may be compounded in situations in which there is an imperfect correlation between a clause intended to establish the proper law of the contract, and a clause specifying the law which the arbitrators are to apply in the event of a dispute. In a limited category of cases it is possible, at least in theory, to see this as a situation which could be resolved by treating provisions relating to the law to be applied in arbitration proceedings as a case of incorporation and accordingly something liable to modification by changes in the proper law. If for example a contract contains a provision specifying that it is governed by the law of Atlantis, but also provides that in the event of a dispute the arbitrators are to apply the law of Japan "as it existed at the date of the contract" it would be difficult to avoid the conclusion that the reference to the law of Japan was limited to incorporation. Given that construction, if at the time when a dispute arose there had been a change in the law of Japan but no relevant change in the law of Atlantis, the particular wording used could assume some practical importance. However, if both clauses refer to the law of Atlantis, they cannot be reconciled in this fashion, and one is left with a puzzle rooted in a contradiction.

CONCLUSION

It would be inappropriate to bring the analysis attempted in Part B of this paper to an end by listing a specific set of conclusions however tentative. The object of providing an analysis has been to indicate some of the conceptual problems inherent in the attempt to create by contract a legal enclave for foreign investment. Questions have been posed but no systematic attempt has been made to provide answers. Enough has been said about the state of opinion on some of the issues raised to indicate deep divisions, creating an impression of intellectual disorder.[44] It would be easy, but quite wrong, to conclude from this that the whole matter is academic. In fact foreign investors and governments alike actually face these issues in practice, and their conduct must, in some measure, be influenced by the uncertain state of the law. That uncertainty reflects the difficulty of reconciling the contractual obligations of a government with its sovereign status as guardian of the public interest. Considered as an academic discipline, the entire corpus of international law is no more than a disquisition on the limits of sovereignty, and in principle there is no reason why its rules should not yield an answer to this particular problem. Nonetheless, if partisan enthusiasm is laid aside, they cannot be said to have done so yet.

FOOTNOTES

1. In this article the term "proper law of the contract" refers to the legal system which governs the contract. "The 'proper' law of the contract is a convenient and succinct expression to describe the law that governs many of the matters affecting a contract." Cheshire, Private International Law (9th ed.), p.201 citing Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society (1938) A.C.224 where the court defined the proper law as "that law which the English or other court is to apply in determining the obligations under the contract."

2. The model oil mining leases prepared by the Colonial Office before the last war (1938) contain no express provisions relating to choice of law.

3. There is no reason to suppose it is not typical, and it is certainly convenient. It is the practice in Sierra Leone to ratify by legislation all major agreements relating to the exploitation of minerals, and the text of the agreements are scheduled to the Acts.

4. Laws of Sierra Leone, Act No.35 of 1962.

5. Laws of Sierra Leone, Act No.72 of 1962.

6. Compare Art. 42(1) of the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (1965) which provides, "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." And see post, pp. 93-94.

7. For a general account of the takeover and the background to it see, Bostock and Harvey: Economic Independence and Zambian Copper — A Case Study in Foreign Investment (Praeger, 1972).

8. Roan Selection Trust Limited.

9. Laws of Sierra Leone, Act No.22 of 1970.

10. The agreement also provides that an arbitral tribunal shall have power to decide a dispute ex aequo et bono.

11. On the concept of incorporation in this context see post pp. 92-93

12. For some further examples see Broches "Choice of Law Provisions in Contracts with Governments" in Choice of Law and Language (Parker School of Foreign and Comparative Law, 1962).

