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The Audacity of the Texaco/Calasiatic Award: *René-Jean Dupuy and the Internationalization of Foreign Investment Law*

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Abstract

The Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic *awards refer to concession contract provisions and a political context that are now obsolete. Thus, this article argues on the one hand that the award on the merits, delivered in January 1977, provides an unparalleled opportunity to survey almost every facet of the world of international investment arbitration of the past. On the other hand, the award must nevertheless also be read as forward-looking. By fostering a shift from the traditional hegemony of national jurisdiction in international investment law to the internationalization of international contracts, the article underlines that the award on the merits remains the finest example of René-Jean Dupuy's long-lasting contribution to international law doctrine. By way of conclusion, it suggests that it provides the very best expression and point of entry into Professor Dupuy's understanding and shaping of what he coined 'la communauté'.*

The *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic* awards (hereinafter *Texaco*)[1] relate to concession contract provisions that are now obsolete.[2] No less obsolete is the context in which

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1 The award on the merit (19 Jan. 1977) is reproduced in 53 *ILR* (1979) 389, *Clunet* (1977) 350. The preliminary award, delivered on 27 Nov. 1975, deals with the jurisdiction of the arbitral tribunal: see 53 *ILR* (1979) 389. A summary is to be found in *Commercial International Arbitration* (1979), at 179.

2 As early as 1983, Jean-Flavien Lalive mentioned that the new '*contrats d'Etat conclus au début des années 1980 relativement à l'exploration et à l'exploitation de ressources naturelles [sont devenus] plus égalitaires [que ceux de la période immédiatement précédente]*' in *RCADI* (1983), at 140.

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the awards were delivered. Accordingly they should be read from a twofold perspective: politically, the New International Economic Order was at its acme; and, legally, the rationales for the 1958 *Saudia Arabia v. Aramco* award[3] and, more fundamentally, the 1929 *Serbian Loans* and *Brazilian Loans* decisions[4] were in conflict with emerging transnational problems. These were the old times of the debates on the so-called 'third legal order'.

In this regard, the *Texaco* award on the merits, delivered on 19 January 1977, remains one of the high points in this ancient world of investment arbitration.[5] *Texaco* was quickly considered 'of immense value and importance to the international legal community . . . [and a] textbook analysis of fundamental issues of international law'.[6] Over 30 years later, the award provides an unparalleled opportunity to survey almost every facet of this ancient world, from issues relating to 'legal order' to those on choice of law, the legality of nationalization, the formation of law, and *restitutio in integrum* (Part I).

The willingness of Professor René-Jean Dupuy, designated as sole arbitrator by the President of the International Court of Justice, to decide the case *en droit* and not to shy away from substantively innovative doctrinal choices has helped to make *Texaco* a keystone in the construction of the modern international law of foreign investment. The *Texaco* award must therefore be read as forward-looking. The shift from the traditional hegemony of national jurisdiction in international investment law to the internationalization of international contracts is Dupuy's long-lasting contribution to international law doctrine (Part II).

1 *Texaco* in the Context of the *Aramco* Award

> La communauté internationale procède, non des initiatives des hommes d'Etat ou des coalitions, mais des mouvements qui travaillent les profondeurs de la vie internationale.[7]

The desire to exploit oil in several areas of the Libyan Desert led two United States companies, Texaco Overseas Petroleum Company (Topco) and the California Asiatic Oil Company (Calasiatic), to sign 14 Deeds of Concession with the Libyan authorities between 1955 and 1966. In 1973 and 1974, the Libyan government took nationalization

[3] *Saudi Arabia v. Aramco*, 27 ILR (1958) 117.

[4] Respectively *France v. Serbia* [1929] PCIJ 5, Series A, No. 21 and 22 (12 July 1929, judgment no. 14) and *Brazil v. France* [1929] PCIJ Ser. A, No. 21.

[5] Concerning the 21 Nov. 1975 award, and its confirmation of the principle of '*compétence de la compétence*' see, e.g., Lalivre, 'Un grand arbitrage pétrolier entre deux sociétés privées étrangères', *Clunet* (1977) 325.

[6] Von Mehren and Kourides, 'International Arbitrations Between States and Foreign Private Parties: the Libyan Nationalization Cases', 75 *AJIL* (1981) 551.

[7] Quoted by Thierry, 'De la clôture à l'ouverture', in *Mélanges René-Jean Dupuy* (1991), at 299. Translation: 'the international community derives, not from the initiatives of statesmen or coalitions, but from the deep underlying currents that shape international life'.

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measures. The legality of such measures[8] was challenged by the companies, particularly under intangibility and stabilization provisions in clause 16 of the Deeds of Concession. The arbitration proceedings culminated in awards in favour of both companies. In the award on the merits, Dupuy essentially decided that the Deeds of Concession at issue were binding on the parties, that the nationalization measures violated the Libyan government's contractual obligations, and that the government was required to perform and to give full effect to the Deeds of Concession.

Among the many issues raised in the award, which have been extensively discussed in the legal literature,[9] five are of particular importance with regard to the complex dynamics at stake in the internationalization of the law of international investment contracts.[10]

A *The Contract*

1 Internationalization of a Contract

Having to determine both the binding nature of the Deeds of Concession and the content of the parties' obligations, Dupuy inquired into the law or system of law governing the contract at stake and then dealt with the 'legal order' issue, which had been variously assessed in jurisprudence:[11] what legal system governs the choice of law clause, and what makes that clause a binding one?

[8] See also the two other arbitrations with Libya – *British Petroleum* (10 Oct. 1973 and 1 August 1974: extracts are available at *Revue de l'arbitrage* (1980) 117) and *Liamco* (American Oil Company, the arbitration); *Baruch Foster Corporation v. Ethiopia*; the arbitration of 30 Nov. 1979 *Agip v. Gouvernement de la République du Congo* (CIRDI); and the 24 March 1982 arbitration in *Kuwait v. Aminoil* (*American Independent Oil Company*). For a summary on Libyan contracts see Lalive, 'Contrats entre états ou entreprises étatiques et personnes privées: développements récents', *RCADI* (1984) 73 ff. On the *Aramco* decision see Bastid, 'Le Droit international public dans la sentence arbitrale de l'Aramco', *AFDI* (1961) 300.

