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ABSTRACT

This article explores whether oil concession agreements are private contracts or public treaties. Specifically, to what extent is the state-owned National Iranian Oil Company (NIOC) bound by its dealings with private companies? In addition, should sovereign immunity apply to the action of a wholly state-owned corporation?

INTRODUCTION

The present article will first examine the concession agreement by a cursory account of the history of concession in Iran and its most significant developments over time. This will pave the way for an evaluation of the juridical character of an economic concession, which is still a source of debate. Secondly, the article sets out the principal legal problem with which this article is concerned, namely, whether the National Iranian Oil Company is a State organ or a commercial corporation. Such a problem carries a special significance in modern international trade, wherein state or state-owned corporations are increasingly participating in commercial relations with entities in the private sector.

With its own legal personality, a state-owned trading corporation acting on a sovereign basis could claim state immunity. In this respect, if a state-owned corporation is sued by a trading corporation in the courts of another sovereign, it does not enjoy immunity and the plea of immunity would not be successful. Whether the intention of the sovereign is to serve private function activities determines if a public corporation is of private law nature. As this article will show, the intention of the sovereign has to be ascertained under the law governing the corporation and, in particular, its constitution in light of all relevant circumstances. A test premised on the nature rather than the purpose of the transaction is critical in determining whether the transaction is governmental or commercial.

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I. EVOLUTION OF CONCESSION AGREEMENTS

A. Traditional Concessions in Iran

Traditionally, the concession agreement\(^1\) was one of the main instruments by which Iran gave some guarantees to foreign investors in its

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oil resources. A concession agreement, according to Professor A.A. Fatouros, is "an instrument concluded between a state and a private person and providing for the grant by the state to the individual of certain rights or powers which normally would belong to and be expected by the state."²

The first of the concessions dates back to 1901 when William D'Arcy, a British citizen, obtained a concession from Muzzaffaraddin Shah to explore oil in Iran. "The D'Arcy concession...was awarded by the corrupt and inexperienced" Shah of the Qajar dynasty, who was dependent on foreign support for his survival.³ In 1909, a British company (the Anglo-Persian Oil Company, subsequently known as the Anglo-Iranian Oil Company, and later simply as British Petroleum) was formed to develop oil fields in the south of Iran under a 60-year concession.⁴ The rationale behind the formation of the Anglo-Persian Oil Company (APOC) was to ensure an inexpensive and secure source of oil for the British navy by "expand[ing] Britain's] political dominance of [Iran] by bribery and force where necessary."⁵ In 1914, the British Government took a controlling position in the Company by buying 52.5 percent of the Anglo-Persian's voting power of the outstanding stock. The result was a 40-year supply contract for the sale of fuel oil to the British navy at special discount prices.⁶

In 1920 an agreement was concluded between the company and the Persian Government with the objective of settling oil disputes arising over the D'Arcy concession. The legal status of the 1920 agreement revealed that it "was a modification and not an interpretation of the D'Arcy concession." From the Iranian Government's point of view, the agreement was not binding because it had not been approved by the Iranian Parliament.⁷ After expressing concern about the amount of oil received, the Persian Government cancelled Anglo-Persian's oil concession on November 28,

² A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 125 (1962).
⁵ Id. at 202; FESHARAKI, supra note 3, at 10.
⁶ W.M. Reisman, The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication, 258 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 92 (1996); Stobaugh, supra note 4, at 202; FESHARAKI, supra note 3, at 8; DONALD N. WILBER, IRAN, PAST AND PRESENT 267 (1976). In its preliminary observation in the Anglo-Iranian Oil Co. case, Iran noted that statements made by members of the British Government in Parliament affirmed that the United Kingdom owned a majority of the share of the Anglo-Iranian Oil Company and that this fact was known to the Iranian Government. United Kingdom v. Iran, 19 INT'L. REP. 501, 541-42 (1952) (J. Levi Carniero, dissenting). See also Reisman, supra note 6, at 92.
⁷ Stobaugh, supra note 4, at 202.
The question may arise as to why the Persian Government cancelled the concession. One reason was a purely economic dispute between Persia and the company due to a decline in royalty payments. Another reason could have been "the participation of the British Government in the concession" and their interference in the commercial management of the company.9

On February 19, 1951, Prime Minister Mohammad Mossaddegh proposed to the Iranian Parliament that the oil industry be nationalized. Subsequently, the Iranian Parliament nationalized Iranian oil in March 1951.10 The reasons why the Iranian Parliament decided to revise the structure of the oil concession was Iran's recent independence, its desire to earn higher oil revenues, the wish for more direct participation by the State, and placing heavier financial burdens and greater risks on the companies.11 In 1954, a consortium was formed of a group of international oil companies to provide and market oil in an area of 100,000 squares miles in southern

8. Id. at 202-203.
9. FESHARAKI, supra note 3, at 23.
11. Europe Publications Ltd., THE MIDDLE EAST AND NORTH AFRICA 116 (42nd ed. 1996). After the nationalization of the oil industry by the government of Mohammad Mosasddegh in 1951, the British took the dispute to the International Court of Justice (I.C.J.). Later, the United Kingdom submitted a resolution to the United Nations' Security Council to require Iran to conform to the provisional measures of the International Court of Justice. See S.H. AMIN, COMMERCIAL LAW OF IRAN 104 (1986). Presenting Iran's position in regard to the nationalization of the Anglo-Iranian Oil Company, Mohammad Mossaddegh and Allahyar Saleh argued that Iran’s oil reserves could provide the most important means by which the country would raise the low standard of living of its people. It should be a national industry with the revenues going to improve the lives of Iranians. Under the existing conditions before the nationalization, practically none of the revenues went to improve the well-being of the people or the technical process or industrial development of Iran. As long as the Company had a monopoly on this great source of wealth, it was impossible for the Iranian people to enjoy political independence. The Company had a budget larger than that of the Iranian government. It intervened in the internal politics of Iran and had a hand in elections and the formations of cabinets. All of this was done in order to secure for itself the highest possible resources which it controlled. Through its support of certain political groups and journalists, it undermined the independence of the Iranian nation.