13. Amerasinghe "State Breaches of Contracts with Aliens and International Law," 58 Am.J.Int. Law 881.

14. In favour of the proposition that breach by a State of a contract with an alien is per se a breach of International Law, Amerasinghe cites Fauchille, Traite de Droit International Public, Vol. 1 (8th ed., 1925) p. 529; Clarke, "Intervention for Breach of Contract or Tort committed by a Sovereignty," (1910) Proceedings, Am.Soc.Int.Law 149, 155; Oppenheim-Lauterpacht, International Law, p.344 (8th ed., 1954); Hershey, Essentials of International Law, p. 261 (1927); Cavare, La Protection des Contractuels Reconnus par les Etats a des Etrangers a les Exceptions des Emprunts, (1956) p. 27; Brandon, "Legal Deterrents and Incentives to Private Foreign Investments" (1957) 43 Grotius Society Transactions 39, 54, 55. Also Schwebel, "International Protection of Contractual Arrangements" (1959) Proceedings, Am.Soc. Int. Law 266. Against the proposition he cites, Hyde, International Law chiefly as interpreted by the United States Vol.2, p.988; Jessup, A Modern Law of Nations (1948), pp.104, 109; Whiteman, Damages in International Law (1943), Vol. 3, pp. 1555, 1558; Borchard, Diplomatic Protection of Citizens Abroad, Chap. VII, Westlake, International Law (2nd ed.,1910) Vol.1, p.331; Decenciere-Ferrandiere, La Responsibilite Internationale des Etats (1925), p.174; Hoijer, La Responsibilite Internationale des Etats (1930); Feller, The Mexican Claims Commissions (1935) p. 174; Dahm, Volkerrecht Vol. 3, p. 210, note 2; Dunn, The Protection of Nationals (1932), p.165, also Mann, "State, Contracts and State Responsibility" 54 Am.J.Int. Law 572-591. For a somewhat different line up of opposing teams see Brownlie, Principles of Public International Law (2nd ed.), pp. 530, 531.

15. State can, and in the context of agreements providing for international arbitration, frequently do waive the rule

requiring an aggrieved party to exhaust his local remedies. On the rule generally see Brownlie, op. cit., pp. 482-492, O'Connell, International Law (2nd ed.) pp.1053-1059; Fawcett, 31 B.Y.B.I.L. 452-458; Amerasinghe, "State Responsibility for injuries to Aliens," pp.169-269. And see (inter alia) the Ambatielos arbitration (1956) 23 International Law Reports 306 and Interhandel case (1959) International Court of Justice Reports 6.

16. Here the term "denial of justice" is used broadly speaking in the sense given to it by Art.9 of the Harvard Draft Convention on State responsibility for injury to aliens — 23 Am.J.Int.Law Special Supplement p.173 viz. "A State is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to the courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice." The concept of "manifest injustice," of course, gives rise to elusive problems of definition.

17. This difficulty was perceived very clearly by the draftsman of the Bougainville Copper Agreement 1967 made between Bougainville Copper Pty. Limited and the Administration of Papua New Guinea. The Agreement is governed by the law of Papua New Guinea and cl. 2(a) of the Agreement provided that the Administration would introduce legislation to ratify the agreement and give it the force of law in the territory; referring to such legislation cl.2(c) then provided as follows: "If such Ordinance comes into effect as aforesaid but at any time thereafter such Ordinance is expressly or impliedly amended or repealed or this Agreement is expressly or impliedly varied added to cancelled abrogated or deprived of any of the force or effect which it has upon the coming into effect of such Ordinance (except as provided by the Ordinance of this Agreement, or with the prior consent of the Company) then irrespective of whether such amendment repeal variation addition cancellation abrogation or deprivation would otherwise constitute a breach of this Agreement the Company the members of the Company and the beneficial owners of shares in the Company shall in respect of the same have all the rights and remedies which it or they would have as if the same were a breach of this Agreement by the

Administration." The laws of Papua New Guinea, Ordinance No.70 of 1967 (the Sched.). As a result of negotiations which took place in 1974 the Agreement has been substantially amended. However this particular provision remains unaltered. For an account of the changes made in the fiscal regime see — M.L.O. Faber, "Bougainville Re-negotiated — an Analysis of the New Fiscal Terms," Mining Magazine, December 1974.

18. Per Lord Radcliffe, Kahler v. Midland Bank (1950) A.C. at p.56. This principle has been described as "one of universal application" — Mann, op. cit. at p.581. See also International Trustee for the Protection of Bond Holders v. The King (1937) A.C. 50. However, in connection with the latter case it should be noted that the change in the proper law of the contract which modified the obligations of the British Government was a change in the law of New York.