[9] See notably Lalive 'Un grand arbitrage pétolier entre un gouvernement et deux sociétés étrangères', *Clunet* (1977) 319; Rigaux, 'Des dieux et des héros. Réflexions sur une sentence arbitrale', *RCDIP* (1978) 435; Verhoeven, 'Droit international des contrats et droit des gens', *Revue belge de Droit International (RBDI)* (1978–1979) 209; Cohen Jonathan, 'L'arbitrage Texaco Calasiatic c. Gouvernement libyen', *AFDI* (1977) 452; White, 'Expropriation of the Libyan Oil Concessions – Two Conflicting International Arbitrations', 30 *ICLQ* (1981) 1; Fatouros, 'International Law and International Contract', 74 *AJIL* (1980) 134; Von Mehren and Kouridès, *supra* note 6, at 476; Stern, 'Trois arbitrages, un même problème, trois solutions – les nationalisations libyennes devant l'arbitrage international', *Revue arb.* (1980) 3.

[10] Developed countries, which sought greater investor protection through greater reliance on international standards, had met with the will of those who wanted to move the contract states from the public domain, dominated by prerogatives of states, to the private domain, which takes as a hypothesis the homogeneity of the parties. The internationalization of contract law that resulted from this was based on the fact that the principles of international law of treaties, being concluded between two parties, both public, would be less sensitive to the requirements of 'public order'. Conversely, the movement of the New International Economic Order relied rather on the heteronomy of the previous approach of international contracts in order to benefit from the protection of the prerogatives of state.

[11] See Verhoeven, 'Droit international des contrats et droit des gens' *RBDI* (1978–1979) 226. Compare with the *Aminoil* award where converging sources will lead arbitrators, including Paul Reuter, to escape this debate on legal order: Burdeau, 'Droit international et contrats d'Etats. La sentence Aminoil v. Koweït du 24 mars 1982', *AFDI* (1982) 461.

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The internationalization (or 'lifting')[12] of the contract was critical if the companies were to obtain greater protection; should a dispute with Libya take place, they would then benefit from the international law of diplomatic protection.[13] The distinction at stake between the law governing the contract and the legal order from which the binding nature of the contract derives had been widely debated in the legal literature. Indeed, the traditional idea that there were only two legal orders – domestic and international – proved to be a problem when the nature of one of the legal subjects fell under domestic law and the other under international law. The *Serbian Loans* and *Brazilian Loans* decisions in 1929, linking any agreement between a state and a private individual to the domestic legal system, had long been considered sufficient.[14] This was no longer the case when the parties clearly expressed their intention, as in the *Aramco* case where the issue had been debated at length during the written and oral proceedings, to remove economic relations from their domestic legal systems.

In *Texaco*, Dupuy deduced the legal possibility that contracts may be connected to the international legal order from clear-cut interpretive choices over half a century of jurisprudence. For instance, he reinterpreted the PCIJ's dictum in the *Serbian Loans* and *Brazilian Loans* cases[15] as a mere presumption, which he found all the easier to 'set aside depending on the specific case under consideration'.[16] He also took account of developments in the legal literature since 1929 along with the growing 'offshoring' ('*délocalisation*') of contracts due to international trade pressures. Basing his argument on Clause 28 of the Deeds of Concession and confirming a choice made in the *Aramco* award, Dupuy refused to permit the contract in question to be attached to a right which would exist at an intermediate stage between national and international law. In other words, the question was whether this was a new legal order (according to Alfred Verdross, the system of 'contract without law' created by the will of the parties on the basis of the general principle of *pacta sunt servanda*[17]) or whether, as was proposed in the *Sapphire International Petroleum Ltd* award,[18] it was a transnational law the substance of which was to be deduced from the general principles of law and the practice of international trade (*lex mercatoria*).[19] Finally, considering that 'the principle of the

[12] For a summary of the debates on this issue see the reports and discussion in Institut de Droit International, 57 *Annuaire* (1977), i, at 192–265 and at ii, 318–325.

[13] In such a situation, a company may benefit from the diplomatic protection of the state of its nationality in the event that it is subject to a wrongful act, but this is not a right. Moreover, the difference does not necessarily originate in a wrongful act of the host state. Finally the host countries often require that a company is created as a citizen of their state.

[14] According to the *Serbian Loans* and *Brazilian Loans* case: '[t]out contrat qui n'est pas un contrat entre des Etats en tant que sujet du droit international a son fondement dans une loi nationale', PCIJ, series A, No. 20, at 41.

[15] *Ibid.*.

[16] At para. 27.

[17] See his theory relating to the Zuordnungsverzicht in 'Die Sicherung von ausländischen Pivatrechten aus Abkommen zur wirtschaftlichen Entwicklung mit Schiedsklauseln', 18 *ZAÖRV* (1957–1958) 635.

[18] At 324. See also P.C. Jessup *Transnational Law* (1956).

[19] The arbitrator dismisses these theories by noting that 'in case the contracting parties did not intend to make their contract the only law of their report but they have instead, opted for a legal system intended to govern them', as indicated by Clause 28 of the Deeds of Concession.

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autonomy of the will of the parties appears today to be much more significant than at the end of the 1920s',[20] Dupuy referred the concession agreement at stake to the international law of contracts because 'the Deeds of Concession in dispute are within the domain of international law and . . . this law empowered the parties to choose the law which was to govern their contractual relations'.

Once it had been admitted as part of the doctrine[21] that contracts between a state and a foreign firm could be internationalized, the conditions for this to be achieved had still to be figured out. Dupuy singled out three criteria for internationalization. The first was the reference made by the contract, in the clause concerning the governing law (clause 28), to the general principles of law, even though such general principles cannot be regarded as coextensive with international law in its entirety.[22] This reference does not rule out the application of domestic law, but reverses the presumption that a state cannot have made the validity of its obligations subject to any law other than its own. Confirming the *Aramco* award again, the arbitrator found a second criterion of internationalization to be the insertion of a clause providing that possible differences in relation to the interpretation and execution of a contract be submitted to arbitration.[23] The award is then an international judicial act that derives part of its binding and enforceable nature from the instrument of international law that established the tribunal. The point is both unprecedented and essential, since it amounts to enabling the tribunal, by the mere fact of its establishment, to determine its jurisdiction and the scope of its award.[24] Given that the internationalization of a contract results from a manifestation of the explicit or implicit intention of the contracting parties, the arbitrator considered that a third criterion for internationalization was the fact that the contract at issue belonged to the category of economic development agreements. The existence of stabilization and intangibility provisions in clause 16 of the Libyan Law on Petroleum of 1955, which formed a core guarantee for the agreements, suggests that these were such economic development agreements. The conjunction in this case of these three criteria of internationalization led the arbitrator to locate the Deeds of Concession 'within the domain of international law'.[25]

[20] He refers here to two passages where F.A. Mann denied that a contract cannot meet international law simply because it cannot be equated with a treaty between states.