Iran. The preamble to the oil agreement of 1954 stated that its objective was to assure a substantial export market for Iranian oil as a means of increasing the material benefits to and prosperity of the Iranian people, and to the companies, on the other hand, the degree of security and the prospect of reasonable rewards necessary to justify the commitment of their resources and facilities to the reactivation of the Iranian oil industry.... 12

The Consortium Agreement "gave to the Iranian the shadow of what they sought, while retaining for the British the substance of what they had." 13 In 1957, the National Iranian Oil Company (NIOC) was permitted to form joint-venture agreements with the other companies. Later, in 1966, in pursuit of Article 2 of the Petroleum Act of 1957, 14 NIOC entered into service contracts 15 under which foreign companies were working as a contractor for NIOC but without having the ownership rights in the country. 16 The emergence of joint ventures was due to the weakening of the dominant position of the international majors and the formation of Oil Producing Exporting Countries (OPEC), which assured the independent companies of supplies of crude oil in the long term. 17 Part of the reason for awarding the non-concessionary contract was also to maximize the short term of oil revenues, since Iran could not expect spectacular increases in the consortium revenues. 18 The role of the concession was ended in 1979 and

13. FESHARAKI, supra note 3, at 50 (quoting G.W. Stocking, MIDDLE EAST OIL (1971)).
14. Article 2 holds that [i]n execution of the provisions of this Act, the National Iranian Oil Company may negotiate with any person, whether Iranian or foreign, whose technical or financial competence shall have been established, and may conclude with such person any agreement which it deems appropriate, on the basis of the terms and stipulations of this Act and other conditions not inconsistent with the laws of the country.
15. In service contracts, "the investor provides the entire risk capital for exploration and development which is reimbursed with interest, in cash or part of the oil produced, if the field proves productive. This is a form of production sharing where the contractor is compensated only upon discovery." Kameel I.F. Khan, Petroleum Taxation and Contracts in the Third World, A Law and Policy Perspective, 22 J. WORLD TRADE, Feb. 1988, at 67, 84. Regarding service contracts in Iran, see STOBAUGH, supra note 4, at 217–18; Asante, supra note 1, at 360–61; FESHARAKI, supra note 3, at 78–82.
16. FESHARAKI, supra note 3, at 79.
17. Id. at 92.
18. Id. at 93.
the ownership of the oil industry and the right to exploit petroleum deposits throughout Iran was vested in the NIOC.

B. The Nature of an Oil Concession Contract

Up to the 1950s the concession was the traditional contractual framework for the purpose of exploiting oil in Iran. The nature of economic concession has long been a controversial issue in the area of international law. According to Samuel K.B. Asante, the grant of concession does not designate the concessionaire as the owner of a natural resource, but it confers on the multinational corporation the exclusive right to exploitation and marketing.

The question is whether oil concessions have the nature of public law or fall within the province of private law. An oil concession has neither exclusive public nor private character, but a mixed public and private character. Some scholars have suggested that the economic development agreements have a public character because they involve vital interests of the developing country. It seems, therefore, that the State can abrogate the concession by unilateral action in the public interest. It might be argued that the matter is private because the concessionaire acquires under the contract rights analogous to those in a contract of private law.

Contracts concluded between a sovereign State and a foreign national are not governed by international law but by the municipal law of the sovereign State. The rationale is that the sovereignty cannot be surrendered by a sovereign to an unequal foreign party. In the Serbian and


20. Asante, supra note 1, at 362; Carlson, International Role, supra note 1, at 627.


23. Rainer Geiger, The Unilateral Change of Economic Development Agreements, 23 Int'l & Comp. L.Q. 73, 102 (1974); E.I. Nwogugu, Legal Problems of Foreign Investment, 153 Hague Recueil des Cours 211 (1976) ("Economic development agreements contain the reciprocal rights and duties which the parties thereto have agreed on to govern their relationship").


25. O'Connell, supra note 22, at 270.

Brazilian Loan cases, the Permanent Court of International Justice (PCIJ) stated that "[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."28

Can an oil concession be termed an international treaty in nature or an agreement similar to a treaty? This view lacks merit. A concession is not analogous to a treaty29 since one of the parties is a foreign private company. According to Derek William Bowett, an investment contract not only is not a treaty but cannot even be regarded as analogous to a treaty. For there is a world of differences between an agreement under international law between two equal, sovereign States and a contract between a State and a private party governed prima facie by the State's own law.30

Economic concessions are not agreements between subjects of international law. According to Angelo Piero Sereni,31 the rules of international law do not lend themselves to the regulation of relations among parties which are not recognized as international subjects. This view was accepted by the International Court of Justice (ICJ) in the Anglo-Iranian oil dispute of 1952.32 On July 22, 1952, while declining its jurisdiction regarding the Anglo-Iranian oil dispute, the Court authoritatively stated that the 1933 concession agreement

[i]s nothing more than a concession agreement between a government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom. Under the contract the