19. "It should be stated from the outset that there are no well settled and universally accepted international rules regarding state measures affecting the contractual rights of aliens. Not only writers and scholars but states and international tribunals, as well, differ in their views on the law in effect. The difference of opinion extends both to the lex lata, the legal rules held as effective, and to the lex ferenda, the law which, according to the particular views of each state or person ought to exist. These controversies, far from being merely 'theoretical' disputes, are of real practical importance and have far-reaching effects on the life and relations of nations." Fatouros, Government Guarantees to Foreign Investors (1962), p. 244. See also this writer's account in this context of the "classical" and "modern" theories, ibid. pp. 247-252, 262-271.

20. Notably by Mann, op. cit. For criticism of Mann see Jennings, "State Contracts in International Law", 37 B.Y.B.I.L. 156; Delaume, Legal Aspects of International Lending and Economic Development Financing (1967).

21. "No state can be fixed with responsibility for expropriation unless the act complained of can fairly be said to involve the taking of property within the meaning attributed to that conception by the general principles of law recognised by civilized nations. These principles cannot be ascertained otherwise than by comparative law."

Mann, op.cit. p.583. If general principles of law recognised by civilised nations can be identified in this context, it is of course true — indeed no more than a tautology — to say that the task of identification is one for the comparative lawyer. But what are the ingredients that are to go into the comparison? Much attention has been paid to the concept of the "police power" in the constitutional law of the United States, but there is a danger in attributing universal validity to principles which are rooted in the political and social mores of a particular system of government.

22. A difficult conceptual problem arises in distinguishing taxation from confiscation. All taxation is confiscatory. Taxation is the confiscation of property, normally in the form of money, for a public purpose. For an unconvincing attempt to distinguish taxation from other forms of confiscation see B.A. Wortley, Expropriation in Public International Law (Cambridge, 1959), p.39. There is a more sophisticated analysis by Mann in "Outline of a History of Expropriation," 75 L.Q.R. While the Supreme Court in the United States has kept open the possibility that a tax might be characterised as confiscatory, its cautious approach to particular cases means in practice that a challenge based only on the rate at which a tax is levied is extremely difficult to sustain. See for example Magnano v. Hamilton (1933) 292 U.S. 40 where the court said, "Except in rare and special instances, the due process clause contained in the Fifth Amendment is not a limitation on the taxing power conferred upon Congress by the Constitution. And no reason exists for applying a different rule against the state in the case of the Fourteenth Amendment. That clause is applicable to a taxing statute such as the one here assailed only if the Act is so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitues in substance and effect the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses; unless indeed, as already indicated, its necessary interpretation and effect be such as plainly to

demonstrate that the form of taxation was adopted as a mere disguise under which there was exercised, in reality, another and different power." It is difficult to avoid the conclusion that the international lawyer who turns to the American cases on this issue is left with a metaphysical conundrum: when does an issue of quantity become one of quality?

23. Consider for example the case of Zambia. The copper mines in which foreign investors still own 49 per cent of the equity, pay 51 per cent of their profits in mineral tax and then pay income tax at the usual rate (45 per cent) on their profits after payment of mineral tax, giving a combined rate of tax on profits of 73.05 per cent. Mineral tax at the rate of 51 per cent applies only to copper and the only copper mines are those jointly owned by the government and foreign investors. The foreign investors may regard this regime as astringent, but have never suggested that it is discriminatory. Copper mining in Zambia accounts for over 90 per cent by value of the country's exports.

24. See for example Carlston, "Concession Agreements and Nationalization," 52 Am.J.Int.Law 260; Schwebel, "International Protection of Contractual Arrangements," 53 American Society for International Law Proceedings 266.