[21] Wengler, 'Les accords entre Etats et entreprises étrangères sont-ils des traités de droit international?', *RGDIP* (1972) 313.

[22] Compare with Judge Lagergen's interpretation in the *BP* arbitration, *supra* note 8.

[23] By following the analysis made in the *Aramco* award, *supra* note 3, René-Jean Dupuy had to dismiss the analysis proposed by Judge Cavin in the *Sapphire* case. *Sapphire International Petroleum Ldt v. National Iranian Oil Company*, 35 *ILR* (1963) 136.

[24] The inclusion of arbitration clauses leads to the utilization of the rules of international law regarding the choice of law when the substance of the dispute itself is considered. The internationalization of the arbitration leads one to place the contract in international law, which enshrines the principle of unrestricted freedom of choice and therefore the choice of applicable law. In the absence of express designation of the applicable law by the parties (which parties can, of course, freely choose the law applicable to the substance of the dispute), it is for the arbitrator to seek their implicit willingness to have a '*rattachement*' of the contract. He has forged his own *lex fori* based, as in the *Aramco* award, on 'general principles of private international law', i.e., a source of public international law.

[25] At para. 35.

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It must be noted that the elevation by Libya of its Deeds of Concession with Topco and Calasiatic to the level of international law for the purposes of a contractual relationship did not mean that Topco and Calasiatic were being given 'competences comparable to those of a state'. These companies not being equated to a state, Dupuy acknowledged that the contract they had concluded with Libya could not be regarded as a treaty.[26]

2 Law Applicable to the Contested Contract

Topco and Calasiatic were trying to remove the investment contract from the host state's legal order in order to minimize what Pierre Mayer once termed the 'normative power of the state party'.[27] No doubt they were more concerned about a change in Lybian law, still possible even after the contract had been concluded, than the application of Libyan law to the contract. This requirement affects a related problem of paramount importance: the intangibility of international contracts. *Texaco* was the first international arbitral award to analyse this issue. More broadly, this award deals with the choice of law clause. In addition to the arbitration clause, which allowed Topco and Calasiatic to escape the jurisdiction of the courts of the state hosting the investment, these investors benefited *in limine* and *a priori* from many options to structure the contracts to their best advantage, ranging from stabilization clauses to a combination of the law of the state, the principles of international law, and the general principles of law. Dupuy confirmed the rule used in numerous international agreements: when one party involved is a state, the law applicable to a state contract is determined by the free choice of the parties.[28] Dupuy decided that the Libyan national law was simply integrated into a body of substantive rules in the international legal order.[29] According to his research conducted under clause 28 of the Deeds of Concession, the principles of Libyan law complied with the principles of international law.

At the core of this strong deduction, the arbitrator stated that 'the application of the principles of Libyan law does not have the effect of ruling out the application of the principles of international law, but quite the contrary: it simply requires us to combine the two in verifying the conformity of the first with the second'.[30] Important case law on the issue exemplifies that the ascertainment of applicable international law is not obvious. In 1951 for instance, the arbitrators in *Petroleum Development Ltd v. Sovereign of Abu Dhabi* decided that the choice of law clause tended to exclude any

[26] According to René-Jean Dupuy, '*le droit international compte des sujets diversifiés*' but Topco and Calasiatic only have 'certain capacities which enable [them] to act internationally in order to invoke the rights which result to [them] from an internationalized contract': *JDI* (1977) 371, at para. 48.

[27] See Mayer, 'La neutralisation du pouvoir normatif de l'Etat en matière de contrat d'Etat', *JDI* (1986) 113.

[28] Serbian and Brazilian Loans, *supra* note 14.

[29] Clause 28 establishes a two-tier system: the necessity to find the common principles of Libyan law in what they have in common with the principles of international law. If the 'common principles' were not to be found, it would be necessary to use the 'general principles of law'. In relation to this system see the comparative analysis of Lalive, *supra* note 8, at 102.

[30] At para. 49.

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implementation of the law of the hosting emirate state in order to apply 'a sort of modern law of nature' resulting from the practice of the states in this field.[31] In 1958, the *Sapphire* arbitrators decided they needed to refer to the legal rules based on the general principles of law recognized by civilized nations,[32] by which they meant the general principles of law under Article 38 of the Statute of the International Court of Justice. That same year, the reference in the *Aramco* award to the 'rules and practices followed in maritime law and in the international oil community' also supported the idea of common rules in this subject area. Things became no simpler later on: the 1974 *BP* arbitration possibly made a distinction between general principles of law and general principles of international law;[33] the 1977 *Liamco* arbitration gave a clear-cut preference to Libyan law, arguing that it would incorporate international law.[34] Shortly thereafter, the *AGIP v. Congo* arbitration in 1979 simply concluded that international law could step in to fill a gap or add necessary things to national law,[35] and the *Aminoil* award applied the law of Kuwait, arguing that it was the law of a developed country which included international law.[36] Considering that the general principles of law set out at Article 38(1)(c) of the Statute of the International Court of Justice have a narrower meaning than those of international law, which includes customary law, Dupuy in the *Texaco* award came to the conclusion that 'the reference which is made mainly to the principles of international law and, secondarily, to the general principles of law must have as a consequence the application of international law to the legal relations between the parties'.[37]

If the arbitral tribunal had stated that there was a lack of commonality between these principles, it should have applied the Libyan Law on Petroleum, with special reference being made to the general principles of law that had been applied by national courts. It has been pointed out that it was an 'interesting transformation in the nature of the approach used'.[38] Indeed, the diversity of possible topics, and multiplicity of possible rules, of international law underpin the ability to 'elevate' to international law. However the international law of contracts which is reached in this way relates to nothing more than traditional international law and not, in this award, to the practice of state contracts within national law.[39] Dupuy, who did not have to proceed further

[31] 18 *ILR* (1951) 149 (where, as in the *Sapphire* case, the contract mentioned 'bonne foi', 'bonne volonté' and 'raison').