29. See O'Connell, supra note 22; Nwogugu, supra note 23, at 217.
30. Bowett, supra note 24, at 54.
31. Angelo Piero Sereni, International Economic Institutions and the Municipal Law of States, 96 HAGUE RECUEIL DES COURS 210 (1959). Sereni argues that "an attempt at applying international law to private relations would be tantamount to seeking to apply the matrimonial laws of France or England to relations between cats or dogs." Id.
32. Greig argues that "it is possible for a State to enter into a contract with a corporation or an individual, but such an agreement will not be a treaty cognizable as such on the international Plane." D.W. GREIG, INTERNATIONAL LAW 458 (1967).
Iranian Government cannot claim from the United Kingdom any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company. The document bearing the signatures of the Iranian Government and the Company has a single purpose: the purpose of regulating the relations between the Government and the company in regard to the concession. It does not regulate in any way the relations between the two Governments.\textsuperscript{34}

In Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha,\textsuperscript{35} the District Court of Tokyo accepted the same view by holding that the Concession Agreement of 1933 was not an international treaty in nature.\textsuperscript{36} It was in its substance an agreement of a private law concerning the right to extract oil.\textsuperscript{37}

The Concession Agreement...cannot be regarded as an international treaty or an international convention of a nature similar thereto, in view of the fact that one of the contracting parties is not the Government of a State but is a foreign corporation having its principal office in the United Kingdom. The Concession Agreement should properly be regarded as a contract under private law relating to oil extraction rights, between the Government of a State and a foreign corporation.\textsuperscript{38}

In the Aramco Arbitration (1958), the arbitration tribunal rejected the argument that the concession agreement could be analogized to an international treaty.\textsuperscript{39} Concessions are also referred to as economic development agreements stressing a fundamental description of economic rather than legal nature.\textsuperscript{40} In the Sapphire Arbitration (1967),\textsuperscript{41} it was held that the “concessions

\begin{footnotesize}
\begin{enumerate}
\item[34.] Id. at 518-19; See also SUNIL KANTI GHOSH, THE ANGLO-IRANIAN OIL DISPUTE: A STUDY OF PROBLEMS OF NATIONALIZATION OF FOREIGN INVESTMENT AND THEIR IMPACT ON INTERNATIONAL LAW (1960).
\item[36.] Id. at 307-308, 310.
\item[37.] Id.
\item[38.] Id. at 312.
\item[39.] See An, supra note 28, at 97-98.
\item[40.] Geiger, supra note 23, at 74.
\item[41.] Sapphire Int’l Petroleum Ltd. v. Nat’l Iranian Oil Co., 35 INT’L L. REP. 136 (1967). The agreement was signed on June 16, 1958, between NIOC and Sapphire Int’l Petroleum Ltd., a Canadian corporation calling for the establishment of an Iran-Canada oil company to be known as IRCAN. See The Official Gazette of the Islamic Republic of Iran, 1337, at 45-52. Under the agreement the two parties formed a joint venture for the exploration and exploitation of oil in the Iranian offshore areas and management of the operations. The net
\end{enumerate}
\end{footnotesize}
give the contract a particular character, which is partly public law and partly private law." 42

Some scholars have linked the economic concession to French contrat administratif, 43 according to which the subject matter is concerned with the recognition of the unilateral powers of the public authority to control a conflict related to the public purpose. By reason of such public interest, the State is given the power to amend unilaterally the concessions or even to terminate them. 44 According to Robert B. Von Mehren and P. Nicholas Kourides, 45 administrative contracts have the following two elements: (1) the ability of the public authority to alter unilaterally the terms of the contract, and (2) the jurisdiction of a municipal administrative court over disputes arising under the contract. According to F.A. Mann, 46 even if a concession is regarded as a contrat administratif, it is still under a specific system of municipal law.

In the Texaco Arbitration, 47 sole arbitrator Dupuy rejected the notion that a concession agreement is an administrative contract under Libyan law. The arbitrator said that the deeds of concession did not fulfill the necessary conditions of administrative contracts. 48 Contrary to the decision in Texaco, in the British Petroleum Arbitration, 49 the arbitrator, Judge Gunner K. Lagergren, concluded that the concession agreement could be regarded as

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42. Lalive, supra note 41, at 1012.
44. El Chiati, supra note 21, at 39.
46. MANN, supra note 26, at 265.
47. Texaco Overseas Petroleum Co. and Cal. Asiatic Oil Co. v. Gov't of the Libyan Arab Republic, 53 INT'L L. REP. 389 (1977). On the Texaco arbitration, see D.W. Bowet, Libyan Nationalization of American Oil Companies Assets, 37 CAMBRIDGE L. J. 5 (1978); A.A. Fatouros, International Law and the Internationalized Contract, 74 AM. J. INT'L L. 134 (1980). In the Texaco award, Dupuy held that one should take into account here the fact that the theory of administrative contracts is somewhat typically French: it is consecrated by French law and by certain legal systems which have been inspired by French law. But it is unknown in many other legal systems which are as important as the French systems and it has not been accepted by international law, notwithstanding wishes which de lege ferenda may have been expressed in this field.

Texaco, 53 INT'L L. REP., at 467.
an administrative contract. In *LIAMCO Arbitration*, the arbitrator, Dr. Sobhi Mahmassani, held that an oil concession is in fact a semi-public agreement. Regardless of their "purpose," economic development agreements are to be regarded by their "nature" as commercial activities.

II. THE ROLE AND POSITION OF THE NATIONAL IRANIAN OIL COMPANY (NIOC)

A. Is the National Iranian Oil Company (NIOC) a State Agency or a Commercial Corporation?

In March 1951, subsequent to a proposal by Mohammad Mossaddegh to the Iranian Parliament to nationalize the oil industry, the oil committee of the Iranian Parliament voted in favor of nationalization of the oil industry, which was under the control of the Anglo-Iranian Oil Company. Within the framework of the nationalization law (1951), the National Iranian Oil Company (NIOC) was established as the first national oil company in the Middle East to develop Iran's industrial and commercial hydrocarbon activities. As Robert Graham pointed out, it was "the only way in which Iran could assert its independence and maximise its potential oil resources."  