25. Referring to the principle Pacta sunt servanda Switzerland said "Il s'impose non seulement a propos d'accords directement conclus entre Etats, mais aussi pour ceux passes un Etat et des etrangers; en raison precisement de leur caractere international, ils peuvent faire l'objet d'un litige dans lequel un Etat se substitue a ses ressortissants pour obtinir le respect des engagements contractuels assumes envers eux. Le principe Pacta sunt servanda permet donc a un Etat de s'opposer a l'inobservation des obligations conventionnelles prises envers des ressortissants de cet Etat par un autre Etat....." "L'Etat ne peut se liberer d'obligations contractuelles valables ni par son droit prive interne, ni par ses dispositions legales de droit public. La these contraire equivaudrait a rendre aleatoires tous les contrats conclus par des etrangers avec un Etat, puisque celui-ci aurait toujours la faculte d aneantir ses engagements en promulguant des lois speciales, comme il l'a fait en l'espece." Losinger case, Pleadings, Oral statements and Documents, series C No. 78, p.32.

26. "Une loi interieure ne peut modifier la substance des contrats internationaux consentis par un Etat; admettre le contraire serait sortir du droit pour entrer dans la voie de l'arbitraire. Le Gouvernement de l'Etat emprunteur ne peut se trouver degage a l'egard de l'etranger par sa propre legislation; s'il suffisait de promulguer une loi pour etre libere de son obligation internationale, il n'existerait plus entre le preteur et l'emprunteur de rapport contractuel, mais seulement un rapport de sujet a souverain mettant le premier a la merci du second," I.C.J.Rep. Pleadings 34. Neither the Permanent Court of International Justice in the Losinger case, nor the International Court of Justice in the Norwegian Loans case, found it necessary to render a judgment on the merits.

27. By Mann, op. cit. p. 578.

28. In this connection the opinion of Harding Q.C.is frequently cited. In 1858 he advised the British Government that it should not afford diplomatic protection to British nationals who had entered into contracts with foreign governments unless they had suffered "a denial or flagrant perversion of justice or some gross wrong." McNair International Law Opinions, pp. 201-204. For the American practice see Whiteman, pp.906-907,viii.

29. "In particular the question immediately arises of the precise meaning of the principle in the context of this general problem of the relationship between international law and the proper law of the contract: for in the difficult case, where the contract is alleged to have been terminated by operation of some change in the proper law, there is after all, according to the proper law, no breach whatever of the principle pacta sunt servanda. The principle does not, therefore, without further definition, indicate which the cases are where, though there is no breach in the proper law, international law will, nevertheless, view that state of the proper law as being itself a breach of the requirements of international law in respect of state contracts." Jennings, op. cit. at p.176. And see also ante p. 90 and note 17.

30. See in particular Jennings, op.cit. whose cautious views are described by Delaume as the "correct approach," op.cit. p. 124 — also Schwarzenberger, 5 Current Legal Problems 294.

31. If interference with contractual rights resulting from a change in the proper law is treated as something giving rise to a claim for compensation it is difficult to see how the quantum of compensation could be assessed without approaching the case as though it were a claim for damages for breach of contract. But see Lena Goldfields Arbitration where the arbitrators preferred to base the award on the principle of "unjust enrichment" while pointing out that "the money result" was the same as it would have been in a claim for damages, Annual Digest (1929-30), Case No.1 and p.258.

32. Delaume, op. cit. p. 122 — Jennings says "Neither the principle of acquired rights nor the principle of pacta sunt servanda is therefore to be regarded as being necessarily absolute or unconditional in its application. As so often in law it is a question of drawing limits and defining exceptions. Whether or not an alleged "breach" of contract amounts to a breach of international law may depend on a number of variants such as the circumstances, or even the motives of the State action with respect to the contract; as also on the nature of the contract and the terms on which it is drafted," op. cit. p. 177.

33. Mann says that the crucial case arises where "the defendant state's refusal to perform the contract according to its tenor is said to be justified by legislative or executive measures of general impact taken since the conclusion of the contract by the defendant state whose law governs the contract, and which are not open to attack," op. cit. p. 576-577. Jennings comments that this is not the crucial case "but merely the difficult case."