[32] 35 *ILR* (1966) 135.

[33] 53 *ILR* (1984) 297.

[34] 62 *ILR* (1993) 141.

[35] *AGIP SpA v. People's Republic of the Congo*, ICSID Case No. ARB/77/1.

[36] 21 *ILM* (1982) 976.

[37] *Supra* note 26, at 358.

[38] Fatouros, 'Editorial Comments: International Law and the Internationalized Contract', 74 *AJIL* (1980) 134, at 137.

[39] Analysis limited to administrative law: *supra* note 1, at paras 57–59. See notes and comments by Fatouros, *supra* note 38, at 137 and notes 13–15.

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on this issue, deduced from international law the binding nature of the concession contracts at issue and their absolute intangibility.[40]

B *Nationalization*

1 Illegality of the Acts of Nationalization

This internationalization, deduced and then applied in the case, has a limited impact:[41] the only explicit rule which this award seems to deduce is the applicability of *pacta sunt servanda,* albeit that all contracts, international or non-international, start from that premise! In fact, the most important consequence of this internationalization is implicit;[42] once elevated in that way, an international contract cannot be altered by a unilateral domestic action such as nationalization. In this case, Topco and Calasiatic claimed that by adopting the measures in question Libya had breached its obligations under the Deeds of Concession.[43] The arbitrator did not, on the contrary, rule out the possibility that a state may lawfully nationalize. This essential attribute of territorial sovereignty[44] simply affects 'international contracts made by the State in the exercise of its sovereignty'. The arbitrator did not care about Libya's compliance with the standard conditions pertaining to validity of nationalization measures in general international law. The only thing he cared about was whether Libya had accepted the international obligations that had the effect of prohibiting the use of nationalization for a certain time, and if the possible disregard of this obligation was justified by the sovereign character attached to the nationalization.

Dupuy, clarifying here the *Aramco* award, found no incompatibility for a state between its willingness to conclude a concession agreement and its concern not to alienate its sovereignty. He did not consider that the intangibility clause and the stabilization clause *stricto sensu*, both of them forming the stability clause of the contractual rights specific to clause 16, affected Libya's legislative and regulatory sovereignty, which remains intact with regard to those with whom Libya made no commitment. Like the late *Aminoil* tribunal, the arbitrator rejected the Libyan arguments based either on a principle of *jus cogens* relating to permanent sovereignty over natural resources or on the assimilation of the concession contract to an 'administrative contract' that would have justified the existence of a unilateral power of amendment in favour of the government party.[45] However, Dupuy maintained that the nationalization

[40] The arbitrator decides that any notion of "administrative contract" is contradicted by the existence of a clause of immutability (Clause 16), in which the Libyan government has explicitly committed not to use, unilaterally, its powers to alter the terms and conditions of the contract. He finds no "general principle of law" sanctioning the existence of any notion of "administrative contract" understood as in French law. V. *JDI* 1977 at 364 *ss*.

[41] J. Verhoeven, 'Contrats entre Etats et ressortissants d'autres Etats', *in Le Contrat économique international: stabilité et évolution* (1975) at 140–141

[42] Fatouros, *supra* note 9, at 137

[43] Starting from similar facts, both the *Texaco* and the *Liamco* awards conclude, unlike the *BP* award, that this nationalization was not discriminatory or confiscatory.

[44] *Supra* note 14, at 367.

[45] With regard to the stabilization clause, compare with the *Aminoil* award.

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measures could not annul specific commitments made in the present case by Libya as part of its sovereignty against the companies: 'a sovereign state which nationalizes cannot disregard the commitments undertaken by the contracting state'.[46] He considered, however, that the intangibility and stabilization clauses *stricto sensu* are binding on the state because of the rules that had been accepted by the parties to the contract which, as he had concluded previously, fell within the international legal order. The nationalization measures were therefore illegal.[47]

2 *Formation of Law*

The *Texaco* award was delivered at the end of a period during which the United Nations significantly modified the rights of people beyond the effect of its own 'formal sources'.[48] Given his desire to decide the case according to the law, and no doubt in order fully to justify his conclusions against Libya which had done very little to co-operate in the arbitration proceedings, Dupuy was driven to establish the exact scope of the '*droit en formation*' contained in the UN General Assembly's resolutions. As subjects of international law, the acts of the United Nations, including resolutions adopted by its plenary body the General Assembly, may indeed contribute to the development of an international custom to the extent that they can be indicative of an *opinio juris* of states. These unilateral acts attributable to the United Nations are not binding. They express an emerging *opinio juris*.[49] In addition to that, Dupuy concluded that under certain conditions they could help to demonstrate the existence of a consolidated *opinio juris*.

In this case, several resolutions found that the nationalizations in question, as expressions of permanent sovereignty over natural resources, were related to the host state's exclusive and independent jurisdiction. They had excluded these resolutions from international law and any foreign national or international jurisdiction. The Libyan memorandum relied heavily on that jurisdiction to ground the idea of a supporting consensus coming from part of the international community. While the value of these resolutions was dubious,[50] these were in some way enforceable in the international order. Dupuy made a strong contribution to the theory of sources, just as he did when he distinguished between '*coutume sage*' (wise custom) and '*coutume sauvage*' (wild custom) and as he would do again in various developments of his General Course

[46] See §68, *supra* note 28, at 370. When a state agrees in advance contractually with its foreign co-contractor that the latter's company or operations covered by the contract will not be nationalized, the state does something freely, in so doing exercising its sovereignty. This results from *pacta sunt servanda*.

[47] The *Liamco* award affirms the legality of such nationalization in the event that this latter is subject to payment of compensation. The *BP* award affirms the unlawful nature of a nationalization violating a contractual commitment and defined it as 'an abuse of sovereign power': *supra* note 33, at 331.

[48] On this question, compare Weil, 'Vers une normativité restreinte en droit international?', *RGDIP* (1982) 5 and Pellet, 'Le bon droit et l'ivraie – plaidoyer pour l'ivraie', *Mélanges Chaumont* (1984), at 465–493.

[49] See the *Legality of the Threat or Use of Nuclear Weapons* case, Advisory Opinion, *ICJ Reports* (1996) 226.

[50] On limiting the power to decide see M. Virally, *L'Organisation mondiale* (1972), at 155–207.