The Oil Nationalization Act of 1951 authorized NIOC to be engaged in exploration, exploitation, and selling of Iranian crude. The Iranian Act on Survey, Exploration, and Exploitation of the Oil Resources was approved on July 31, 1957. The most important feature of the Act was that it provided a new basis for oil operations in the country. The Act "was one of the first well-thought-out and comprehensive petroleum laws of any oil-producing country." The main purpose of the Act was not only to protect the interests of the country, but also to safeguard the national prosperity. Under the Act the NIOC was recognized as the owner of Iran's oil resources. The

52. Robert Graham, *Iran: The Illusion of Power* 36 (1979). Kojanec has pointed out that "whenever the State entrusts the exercise of an economic activity to the organs or agencies, it is implicit that such an activity is regarded as being significant in the attainment of political goals whose realization is to be achieved through special mechanisms of a broadly public character." G. Kojanec, *Recent Developments in the Law of State Contracts*, in 24 The Y.B. of World Affairs 186 (1970).
54. Fesharaki, supra note 3, at 66.
55. Id.
Petroleum Act of July 31, 1957, has however, broadened its role and has permitted it to form joint ventures with foreign companies. The reason was to extend as readily as possible the operations of research, exploration, and extraction of petroleum throughout the country and the continental shelf, excluding the area of operations of the Consortium. It was also intended to extend promptly the operations of refining, transportation, and sale of all petroleum to be obtained from outside the Consortium throughout the territory as well as abroad. Thus, NIOC has its origins in the Nationalization of Oil Industry Law of Iran (1951) and the subsequent law, namely, the Law Regulating Nationalization of the Oil Industry.

Under the Iranian law, the proceeds from the sale of oil are transferred by the NIOC to the Central Bank of Iran to be earmarked for financing the Government budget. By exploiting the property rights of the Iranian nation over reserves of oil and gas, and pursuing activities in related industries, NIOC exercises the sovereign power of the Iranian nation over Iran’s oil deposits. The preamble of the 1973 Main Agreement, which replaced the 1954 Consortium Agreement, provides that Iran has determined that the right of full and complete ownership, operation, and control in respect to all hydro-carbon reserves and assets, and administration of the petroleum industry shall be exercised by NIOC. As far as conflict resolution is concerned, it is a universal rule that the status of a company is

56. See art. 1 of the Act of July 31, 1957, on Survey, Exploration and Exploitation of the Oil Resources in the Iranian Territory and Its Continental Shelf in The Official Gazette of the Islamic Republic of Iran, No. 3642. Pursuant to the Iranian Petroleum Act of 1974 “the exercise of the right of the people of Iran, in respect to the Petroleum resources,...is exclusively National Iranian Oil Company’s responsibility.” See Elf Aquitaine Iran v. Nat’l Iranian Oil Co. (Preliminary Award January 14, 1982), 69 Int’l L. Rep. 252 (1994) (concluding that joint venture agreements with foreign companies and opening Iran’s resources for exploration were in sharp contrast with the provisions of the law of Dec. 2, 1944, which had banned any cabinet minister from entering into negotiations for an oil concession and from granting it without prior authorization from the Majles). However, despite this ban twelve 50-50 joint venture contracts were concluded by NIOC between Oct. 29, 1957, and July 27, 1971. S.H. AMIN, COMMERCIAL ARBITRATION IN ISLAMIC AND IRANIAN LAW 250, 275 (1988). The following reasons could be responsible for Iran’s oil policy during the period under discussion: (1) The stringent economic and political difficulties; (2) Iran’s need of private foreign investment, technological know-how and industrial skill; (3) Iran’s willingness to participate actively in oil operations through joint venture with foreign companies; and (4) protecting the legitimate interests of the country vis-à-vis foreign companies. See Ramazani, supra note 53, at 517.

57. See Ramazani, supra note 53, at 506.


59. Id. at 1284.

determined by its personal law or the law of its incorporation. Therefore, the constitution of a company is the ultimate source of authority for the determination of its status.

But can it be argued that NIOC is part of the Iranian State? Under the Consortium Agreement of 1954, NIOC has been described as "a corporation organized and existing under the laws of Iran." In regard to NIOC, the functional approach sheds some light on its position. It is established that NIOC is a company of both public and commercial character. By way of example, NIOC Statutes reveal the distinguishing features of NIOC as a State corporation. Referring to the issue of sovereign immunity in Sapphire, Jean-Flavien Lalive took the view that NIOC is not to be equated to the State of Iran. The Federal Constitutional Court of Germany in the National Iranian Oil Company Revenues from Oil Sales Case also concluded that NIOC is not part of the Iranian State. NIOC was structured according to private law and carries out its business affairs according to the principles of commercial law. Accordingly, NIOC is not an international person but an instrument of the Iranian State responsible for performing functions related to the production and sale of oil. In Amoco International Finance Corporation, the Iran-United States Claims Tribunal concluded that "the separate personality of an entity controlled by a State can be discarded...only if this entity acted as an instrument of the State."