Whether this case is regarded as "crucial" or "difficult" it should be noted that many of the decisions of international tribunals to which reference is made in the lierature cannot, because of the existence of extraneous factors, be regarded as establishing any principle which relates directly to this particular situation. This is true for example of the Delagoa Bay Railway case (Moore, International Arbitrations (1898), Vol.3, p.1865), the Schufeldt case (24 American Journal of International Law 799) and the El Triunfo case (Moore, Digest of International Law (1906), Vol. VI, p.649). For a critique of the relevance in this situation of the U.S.-Mexican Claims Commission cases see Mann, op. cit. p.580.

34. "It is clear for example, that the imposition of wartime transfer restrictions or genuine exchange control regulations would not necessarily give rise to responsibility even though similar measures, taken in another context, would be objectionable. Similar problems may arise in connection with the manipulation of currency and gold clause legislation." Delaume, op. cit. p.123, note 164, referring to cases where the contract contains an express promise of non-interference by future legislation — a fortiori, one must assume, if it does not.

35. This point might be thought trite but in practice appears to need some emphasis. A major international company in recent negotiations for the grant of mining rights in Papua New Guinea stated that its minimum requirements for an arbitration clause would guarantee "the right to international arbitration based on general principles of commercial law and international law accepted by developed nations." If a concensus is to be established the mining companies must be ready to take account of, even if they cannot accept, contemporary thinking in the Third World. In this connection see the Declaration and Programme of Action on the Establishment of a New International Economic Order adopted by the United Nations General Assembly in its Sixth Special Session, April 9 - May 2, 1974, and the Charter of Economic Rights and Duties of States adopted by the Assembly on December 12, 1974 (Resolution 3281 (XXIX)).

36. On the distinction between the choice of a proper law and a case of incorporation see Dicey and Morris, Conflict of Laws (9th ed.), p.732.

37. The idea associated with Professor Verdross that a contract can create its own independent legal system which exhaustively regulates the relations between the parties is difficult to comprehend, and has not generally been well received. Mann describes it as "so doctrinally unattractive, so impracticable, so subversive of public international law, so dangerous from the point of view of legal policy and so unnecessary that its novelty will not cause surprise " — "The Proper Law of Contracts concluded by International Persons" — (1959) B.Y.B.I.L.34. For a milder critique see Delaume, op. cit. pp. 73-74, note 6.

38. For an excellent analysis of some of the difficulties in the context of Art. 42(1) of the Convention for the Settlement

of Investment Disputes see E. Lauterpacht — "The World Bank Convention on the Settlement of International Investment Disputes," En Hommage a Paul Guggenheim (1968), p.642. For the text of Art. 42 (1) of the Convention, see note 6.

39. See e.g. McNair, "The General Principles of Law Recognised by Civilised Nations," 33 B.Y.B.I.L.; Mann, "The Proper Law of Contracts concluded by International Persons" (1959) B.Y.B.I.L. 34; Schartzenberger, op. cit.; Broches, "Choice of Law Provisions in Contracts with Governments," ante, note 13. And see the Award of Lord Asquith of Bishopstone in the Abu Dhabi Arbitration (1951) 37 Int. L.R. 18.

40. Ante, note 18.

41. E. Lauterpacht, op. cit. It is not clear in the context of the essay whether the learned author espouses this view or is simply rehearsing it.

42. A similar result would follow if the direction to the arbitrators were treated, in spite of the language used, as referring only to questions of interpretation. Delaume says that a reference to a particular law in force at the time of contracting "cannot by all relevant canons of interpretation be construed as a choice of law provision," op. cit. pp. 84, 85 (in connection with early IBRD agreements which were to be interpreted in accordance with the law of New York as in effect at the time of the agreement).

43. The Joint Resolution provided that every provision contained in or made with respect to any obligation which purported to give to the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby was against public policy and every obligation containing such a provision should be discharged upon payment dollar for dollar in any coin or currency which at the time of payment was legal tender.

44. "It is difficult enough to predict the effect of a choice of law clause in a domestic contract; but to do so in an international contract involves so many imponderables that it seems more like predicting the result of a lottery." Nurick, "Choice of Law Clauses and International Contracts" Proceedings of the American Society for International Law (1960).