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'*Communauté internationale et disparités de développement*' when he would deal with *jus cogens*, obligations *erga omnes,* or international crimes of state mentioned by the ILC's draft on the responsibility of states for internationally wrongful acts.

Indeed, Dupuy is not denying any general legal authority to the resolutions of international organizations. On the contrary he specifies how some contribute to the formation of customary norms of international law. This requires that extraneous variables are taken into consideration on 'the analysis of voting conditions and of the articulated provisions'.[51] It concludes that certain resolutions of the UN General Assembly approved by a large majority of states belonging to all sections of international society help to define the law applicable to the case. In this case, as was confirmed by the *Aminoil* award, the 1803 resolution (XVIII) adopted by a very broad and representative majority of states indicates an *opinio juris communis,* i.e., the acquiescence of states to certain customary rules regarding the nationalization of foreign property. On the contrary, Dupuy considers that others – *de lege ferenda* and eventually *contra legem* – are introducing new principles rejected by some representative groups of states. So does article 2(c) of Resolution 3281 (XXIX) ('Charter of Economic Rights and Duties of the States') (1974) conferring exclusive jurisdiction on domestic courts and legislation on foreign investments. As a consequence, Dupuy concludes that 'such an outcome would go directly against the most elementary principle of good faith and for this reason it cannot be accepted'.[52]

3 Restitutio in integrum

Having concluded that the Libyan nationalization failed to fulfil contractual obligations, the arbitrator was bound to invoke the appropriate sanction for this internationally wrongful act. Should the compensation intervene in the form of payment of compensation or a *restitutio in integrum*, which would lead to the restoration of the status quo?

The form of redress for damage resulting from an internationally wrongful act varies under the influence of factors such as the content of the obligation breached or the nature of the prejudice. Dupuy considered that the restitution was sanctioned by principles of Libyan law.[53] Reaffirming the principles laid down in the *Factory at Chorzow* decision,[54] he considered that the restoration of the situation which had been disturbed by the wrongful act is also a principle of international law.[55] He refutes any

[51] §83, *supra* note 1. These factors are relevant only for the analysis of the legislative process, of which the recommendation is an element. They are, however, of no interest in assessing the legal value of such a resolution as a legal instrument.

[52] *Supra* note 1, at 380.

[53] *Ibid.*, at 382 ff, paras 93–96.

[54] PCIJ, 13 Sept. 1928, series A No. 7, at 47.

[55] *Supra* note 14, at 382 ff, paras 97–109. Recently, see the International Law Commission draft on the international responsibility of states: 'The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition', A/CN.4/SR.2288, *Yearbook of the ILC*, vol. I (1992).

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diminution in the scope of the *Chorzow* dictum, which would be confirmed later.[56] The diplomatic practice beyond the then recent *BP* award[57] had at first favoured compensation, with restitution being the exception. Where restitution was given, the compensation would generally not have been sufficient. But Dupuy did not wish to alter this principled position on behalf of this new practice. In addition, given the information available to him, he found nothing in the factual elements of the case at stake to oppose a reinstatement of things.[58]

As a consequence, the arbitrator invited 'the Libyan government to perform specifically its own obligations', in order to re-establish *in integrum* the situation that would have resulted from the mere application of the contract involved. He envisaged this to be dismissed only 'to the extent that restoration of the status quo ante is impossible'. Being a Professor also, Dupuy clearly grounded his awards on strong legal principles in finding that his role was to decide according to the law without considering the implementation of his award. The arbitrator in the *BP* case, a professional judge, based his linking of the award to international law more on practical reasons such as convenience and effectiveness in terms of execution of the award.

2 *Texaco* and the Dynamics of Internationalization

> Le contresens le plus grave sur notre démarche serait de croire que nous gardons le regret de ne pas nous trouver dans un système institutionnel parfait.[59]

Oil concessions were the most important international contracts at the time. They relied primarily on traditional oil contracts – the 'actes de concession' – before giving way to new and more convenient formulas. Related to such traditional contracts, the *Texaco* award reviewed their level of internationalization, the value of stabilization clauses, and the limits of the power of nationalization in constant dialogue with the *Aramco* award.

The difficulty of assessing the definite scope of this arbitration arises from at least two sets of reasons. The first relates to the context of the arbitration. As was the case in all the Libyan cases, the government refused to have the dispute settled by arbitration, as suggested by the companies in accordance with Clause 28 of the Deeds of Concession and as would happen in 1982 in the *Aminoil* case. As a consequence, Libya did

[56] See the *Mavrommatis concessions in Palestine* case, PCIJ, Series A, No. 5, at 51 and the *Préah-Vihéar Temple* case, *ICJ Reports* (1962), at 36–37. In doctrine, see Alvarez de Eulate, 'La "restitutio in integrum" en la práctica y en la jurisprudencia internacionales', *Anuario Hispano-Luso-Americano de derecho internacional* (1973) 261, and the refusal to take into account Baade, 'Indonesian Nationalization Measures Before Foreign Courts – A Reply', 54 *AJIL* (1960) 801. *Contra* Verhoeven, 'Droit international des contrats et droit de gens', *RBDI* (1978–1979) 226; Rigaux, *supra* note 9, at 440; and Fatouros, *supra* note 9, at 138.

[57] René-Jean Dupuy did not refer to the *BP* award in which the single arbitrator concluded that *restitutio in integrum* was not part of the principles of international law and that the normal form of compensation for breach of contract was pecuniary compensation.

[58] *Supra* note 14, at 382 ff, at paras 110–112.

[59] Quoted by Thierry, *supra* note 7, at 299.

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not appoint any arbitrator, and the two companies used the arbitration clause to have the President of the International Court of Justice appoint a single arbitrator. Dupuy merely received a memorandum from the Libyan government asserting that there was no need to arbitrate this case.[60] One suspects that the lack of defendant could not but influence the writing of the award, although it is difficult to assess to what extent – '*pour faire reste de droit à la partie défaillante, [elle a recherché et analysé] les thèses qu'elle aurait pu opposer aux demandes'*.[61]

Secondly, the institutional framework had also been transformed. The importance given to the issue of the legal value of UN resolutions was naturally proportional to the important role played then by the General Assembly, whether or not this was later conventionally sanctioned as in the case of human rights and the law of the sea. The inertia of the Security Council, the discretion of the General Assembly Secretariat, the decision of the International Court of Justice in *South West Africa* (1966),[62] and its discrediting impact on that institution are all good reasons to explain the role of impulsion and maturation played by the General Assembly.[63] That would change a decade after the *Texaco* award, and such a change would lessen the importance of some of its conclusions. However, the major contribution of this award to the internationalization of international investment law cannot be debated.