The question is how much State control is necessary to render an independent legal entity a part of the State. Pursuant to Article 23 of the NIOC's statutes, its governing body, the High Council, is composed of four Deputies of the Iran's House of Representatives, the Minister of Finance and two other state officials. The Council of Ministers is empowered to

62. Id. at 168.
63. See E.H. Wall, The Iranian-Italian Oil Agreement of 1957, 7 INT'L & COMP. L.Q. 736, 741 (1958). Under Article 4 of the Public Accounting Law of Iran (1987), "[a] government company is a specific organization unit organized with the authorization of law or nationalized or expropriated according to law or to the decree of a competent court which is known as a government company and more than fifty percent of its shares belong to the government." See AIDA AVANESSIAN, IRAN-UNITED STATES CLAIMS TRIBUNAL IN ACTION, 228 (1993).
64. The task of preparation of the Statutes of NIOC was entrusted to a mixed Board composed of five members of the Senate, five parliamentarians, and the Minister of Finance. See Ramazani, supra note 53, at 506-507.
65. Lalive, supra note 41, at 1007.
66. Federal Republic of Germany, supra note 58, at 1283.
67. Id. at 1283.
68. Id. at 1281-82.
nominate the seven members of the Board of Directors who represent the shareholders in general meetings.\textsuperscript{70} Under Article 15, the Minister of Finance and two other persons nominated by the Council of Ministers are the representatives of shareholders in the general meeting. Meanwhile, under Article 57 the Government is required to allocate the company's income to the country's constructive and productive expenditure.

According to Professor Mahmoud Kashani, the Iranian judge at the Iran-United States Claims Tribunal, the degree of control should be substantial and close to render the independent legal person a part of the State.\textsuperscript{71} For a finding of control, the relevant questions are "inter alia, whether the company was managed by its registered Board of Directors and whether the shareholders were in a position to exert their rights and to fulfill their duties as shareholders."\textsuperscript{72} To find that NIOC was an entity controlled by the Iranian Government, in \textit{Oil Field of Texas} the Tribunal held that "(1) 'all NIOC's shares are, and have always been, owned by the Government of Iran'; (2) that its business was and is supervised by the Government of Iran; and (3) this process was conducted by the executive branch of the State, at one time by the Prime Minister and six other Cabinet Ministers, and subsequently by the Ministry of Petroleum."\textsuperscript{73} For the test of control to be met, the award in \textit{Foremost Tehran, Inc.} ruled that "[t]he two main indicators of government control of a corporation are the identity of its shareholders and the compositions and behavior of its board of directors, which must be examined together."\textsuperscript{74}

When the question of control of an entity is to be decided, it would seem reasonable to argue "that control does not necessarily require the majority ownership of shares but may also be constituted through possessing the right or power to direct the policies and business of that entity."\textsuperscript{75} In \textit{Mavromatis Palestine Concessions} (1924), the Permanent Court of International Justice (PCIJ) held that "control always means measures of a special character in connection with an economic policy consisting in

\begin{itemize}
\item \textsuperscript{70} See \textit{id.} at 207.
\item \textsuperscript{71} \textit{id.} at 201.
\item \textsuperscript{72} \textit{id.} at 207.
\item \textsuperscript{73} \textit{id.} at 203.
\item \textsuperscript{74} \textit{id.} at 205 (citation omitted). Likewise, in Hollyfield, the Tribunal stated that "[d]ecisive elements for a finding of control are the identity of the company's shareholders, the composition and behavior of its board of directors, and whether government appointed managers were in charge of the company...." \textit{id.} at 206-207.
\item \textsuperscript{75} See \textit{AVANESSIAN, supra} note 63, at 229.
\end{itemize}
subordinating, in one way or another, private enterprise to public authority."  

In practice, NIOC is Iran's most important State corporation, it operates as a government agency, and its rights and obligations as indicated in the relevant contracts have been consistently those of the Government of Iran. For example, in the Consortium Agreement of 1954, Sovereign Iran was a Party by acting through the Imperial Government of Iran and the National Iranian Oil Company. Therefore, for all practical purposes, NIOC has operated in the Consortium Agreement as a government agency on the same footing as the government itself. This can further be seen in Article 47 of the 1957 Agreement between NIOC and AGIP [Azienda Generale Italiana Petrolifera] Mineraria, which provides for the confirmation of the Agreement by the Council of Ministers in the following manner: "This Agreement, which has been signed by NIOC and AGIP Mineraria and confirmed by the Council of Ministers shall have the force of law in conformity with Article 2 of the Petroleum Law of July 31, 1957."  

The role of the NIOC in the Iranian-Italian Agreement of 1957 seems to be as a State commercial corporation of public law. The obligations and rights of NIOC may be equated with those of the Iranian government. This could be illustrated for example by reference to Article 42, which mentions expressly "the Iranian Government or First Party" and then stipulates that under certain circumstances "the Iranian Government shall have the right to require the impounding of the proceeds from oil sale or export of petroleum from Iran by Second Party." Further evidence that this is the true position can be found in Article 10, section 4(b) of the Iran-Pan American contract, which declares that prior consent of the Iranian government is required before the agreement can be signed.

77. See Ramazani, supra note 53, at 507.
78. See Wall, supra note 63, at 742.
79. Id.
80. Id. at n.12. art. 2 of the Petroleum Law requires all agreements of associations to be submitted to the Council of Ministers, which, if it confirms the same, will place it before the legislature for approval. Agreements, therefore, would be enforceable after approval by the legislature and with effect from the date of such approval; the obligations of the Iranian Government have also been mentioned in art. 28 of the Agreement with AGIP Mineraria under which "the Iranian Government shall take the necessary steps to ensure that S.I.R.I.P. [Société Iraniennne des Pétroles] and AGIP Mineraria shall be able to buy Iranian currency with such foreign exchange as have been quoted by or are acceptable to the Bank Meli....." Id. at n.13.
81. Id. at 742.
82. Ramazani, supra note 53, at 507–508.
Government for certain work under the contract "shall not be unreasonably withheld or delayed." In Sapphire, the arbitrator held that the dominant status of NIOC is that of a public corporation.

On the other hand, Article 65 of the statutes of NIOC makes it clear that the company is a commercial corporation. By virtue of Article 10, "the company's directors, the members of the High Financial Inspection Board, and employees, shall in no respect be regarded as Government employees or as persons entrusted with public services." Under Article 73, the company is subjected to the provisions of the Iranian Commercial Code in regard to all matters not stipulated in the NIOC statutes. In this sense, NIOC is a government agency established in corporate form for the official transaction of public business.

Since NIOC is a separate legal entity, its legal and commercial independence is not affected by the fact that its shares are in the hands of the Iranian Government. This leads to the conclusion that government instrumentalities, which are typically established as separate personalities distinct and independent from their sovereign, should normally be treated as such.

B. Sovereign Immunity of State-Owned Corporations

One of the most important questions regarding the status of NIOC is the question of sovereign immunity. To what extent is NIOC bound by

84. Ramazani, supra note 53, at 507. The Iranian government undertook its obligation "through the First Party," as mentioned in Section 1 of Article 17 of the Contract. Id.
85. Lalive, supra note 42, at 1012.
86. Ramazani, supra note 53, at 507.
87. See Federal Republic of Germany, supra note 58, at 1282.
88. See MANN, supra note 26, at 202.
its acts as an agent of the Iranian Government? There is by no means a clear-cut answer to this question. The controversy pertains to the question of sovereign immunity when a State or a wholly State-owned company enters into contractual relationship with a foreign party and proceedings are instituted by the latter against the former. Sovereign immunity, according to M. Sornarajah, is a defense to jurisdiction that can be pleaded

90. SORNARAJAH, supra note 19, at 278–79.
only by a State or an agency of the State. Clive M. Schmitthoff argues that under international trade law the plea of immunity from judicial process is not raised automatically by State-controlled companies if case proceedings are instituted against them in the courts of another sovereign.

There are some important factors that should be taken into consideration with regard to the sovereign immunity of foreign public corporations, including financial dependence, appointment of members, and the degree of independence enjoyed by these corporations. In order to claim immunity for the person or property of a foreign sovereign, an important test is ownership. Thus, the mere ownership of the majority of shares and capital of a separate company is a sufficient test for a finding of control by the government. Meanwhile, regardless of the amount of government ownership of its capital, a company will also be regarded a controlled company "when it performs functions of an essentially governmental nature."

Corporations established "by the State but possessing a distinct legal personality" cannot plea immunity "from suit unless it can be proved that the property which is the subject matter of the action is the property of the State." In other words, a State corporation having separate legal

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91. Clive M. Schmitthoff, The Claim of Sovereign Immunity in the Law of International Trade, 7 Int'l & Comp. L.Q. 452 (1958) (arguing that three theories regarding immunity have been advocated: (1) The theory of absolute immunity under which "the plea of immunity is available in every instance in which the person or the property of a foreign sovereign is impleaded in the courts of another sovereign"; (2) The theory of limited immunity according to which a distinction is to be made between "acts of a sovereign jure imperii and acts jure gestionis..." advocates of this theory will admit the plea of immunity if acts of the former type are involved — they argue "that the sovereign should not be exempt from legal process if engaged in acts jure gestionis, such as commercial transactions"; (3) The theory of denial of immunity by virtue of which a foreign sovereign is principally "not entitled to immunity from legal process in the territory of another sovereign...subject to a number of important exceptions"). Id. at 453-54.


93. Schmitthoff, supra note 91, at 463 n.52.

94. MOURI, supra note 69, at 210.

95. AVANESSIAN, supra note 63, at 233. Under art. 4 of the Public Accounting Law of Iran, "[a]ny Commercial company which is established by the investment of government companies, as long as more than fifty percent of its shares are owned by government companies, is itself considered to be a government company." Id. at 227.

96. L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE: PEACE 265, n.3 (H. Lauterpacht ed., 8th ed. 1955). According to Kojanec, "the corporation being a decentralised organ of the State, with relative autonomy of decision, its activity may not be dissociated in so far as the application of international rules on State immunities are concerned." Kojanec, supra note 52, at 192. In cases where the public corporation possessing a legal personality and capacity separate from the State entered into contracts with a private investor, such contract directly involves the State and impinges upon it the responsibility, as the State itself, from the perspective of international law. Id.
personality is not entitled to plea immunity unless the State concerned intervened in a certain transaction by exercising its sovereign rights *stricto senso*.  

The intention of the foreign sovereign is another decisive factor with regard to making its agent a commercial concern on the level of private law. In other words, whether the trading corporation is of an ordinary private law nature reflects the intention of the sovereign to act on the level of private law. If that is the case, the corporation cannot claim the plea of immunity. Such intention is to be ascertained in accordance with the governing law of the corporation by reference to the constitution of the corporation and, in particular, its power to contract. Where it has been established that a typical government instrumentality is not a trading corporation of ordinary private law nature, the question of whether the corporation is entitled to immunity will be dependent on the same criteria that applies when the sovereign has been directly impleaded.

Following the *Sapphire Arbitration* and in the enforcement proceedings Sapphire assigned its rights against NIOC to a Dutch company under the name of N.V. Cabolent. The rationale for the Sapphire corporation was to take “advantage of a Dutch exorbitant rule of jurisdiction” (Article 126 (3) of the Dutch Code of Civil Procedure) “based on the plaintiff’s domicile in the Netherlands.” Subsequently, N.V. Cabolent brought suit at The Hague for the amount of the award and for a declaratory judgement validating the attachment of certain Dutch assets of NIOC. NIOC’s plea of immunity, although successful in the first instance, later failed in the Court of Appeal. While considering matters such as the


98. Schmitthoff, supra note 91, at 466. The intention of the sovereign may be ascertained according to the law governing the corporation and its powers to contract. *Id.* at 466-67; see also Wedderburn, supra note 92, at 297.