A *Internationalization*

The *Texaco* award is a key step in the development of mixed arbitration between a state and a private person. It reflected the transition that progressively occurred between concession contracts and internationalized contracts represented by state contracts, and between *ad hoc* arbitrations and the establishment of an arbitration centre founded on the basis of an international treaty (ICSID). This transition must be read as constituting part of a triple evolution.

As was noted by René-Jean Dupuy, '[l]e mythe du nouvel ordre international [si prégnant dans les années 1975 à 1985] ne parle[ra bientôt] plus'.[64] The major resolutions of the UN General Assembly on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States, on which Libya based its argument, had notably repudiated both the need for prompt, adequate, and

[60] After being declared competent to hear the dispute on the merits (Preliminary award of 27 Nov 1975), the tribunal ruled that the Libyan government's failure to continue to participate did not prevent the plaintiff companies '"de demander à l'Arbitre unique de leur adjuger leurs conclusions" étant entendu que celui-ci ne pourrait le faire que "dans la mesure où ces conclusions sont fondées en fait et droit" conformément au règlement du procédure', Cohen Jonathan, *supra* note 9.

[61] The plaintiffs had insisted in their brief on the merits and oral argument for this arbitration to be 'un arbitrage de principe', which the Tribunal did not fail to take into account: see Lalivre, *supra* note 5, at 324.

[62] *Ethiopia v. South Africa* [1966] ICJ Rep 6.

[63] See Pellet, 'La formation du droit international dans le cadre des Nations Unies', 6 *EJIL* (1995) 401.

[64] R.-J. Dupuy, *L'humanité dans l'imaginaire des nations* (1986), at 165. See *La clôture du système international. La cité terrestre* (1989), at 25. Translation: the myth of the new international legal order, so important between 1975 and 1985, would soon become outmoded.

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effective compensation and the reference to the rules of international law in the matter. The conventional practice of states and the arbitral case law were to impose new customary rules, especially on compensation for nationalization.

Secondly, bilateral investment treaties (BIT) and bilateral or multilateral agreements with provisions of the same type had proliferated shortly after 1977 (from 385 in 1989 to over 2,400 in 2004). At present, nearly 180 states are Contracting Parties in at least one BIT, and developing countries are disproportionately involved in these treaties. In particular, the BITs excluded from the possible unilateral action of host states, otherwise facing an international responsibility, the provisions on the reception, treatment, and protection of investments,[65] notably with regard to compensation for nationalization, by reaffirming principles similar to these of the Hull formula of 1938.[66]

Finally, and beyond the sole issues of nationalization, the BITs have impacted on the provisions relating to the settlement of disputes between the host state and non-state parties to the treaty. Companies have increasingly been given the opportunity to submit a dispute to arbitral proceedings so that disputes are settled by a neutral tribunal applying the law which is not under the control of the host state. In this regard, the ICSID arbitral tribunals have gradually accepted jurisdiction on the basis of a national law[67] or a bilateral treaty[68] in which the states express their intention to resolve such disputes by arbitration,[69] not just as was the case in *Texaco* where an arbitration clause was included in the contract between the investor and the state. Arbitration which is not based on equity has now become the norm where disputes on international investments are concerned.

But the current phenomenon of the internationalization of investment law is nurtured by developments relating to investment contracts which extended two core elements of the *Texaco* award. As a consequence, *Texaco* should be seen as an active part of this phenomenon. As to the determination of the legal relationship between a host state and a non-state investor, the *Texaco* award recognized that foreign private companies had some form of legal status where the parties were bound by an international investment contract. What happens if the private party goes to arbitration under a treaty of protection? This interrogation is part of the debate, long and passionate (via the question of recognition),[70] on the ability of the state to create other subjects of

[65] See the Fair and Equitable clause in accordance with the 'principles of international law' and the National Treatment clause, often read in combination with the Most Favoured Nation clause.

[66] The inclusion of such clauses in BITs are often a condition for the giving of a guarantee by national organizations for investments made abroad.

[67] *SPP v. Egypte*, Decision on jurisdiction, 14 Apr 1988, 3 ICSID Rep 142–143.

[68] *AAPL v. Sri Lanka,* ICSID/ARB/87/3 (1990). On this award see Dumberry, 'L'entreprise sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissments', 108 *RGDIP* (2004) 103.

[69] Leben, 'La responsabilité internationale de l'Etat sur le fondement des traits de promotion et de protection des investissements', *AFDI* (2004) 000, at n. 6.

[70] See the debate on its declarative or constitutive nature in V.D. Anzilotti, *Cours de droit international* (1929, reed. P.-M. Dupuy and C. Leben, 1999) and Blix, 'Contemporary Aspects of Recognition', 130 *RCADI* (1970) 587.

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international law by its sovereign will, endowed with an international legal personality even if they had a second rank international capacity.

Based on this power of subjective creation, amply illustrated by positive law,[71] the states can elevate a foreign private corporation to be a subject of international law for the purposes of a specified contractual relationship. The *Texaco* award, according to Professor Prosper Weil,[72] 'prolonge[ait simplement] jusqu'à l'extrême le postulat du volontarisme'.[73] In this case, the recognition of the Libyan state's capacity to invest its private co-contractors with an international legal personality[74] led the contract to be subjected to international law. This conviction, then strongly criticized by part of the scholarly community,[75] was to prosper later on. Companies have since been able to increase their arbitral ability to defend their own rights in 'transnational' investment relations.[76] Whether under ICSID, NAFTA, or the Treaty on the Energy Charter, for instance, they have even been given the opportunity to appeal directly to a dispute settlement body in the event of a dispute with the state to which they are linked by a state contract.[77]

The *Texaco* award is significant not only because of its findings on choice of law but also as far as the merits of the arbitration are concerned. According to the established principle of autonomy, reflected in famous PCIJ decisions, the law of any 'state contract' between a sovereign power and a foreign private person is the law of the state at issue.[78] By contrast, the *Texaco* award considered the international law of contracts as a specific branch of public international law, which applied whenever the choice of law clause in the contract in question left open the possibility of a total or partial 'outsourcing' of the co-contractors' legal relationship.[79] It becomes essential to know

[71] On Art. 26 of the Energy Charter Treaty see Poirat, 'L'article 26 du traité relatif à la Charte de l'énergie: procédures de règlement des différends et statut des personnes privées', *RGDIP* (1998) 45, at 45 ff. and Leben, 'Retour sur la notion de contrat d'Etat et sur le droit applicable à celui-ci', in *Mélanges Offerts au professeur H. Thierry* (1998).