99. Schmitthoff, supra note 91, at 466.

100. *Id.* at 466-67.

101. *Id.* at 467.

102. Delaume, supra note 51, at 322.

103. Georges R. Delaume, *Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies*, 8 ICSID REV.—FOREIGN INVESTMENT L.J. 29, 31 (1993) [hereinafter Delaume, *Enforcement of State Contract Awards*]. In the pleadings before the Court, the question was raised on behalf of NIOC as to whether the appellant (N.V. Cabolent) had a valid existence. It was argued, *inter alia*, that Cabolent, as a tool of the Sapphire corporation, was formed in order to create jurisdiction in the Netherlands under the Dutch Code of Civil Procedure. Although the Dutch court was aware of the stratagem, it stated that this purpose was not illicit, nor was it incompatible with the purpose of profit making. *Id.*

ownership and control of NIOC by the Iranian Government, the Court of Appeal maintained that NIOC had a separate juridical existence and that its assets were distinguishable from those of the Iranian government. In this connection, the court stated that NIOC's operations as a separate entity and as a party to the contract with Sapphire would not be considered as *acta jure imperii* (sovereign acts) and should instead be characterized as commercial acts, *jure gestionis* (acts of a private-law nature).  

All other matters...concerning the structure and authorities of NIOC, its ties with the State of Iran and the significance of petroleum for that country are irrelevant. The fact that the Iranian oil industry was nationalized by Law of March 15 and 20, 1951; that N.I.O.C. was established by Law of April 30, 1951; that all its shares are owned by the Iranian State and cannot be transferred; that the Government of Iran can influence N.I.O.C.'s management; that N.I.O.C. has certain powers of a public law nature, including the power to expropriate land against compensation—all these and similar facts do not detract from...the conclusion [that NIOC could not plead immunity].

The crucial question is whether the principle of international law providing that States are bound by arbitral clauses in their international agreements also applies to agreements made, not by the State itself, but by a corporation established as an independent legal entity but controlled by the State. It may be plausible to argue that since the links between the Iranian government and the board directing NIOC are close, any agreement with a private oil company for the exploitation of oil in Iran concluded by NIOC cannot be treated differently from an agreement signed by the State itself as a party in regard to the obligation under international law to respect contracts on arbitration.

C. The Distinction Between the Public and the Private Nature of the Transaction

The states in the course of the nineteenth century and later after World War I increased their activities abroad through public corporations and have evolved in business operations on a considerable scale. In this
regard and as far as the immunity from jurisdiction is concerned, the doctrine of restrictive immunity has increasingly gained ground in international relations. In applying the principle of restrictive immunity, reference is often made to the distinction between acts *jure imperri* and acts *jure gestionis*. This means that where a foreign State or a foreign State corporation acts on a sovereign basis, the plea of immunity is available, but non-sovereign activity does not enjoy freedom from jurisdiction. The practice of states seems also to support a trend toward the adoption of a restrictive doctrine of immunity.\(^9\)

In cases where a dispute involves a transaction of both commercial and governmental elements, the question could arise as to which test is to be applied to determine the ultimate object of the transaction. The decisive criteria is premised either on purpose or nature. Under recent developments of international law, the acts of a foreign State that are considered commercial in nature do not enjoy sovereign immunity. The underlying rationale is that when a state is involved in business in competition with private persons, competition would be unfair if the competing state is not answerable in the foreign court where the business is transacted.\(^1\)

Therefore, in situations where a State entity engages in commercial activities, it would be fair to conclude that the State would accept that its obligations, as identified by a foreign court, should be fulfilled.\(^11\) It has in fact been suggested, "[t]hat a State which seeks to trade through public corporations should not be allowed to plead immunity and thereby avoid the commercial obligations it has undertaken."\(^12\) The commerciality of an act is to be determined by reference to the nature of the act rather than by reference to its purpose.\(^13\) The reference to the "nature" of the action means nothing other than excluding the domestic law of the defendant State and applying *lex fori* to the case. On the contrary, the focus on the "purpose" does necessitate taking account of the domestic law of the defendant State.\(^14\) On the other hand, while the criterion based on purpose probes into

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112. Id. at 663.


motive of the act, a test based on nature insists for ascertainment of juridical character of the State activity and the capacity in which the act was done.\textsuperscript{115}

Almost every activity would ultimately be regarded as having a public-purpose nature if the purpose test's basic criterion was to demonstrate the distinction between sovereign and non-sovereign activity. Under the United States' Foreign Sovereign Immunities Act, "it is the essentially commercial nature of an activity or transaction that is critical" in determining whether the relevant transaction is commercial or governmental.\textsuperscript{116} The European Convention on State Immunity also adopted a restrictive approach to immunity. Instead of a conclusive definition for commercial transaction, it seeks to categorize a list of typical activities of foreign sovereigns to which immunity is not allowed to invoke (articles 1 through 14). Article 7 of the Convention provides,

[A] Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency, or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial, or financial activity, and the proceedings relate to that activity of the office, agency, or establishment.

The Convention actually provides a basis for distinguishing immune from non-immune state activity. Taking into account the specific rules for each category, the question is whether a particular act falls under one of the examples or beyond it. This is a question that is to be decided by the court before which the point arises.

The English courts have also held that the restrictive principle of immunity applies at common law. The matter has been settled by the State Immunity Act of 1978, which shows a trend toward the restrictive doctrine of immunity.\textsuperscript{117} The English courts, when applying the nature test, primarily take into account whether the act was one that could also be done by a private corporation or whether it could only be done by a sovereign state in the exercise of its sovereign power.\textsuperscript{118}

\begin{thebibliography}{9}
\bibitem{116} Sornarajah, \textit{supra} note 111, at 669 (citation omitted).
\bibitem{118} Dons Hockl, \textit{The State Immunity Act of 1978 and its Interpretation by the English Courts}, 48 AUSTRIAN J. PUB. & INT'L L. 134 (1995). Although there is no consensus in international law regarding the distinction between private acts of states and their public acts, it can be said that only property protected by diplomatic and consular immunity, warships, and military aircraft used for public purposes are out of the jurisdiction of a forum state. This restriction is
The restrictive practice that confines the jurisdictional immunity of foreign States reveals an inclination to pay more attention to the nature, or object, of the transaction than to the status of the defendant. This would mean that the immunity *ratione personae* is losing ground to the immunity *ratione materiae.*

In some cases, the commercial nature of the corporation has made the government a partner in a trading corporation so far as the transactions of that corporation are concerned. In *National Iranian Oil Company Pipelines Contracts* regarding a dispute over the financial performance of contracts to build up oil and natural gas pipelines, the plaintiff obtained an order from the Provincial Court (Landgericht) of Frankfurt am Main attaching property of the NIOC (defendant). The NIOC unsuccessfully argued that it formed part of the Iranian Government and thus was entitled to jurisdictional immunity as well as immunity from attachment. The plea of immunity was rejected by the Court for the simple reason that the present case does not involve the actual exploitation of oil resources by the defendant in the attachment proceedings. The parties are in dispute over the financial performance of contracts for the building of oil and gas pipelines. In this respect, moreover, the defendant contracted with the plaintiff on a purely private commercial basis (contracts for work). It did not carry out any oil-related activities on a sovereign basis. The conclusion of the contracts for oil and gas pipelines was at most a preliminary step or a sequel to possible sovereign activity.

Likewise, in *National Iranian Oil Company Legal,* the Superior Provincial Court (Oberlandesgricht) of Frankfurt au Main maintained that immunity can not be claimed for the funds from oil agreements deriving from commercial activity.

In *Eurodif v. Iran,* the main issue was whether the activities of production and distribution of nuclear energy in which the Iranian generally recognized and established in international law. See Crawford, *Execution of Judgments,* supra note 89, at 820; Bouchez, *supra* note 97, at 15.


120. Wedderburn, *supra* note 92, at 294.


122. *Id.*

123. *Id.* at 214.


125. *Id.* at 202; *see also* Federal Republic of Germany, *supra* note 58, at 1285.

Government had undertaken to participate were of a commercial nature that subjects them to private law. The Cour de Cassation while revising the decision of the Court of Appeal of Paris to accord immunity to the Iranian government on the sole basis that the attached assets were public funds, held that a foreign State in principle benefits from immunity of execution, but this immunity may be ruled out where the seized asset has been allocated to economic or commercial activity governed by private law.

The foregoing observations taken together justify this widely accepted view within the international community that the restrictive immunity rule predicates on a distinction between commercial and non-commercial acts of States.

III. CONCLUSION

This article has shown that there is uncertainty and confusion as to the exact nature and legal status of oil concessions. However, economic concessions are not treaties since they are not concluded between states. NIOC is a company established under the Iranian law of 1951 as a separate legal entity with special capitalization in the form of a joint-stock company, but controlled by the Iranian Government. A contract entered into by NIOC with a foreign oil company is treated as a contract signed by the Government of Iran itself. In fact, commercial undertakings of a foreign State do not enjoy any personal immunity. From a commercial point of view, NIOC is closely linked with the Iranian Government and exercises the principle of ownership and national sovereignty of Iran on the oil and gas resources and reservoirs of the country in accordance with Article 45 of the Iranian Constitution.127 Under international law, it is submitted, the plea of

127. The text of art. 45 reads as follows:

Natural resources and national wealth such as waste lands or deserted lands, mines, seas, lakes, reed beds, natural woods, virgin land and pastures are part of the public domain. Heirless property and property of unknown ownership and public property restored from usurpers are in the possession of the Islamic government which will determine the best way to utilize them in the interests of the nation. Details and manner of usage will be determined by law.

The Constitution of the Islamic Republic of Iran, 1358 [1980], art. 45. English translation available at http://www.iranchamber.com/government/laws/constitution_ch04.php. Iran's national resources are public property (or Anfal). Id. The designation of petroleum resources as public property demonstrates a change of terminology to Islamize the system. The Iranian Law does not recognize private rights to oil resources. Therefore, all the operations relating to petroleum are under the Islamic Republic's control and are subject to strict statutory provisions. See Petroleum Act of 09-7-1366 [May 30, 1947] (Iran), The Official Gazette of the Islamic Republic of Iran, No. 12444, 25-08-1366 [July 14, 1947], reprinted in Moini-Biontino Verlagsgesellschaft, IRAN Y.B., 1988, 398-402. See also AMIN, supra note 56, at 258-59.
immunity is not raised automatically. The question whether a particular trading corporation acts within or beyond its capacity is to be determined by interpreting the constitution of the corporation, its financial dependence and the degree of dependence on the state, and all other relevant circumstances.

Due to the lack of financial resources and technological knowledge, the developing countries are in a very weak bargaining position in dealing with multinational oil companies. Perhaps the key to the solution of stability problems is a more flexible mechanism capable of compromising between the stability of contracts and their evolution, between the principle *pacta sunt servanda* and the clause *rebes sic stantibus*. 128

By the device of an inbuilt mechanism for systematic renegotiations, a long-term oil contract can provide a basis for a viable and enduring contractual relation between a host State and a multinational oil company if it is considered "as the broad framework of a business relationship which admits of a continuous process of accommodation and adjustment between the parties, rather than a body of fixed rights and obligations impervious to political, economic and social changes." 129