[72] Weil, 'Droit international et contrats d'Etat', *Mélanges offerts à P. Reuter* (1981) 549. Translation: was simply extending the voluntarist postulate to the extreme.

[73] P.-M. Dupuy, '*L'Unité de l'ordre juridique international*', 97 *RCADI* (2002) 101.

[74] According to F. Rigaux, it is the duty of 'la communauté internationale elle-même d'admettre, soit par catégorie de sujet, soit par reconnaissance individuelle, de nouveaux partenaires', *in* Rigaux, 'Des dieux et des hommes. Réflexion sur une sentence arbitrale' *RCDIP* (1978) 444. See also Stern, 'Trois arbitrages, un même problème, trois solutions: les neutralisations pétrolières libyennes devant l'arbitrage international' *Revue arb.* (1980) 3.

[75] Dolzer, 'New Foundations of the Law of Expropriation of Alien Property', 75 *AJIL* (1981) 553. See also von Mehren and Kourides, *supra* note 6, at 476 ff.

[76] See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Reports* (1949) 174.

[77] See Leben, *supra* note 71, at 247–280, in part 264 ff. and 'Quelques réflexions théoriques à propos des contrats d'Etat', *Souveraineté étatique et marchés internationaux à la fin du 20ème siècle*, CREDIMI (2000) vol. 20 at 119–175. See also Poirat, *supra* note 71, at 79 ff.

[78] According to the *Serbian Loans* and *Brazilian Loans* decision, 'tout contrat qui n'est pas un contrat entre Etats en tant que sujets du droit international a son fondement dans une loi nationale': *supra* note 14.

[79] See §36, *supra* note 26, at 356.

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under what conditions and how the arbitrators may 'relocate' the contract without acting *ultra vires*, and whether the contract is then under the complete dominion of public international law or only some public international law principles.

Dupuy determined that the potentially applicable law depending on the dispute settlement clause related to foreign investment. This clause relates either to the jurisdiction of the courts of the host country of investment or an international mode of dispute settlement like the ICSID, as was the case for *Texaco*. It is to be found in the contract binding the state to the foreign investor, the bilateral treaty on investment protection between the state and foreign investor, or in some cases in a multilateral treaty.[80] The *Texaco* award was also supported by the aforementioned phenomenon of internationalization, which was soon to impose itself through other means: for instance, by the major growth of bilateral treaties containing an ICSID clause or by the registration of umbrella clauses in bilateral treaties of investment protection.[81] The violation by the host state of its contractual obligations results in a violation, directly or indirectly, of public international law (even outside nationalization), which can then be challenged under the influence of customary international law. When considering the legal developments relating to the settlement of disputes between state and foreign investors, still largely debated in the literature,[82] the 1990 *AAPL v. Sri Lanka* award goes much further: it allows the investor to refer the matter to ICSID solely on the basis of the treaty of protection in the absence of any contractual relationship with the host state. If the state has conventionally agreed to go to arbitration to resolve any disputes with investors, there is no need for any contract containing an arbitration clause to allow the investor to sue the state before the arbitral tribunal.[83] The existing multilateral agreements enshrine this very possibility.

The internationalization of disputes concerning contracts seems to start only when one takes into account ICSID jurisprudence and the fact that the majority of the cases brought to ICSID are based on the acceptance by the state of the arbitration, not in a contract with an investor but in a BIT or in national law.

B *The Meaning of Internationalization*

To read the *Texaco* award as contributing to the internationalization of the law of investment contracts, and more generally of international investment law, lends the award an important responsibility in a process that is far from over. The previously

[80] In practice, these two clauses often exist in conjunction at each of these levels; the first one refers in the contract to the domestic courts, the second in the treaty to international arbitration – especially ICSID.

[81] According to Prosper Weil, these treaties transform the contractual obligations between the host state and the investor into real international obligations under public international law. Pierre Mayer considers, however, that the nature of *inter partes* relationships remains unaltered and subject to the *lex contractus* – only the interstate report is submitted to international law.

[82] See the excellent debate between Douglas, 'The Hybrid Foundation of Investment Treaty Arbitration', *BYBIL* (2003) 151 and Leben, 'La responsabilité internationale de l'Etat sur le fondement des traits de promotion et de protection des investissements', *AFDI* (2004) 683.

[83] No difference if the host state has accepted ICSID jurisdiction in domestic law: see *SPP v. Egypte*, 20 May 1992.

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noted phenomenon of privatization of internationalization has multiple interfaces with the issue of World heritage raised by Dupuy in his General Course: for instance, Dupuy demonstrated that this law far exceeded the heavy machinery designed by the Convention of Montego Bay when dealing with the exploitation of resources of the deep sea area. Two examples, relating to the subjects and content of international law, are explicit in this regard.

The question of broadening the scope of subjecthood in international law is also at stake when considering. . . the states themselves. This is the challenge posed by having the state made liable for the acts of its entities, by which one means not the behaviour of the organs of the State but the behaviour of a person or an entity exercizing the prerogatives of official authority and, even if it is more uncertain, the behaviour of a person if this latter acts under the instructions or under the control of the State.[84]

One cannot be satisfied by the sole reference to the law of the state to determine the liability incurred for the wrongful acts of its emanations.[85] How could this sole reference determine the legality or illegality of the potentially wrongful act in question, given that this act is determined solely by reference to international law? This reference does not in any way justify the state failing to fulfil its obligations in respect of its international liability. This issue is far from being merely theoretical, and there are an increasing number of cases where the above rules are referring directly to public international law, itself considered to be the law applicable to the merits of the case.[86] If the path that *Texaco* has committed to follow is correct, it is certainly not easy. The game of justiciable treaty norms and the arbitrators' reasoning in relation to the nature of claims addressed by the parties, among other reasons,[87] limit the process of unification under the aegis of international law of the approaches taken hitherto in relation to complex issues of liability for illegal acts of state emanations. There is no reason to be sceptical in light of these complex liability issues: it is likely that developments subsequent to *Texaco* solved the problems they put forward by themselves;[88] to borrow a recommendation from Professor Pierre-Marie Dupuy, they are resolved simply by a new addition on state responsibility. Following that author, there is every reason to believe that the consistency and predictability of investment arbitration will be provided by compliance with the allocation of rights according to the nature of the

[84] See Arts 4, 5, and 8 of the draft of *The International Law Commission's Articles on State Responsibility* (2001), *in* J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (2002).

[85] See here P.-M. Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements', *EUI Working Paper Law*, No. 2006/7.

[86] P.-M. Dupuy, *ibid.*, at 7–10. Concerning ICSID see, inter alia, with regard to jurisdiction *Salini v. Royaume du Maroc* (3 June 2002), *JDI* (2002) 204, at para. 33 and *E.A. Maffezini v. Royaume d'Espagne*, 5 ICSID Rep. 434, at para. 74.

[87] Dupuy, *supra* note 85, at 12.

[88] At this stage, as noted by P.-M. Dupuy, the distinction between 'treaty claims' and 'contract claims' matters very much. See also Gaillard, 'L'arbitrage sur le fondement des traités de protection des investissements – les Etats dans le contentieux économique international, I. Le contentieux arbitral', *Revue arb.* (2003) 853, at para. 13. See also the *Vivendi Universal v. Argentine Republic* award, No ARB/97/3, 3 July 2002 (annulment decision), 41 *ILM* 1135, at paras 95–96.

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claims, even if there is some specificity in the subsequent mechanism of imputation. Whether state contracts, internationalized contracts, or economic development agreements, the prospect of a contractual relationship entering the international legal order, as sanctioned in *Texaco*, continues to complicate international law. To date however, the complexity introduced with regard to the emanations of the state leaves hope for greater consistency in international law.

Whoever considers the substance of the applicable law cannot fail to observe that *Texaco* has participated in a movement that has naturally resulted in flawed internationalization by public international law.

In an increasing number of ICSID arbitrations sought by investors, the awards are based on public international law obligations upon which the host country of investment based its relationship with its treaty partner, the state of nationality of the investor. The arbitrators apply to the merits of the dispute not only some rules isolated from the legal order from which they arise or the *lex specialis* defined in the relevant treaty, but *all* international law. This is most welcome as a means of giving more coherence to issues such as the definition of emanation.

These developments also pose challenges, driven by the movement that the *Texaco* award helped to initiate and for the development of which it is somehow collectively liable. As an insight, NAFTA jurisprudence on human rights provides an excellent example of the problems at stake.[89] The strictly functional interpretive approach adopted in arbitrations so far leads the existence of international human rights obligations to be neglected, in situations where states are required to adopt positive measures to ensure their effectiveness. Although it seems that there would be no inconsistency between human rights obligations and treaty obligations that promote and protect investments, it remains to resolve cases in which the implementation of investment obligations would conflict *in concreto* with the fulfilment of human rights obligations. In this regard, the adoption of positive references to human rights or non-market values in BITs is an inadequate solution to ensure the effectiveness of the protection of human rights in that context.[90] Assuming that no structural constraint precludes the application of international law as a whole, a mere interpretive approach might be considered to resolve any normative interference. Indeed the arbitrators *must* also ensure that their award is consistent with international law *in toto*. This raises many

[89] See here Liberti, 'Investissements et droits de l'homme', in P. Kahn and T. Walde (eds), *New Aspects of International Investment Law* (2007).

[90] As clearly shown by L. Liberti, this interpretative approach faces a difficulty in that property right is a requirement that the state party to a BIT is committed to respect, but also a human right (the treaties protect property right as much as the right to a fair trial, to privacy, and, to some extent, freedom of expression). Now, as evidenced by the case law on 'measures tantamount to expropriation', the protection of property rights in the *lex specialis* of investment has been extended so as to be able to declare unlawful a decision of any state 'measure' taken normally to regulate foreign investment, including those most attached to the attributes of sovereignty.

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questions however.[91] Above all, it is not certain that the arbitrators, appointed on the basis of a treaty, may recognize a possible breach of an investor's obligations in human rights matters that may lead, indeed, to the exclusion of the implementation of investment safeguards that are enshrined in BITs in the context of investor–state arbitration. The more radical solution that is sometimes proposed is substantially to alter the relevant treaties to establish, if not a formal hierarchy, at least the correlations between international investment law and other areas of international law to take into account non-market values in general and the protection of human rights in particular. This would involve a satisfactory anchoring of the rights and obligations of investors in public international law and a determination of the priorities that would apply in foreign direct investment arbitration. To acknowledge both the existence of international human rights obligations binding on companies and the possibility for the state to bring its own proceedings certainly paves the way for arbitrators to determine the scope of legality of international private conduct and, where appropriate, to affirm the investor's responsibility and impose liability on it. It is always a difficult, but nevertheless necessary, task to define the consequences of the so-called 'internationalization' that the *Texaco* arbitral award has contributed to and the coherence of which must serve as a norm to appraise its final contribution to international investment law.

The *Texaco* award on the merits of January 1977 significantly reflects the international investment law specialization of Professor René-Jean Dupuy. By his overtures to the internationalization of investment law, Dupuy canvassed issues relating to the public side of international contracts (internationalization as a means to privatize international investment contracts so that the investor can get rid of state prerogatives) and issues relating to the public side of international law (internationalization as a way to adjudicate international investment litigation though public international law). As a consequence, an array of questions is raised from issues concerning the 'public prerogative' to those relating to the lack of coherence of international law. All in all, *Texaco* provides the very best expression and entry into Professor René-Jean Dupuy's understanding and shaping of what he coined as 'la communauté'.

[91] So what are the international obligations regarding human rights that the state may invoke as a defence against an investor's claim for compensation? Do these obligations have a expropriating or discriminatory character, or any effect on the determination of the pecuniary amount? Can the state form 'demandes reconventionnelles' against the foreign investor responsible for behaviour contrary to its own international obligations? To this end, can he refer to other international obligations concerning the protection of civil or political rights or economic, social, and cultural factors that are not within the limited category of *jus cogens*?

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